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# COMMENTARIES

ON THE LAW OF

# PRIVATE CORPORATIONS

BY

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IN SIX VOLUMES.

VOLUME V.

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# **TITLE TWELVE.**

(CONTINUED.)

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**CORPORATE POWERS AND THE DOCTRINE  
OF ULTRA VIRES.**



## CHAPTER CXXVII.

### POWERS RELATING TO THE OWNERSHIP AND TRANSFER OF PROPERTY.

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**§ 5770. Power of Corporations to Take and Hold Land at Common Law.**—At common law, corporations have the power, without any special license thereto in their charters or governing statutes, to take and hold as much land as may be reasonably necessary or convenient for the purposes of their creation.<sup>1</sup>

<sup>1</sup> 1 Bla. Com. 478; 2 Kent's Com. 227, 281; 1 Wash. Real Prop. (4th ed.) 75; Blanchard's Gun-stock Turning Factory v. Warner, 1 Blatchf. (U. S.) 258; Brown v. Hogg, 14 Ill. 219; St. Louis Stoneware Co. v. Parttridge, 8 Mo. App. 580; Page v. Heineberg, 40 Vt. 81; s. c. 94 Am. Dec. 378; Champlain &c. R. Co. v. Valentine, 19 Barb. (N. Y.) 484, 487; Barry v.

Merchants' Exchange Co., 1 Sandf. Ch. (N. Y.) 280; Sherwood v. American Bible Soc., 4 Abb. App. Dec. (N. Y.) 227; Natoma Water &c. Co. v. Clarkin, 14 Cal. 544; Hayward v. Davidson, 41 Ind. 212; Lathrop v. Commercial Bank, 8 Dana (Ky.), 114; s. c. 33 Am. Dec. 481; First Parish v. Cole, 3 Pick. (Mass.) 232; Thompson v. Waters, 25 Mich. 214; s. c. 12 Am.

§ 5771. **Effect of Statutes of Mortmain.**—In England, by a series of statutes, called the statutes of mortmain, beginning with *Magna Charta*, 9 Henry III., and ending with 9 George II., corporations, both ecclesiastical and lay, were rendered incapable of taking and holding lands without a *license* from the Crown.<sup>1</sup> These statutes have never been re-enacted in this country, and do not seem to be regarded as in force in any State of the American Union,<sup>2</sup> with the exception of Pennsylvania.<sup>3</sup> In Pennsylvania, the operation of the stat-

Rep. 243; Callaway &c. Co. v. Clark, 32 Mo. 305; McCartee v. Orphan Asylum Soc., 9 Cow. (N. Y.) 437; s. c. 18 Am. Dec. 516; Robie v. Sedgwick, 35 Barb. (N. Y.) 319; Reynolds v. Stark County, 5 Ohio, 204; Leazure v. Hillegas, 7 Serg. & R. (Pa.) 313, 320; Banks v. Poitiaux, 3 Rand. (Va.) 136; s. c. 15 Am. Dec. 706; Rivanna Nav. Co. v. Dawsons, 3 Gratt. (Va.) 19; s. c. 46 Am. Dec. 183. It has been said in North Carolina "that the common-law right to take an estate in fee, incident to a corporation at common law, is unlimited, except by its charter and by statute." Ashe, J., in Mallett v. Simpson, 94 N. C. 37; s. c. 55 Am. Rep. 594, 596.

<sup>1</sup> 2 Kent's Com. 282; 1 Wash. Real Prop. (4th ed.) 76.

<sup>2</sup> Moore v. Moore, 4 Dana (Ky.), 354; s. c. 29 Am. Dec. 417; Lathrop v. Commercial Bank, 8 Dana (Ky.), 114; s. c. 33 Am. Dec. 481; Rivanna Nav. Co. v. Dawsons, 3 Gratt. (Va.) 19; s. c. 46 Am. Dec. 183; Mallett v. Simpson, 94 N. C. 37; s. c. 55 Am. Rep. 594.

<sup>3</sup> In 1808 the judges of the Supreme Court of Pennsylvania, in pursuance of an act of the assembly requiring them to make a report of the English statutes in force in the Commonwealth, reported the following statutes of mortmain as being in force in that State: 7 Edw. I., stat. 2; 13 Edw. I., ch. 32; 15 Richard II., ch. 5; 23

Hen. VIII., ch. 10. Those judges rendered the subject very obscure by adding "that these statutes are in part inapplicable to this country, and in part applicable and in force. They are so far in force that all conveyances by deed or will, of lands, tenements, or hereditaments, made to a body corporate, are void, unless sanctioned by charter or act of assembly. So also are all such conveyances void, made either to an individual, or to any number of persons associated, but not incorporated, if the said conveyances are for uses or purposes of a *superstitious* nature, and not calculated to promote objects of charity and utility." See Leazure v. Hillegas, 7 Serg. & R. (Pa.) 313, 320, where this report of the judges is embodied in the opinion of Tilghman, C. J. The construction put by the court upon this report of the judges was that the statutes of mortmain were so far operative in Pennsylvania that *conveyances to superstitious uses* were *absolutely void*, but that all other conveyances to corporate bodies were voidable only at the election of the State. This conclusion is thus stated in the language of Tilghman, C. J.: "Now, by reference to the statutes, it will appear that in all of them, except 23 Hen. VIII., ch. 10, the conveyance is not absolutely void, but the estate passes to the corporation, subject, as before mentioned, to the right

utes of mortmain is said to be not to restrain a corporation from *acquiring* lands in pursuance of its common-law power, but to prevent it from *retaining* lands which it has acquired without a license, and to vest the right thereto in the State.<sup>1</sup>

§ 5772. **Cannot Take and Hold for Purposes Foreign to the Objects of their Creation.**—Irrespective of the operation of statutory restrictions, it is a settled principle of American jurisprudence that a corporation cannot take and hold land except in so far as reasonably necessary to carry out the objects of its creation.<sup>2</sup> These bodies, which never die, are not allowed, against the objection of the State, to take and hold land for purposes wholly foreign to the purposes for which the State endowed them with a corporate existence and the power of perpetual succession.<sup>3</sup> A pointed application is given to this principle by a case where it is held that a corporation, chartered for a specific purpose, has no power to take a *lease* of land not needed for that purpose, or of no substantial use for it, with the intention and for the purpose of *harassing* another party by the use, under the forms of law, of the supposed rights thus obtained. The court state the governing principle to be that where a party has a legal right, his *motive* in asserting that right is immaterial; but where a

of several *mesne* lords, and in their default, of the King, to enter and hold in fee. But by the statute of 23 Hen. VIII., ch. 10 (which has been determined to extend to *superstitious uses only*; see 2 Bla. Com. 273; 1 Co. 24), uses and trusts made and contrived in favour of religious persons, or any bodies corporate, for more than twenty years, shall be utterly void. Now, the meaning of the report of the judges is, that, according to the statute cited by them, conveyances to *superstitious* uses are absolutely void, and conveyances to corporations, to uses not *superstitious*, are so far void that these corporations shall have no capacity to hold the estates for their own benefit, but subject to the rights

of the Commonwealth, who may appropriate them to its own use, at pleasure; in other words, that such conveyances have no validity for the purpose of enabling the corporation to hold in *mortmain*." *Leazure v. Hillegas*, 7 Serg. & R. (Pa.) 313, 321.

<sup>1</sup> *Leazure v. Hillegas*, 7 Serg. & R. (Pa.) 313, 320.

<sup>2</sup> 2 Kent's Com. 229, 240; *Rivanna Nav. Co. v. Dawson*, 3 Gratt. (Va.) 19; s. c. 46 Am. Dec. 183; *First Parish v. Cole*, 3 Pick. (Mass.) 232; *Occum Co. v. Sprague Man. Co.*, 34 Conn. 529.

<sup>3</sup> *State v. Commissioners*, 23 N. J. L. 510; s. c. 57 Am. Dec. 409; *First Parish v. Cole*, 3 Pick. (Mass.) 232; *Overmyer v. Williams*, 15 Ohio, 26, 31.

corporation obtains the title to property for the sole purpose of making a *malicious use* of it, the motive becomes material as affecting the question of power.<sup>1</sup>

**§ 5773. Constitutional and Statutory Restrictions upon This Power.** — Outside the English *statutes of mortmain*, which, as already seen, are not generally in force in this country,<sup>2</sup> numerous constitutional and statutory restrictions have been imposed upon the power of corporations to take and hold land. Some of these are merely declaratory of the principle of American jurisprudence, already stated,<sup>3</sup> that a corporation cannot take and hold any more land than is necessary to effectuate the purposes of its creation. Of these, a single instance, from the constitution of one of our newer States, may suffice: "No corporation shall engage in any business other than that expressly authorized in its charter, nor shall it take or hold any real estate except such as may be necessary and proper for its legitimate business."<sup>4</sup>

<sup>1</sup> *Occum Co. v. Sprague Man. Co.*, 34 Conn. 529. The case was in *tort* by one mill company against another for an injury by *flooding* the premises of the plaintiffs, who were the owners of the lower dam and mill; and the court held, on the principle stated in the text, that the plaintiff could recover, — forming one of several exceptions to the rule hereafter considered, that the title of a corporation to land cannot be inquired into in a collateral proceeding.

<sup>2</sup> *Ante*, § 5771.

<sup>3</sup> *Ante*, § 5772.

<sup>4</sup> Const. South Dak., art. 17, § 7. See *Gilbert v. Hole*, 2 S. Dak. 164; s. c. 49 N. W. Rep. 1. A statute incorporating a manufacturing company in New Jersey empowered the company to purchase, hold, or convey, any estate, real, or personal, for the use of the corporation. This right was afterwards modified so as to allow it to hold no more real estate

than was necessary for its immediate accommodation in the transaction of its business, or such as it might acquire by sale, or otherwise, for the purpose of securing any debts due to it. Under this statute it was held that the company was capable of taking and holding a *banking-house* and the *lot* on which it was situated, where, under its charter, its banking business was carried on. It might also *mortgage* such property for corporate purposes. *Leggett v. New Jersey Man. &c. Co.*, 1 N. J. Eq. 541, 549; s. c. 23 Am. Dec. 728. Nearly to the same effect is *Banks v. Poitiaux*, 3 Rand. (Va.) 136; s. c. 15 Am. Dec. 706. A corporation is prohibited from buying, selling, or becoming a speculator in lands by the following clause in its charter: "The lands, tenements, and hereditaments, which it shall be lawful for the said corporation to hold, shall be only such as shall be required for its accommoda-

§ 5774. **Instances of Such Restrictions upon Religious Corporations.**—The Revised Statutes of the United States<sup>1</sup> provide that no corporation or association for religious or charitable purposes shall be permitted to acquire or hold more than \$50,000 worth of real estate in any territory of the United States. Congress, in the exercise of its plenary power over the Territories, may abrogate a charter granted to a church corporation by a territorial legislature, and provide for the future disposition of its property.<sup>2</sup> A statutory prohibition<sup>3</sup> restraining the amount of land which a corporation, formed for religious purposes, may have, is governed in its construction by another section of the same statute,<sup>4</sup> which makes the corporations intended, such as are formed for “the purpose of religious worship”; and does not affect a devise made to foreign *benevolent* or *missionary societies*, such as the Board of Foreign Missions of the Presbyterian Church of the United States, or the Board of Home Missions of that church.<sup>5</sup> The constitution of Missouri contains this restriction upon the purposes for which religious corporations may be organized: “No religious corporation can be established in this State, except such as may be created under the general law, for the purpose only of holding the title to such real estate as may be prescribed by law for church edifices, parsonages, and cemeteries.”<sup>6</sup> Commenting on this provision, it has been said: “There can, therefore, be no incorporation of a church for religious or other purpose in this State, except only for the sole purpose of holding the title to such real estate, and the quantity as may be prescribed by general law for a church edifice, a parsonage, and a cemetery; and consequently the church organization for religious purposes must continue after the incorporation of the religious body for the sole purpose for which such incorporations are authorized by the constitution.”<sup>7</sup> The Declaration of Rights of Maryland of 1776,

tion in relation to the convenient transacting of its business, or such as shall have been *bona fide* mortgaged to it by way of security, or conveyed to it in satisfaction of debts previously contracted in the course of its dealings, or purchased at sales upon judgments which shall have been obtained for such debts.” Bank of Michigan v. Niles, 1 Dougl. (Mich.) 401; s. c. 41 Am. Dec. 575.

<sup>1</sup> Rev. Stat. U. S., § 1890.

<sup>2</sup> Mormon Church v. United States, 136 U. S. 1; United States v. Mormon Church, 150 U. S. 145.

<sup>3</sup> Ill. Act Apr. 18, 1872, § 42.

<sup>4</sup> *Ibid.*, § 5.

<sup>5</sup> Gilmer v. Stone, 120 U. S. 586; s. c. 1 Rail. & Corp. L. J. 324; 7 Cent. L. J. 491.

<sup>6</sup> Const. Mo. 1875, art. 2, § 8.

<sup>7</sup> Catholic Church v. Tobbein, 82 Mo. 418, 424.

article 34, provided that "every gift, sale, or devise of lands to . . . any religious sect, order, or denomination, . . . without the leave of the legislature, shall be void; except, always, any sale, gift, lease, or devise of any quantity of land, not exceeding *two acres*, for a church, meeting, or other house of worship, and for a burying-ground, which shall be improved, enjoyed, or used only for such purpose, or such sale, gift, lease, or devise shall be void." The effect of this article was to impose a restriction upon the acquisition of property by religious sects, orders, or denominations, while at the same time reserving to the legislature the power to remove that restriction. This power reserved to the legislature was *plenary*, the whole subject resting within its *discretion* and wisdom. In granting this leave, it was competent for the legislature, in its discretion, to prescribe the conditions, and to declare the limits, both as to the extent and quality of the estate to be purchased, and as to the use which the property, when purchased, should be devoted. But there was this necessary restriction upon the power of the legislature in granting such leave, — that no leave granted by it could operate to enlarge the quantity of the estate of the grantee, without the consent of the grantor or his heirs.<sup>1</sup> But where a grant has been made to a religious corporation, of land in fee-simple, and the deed contains no restriction as to the use to which it is to be put by the grantee, or the only restriction upon the use rests in the Declaration of Rights above quoted, then it is competent for the legislature to enlarge such use, because in doing so it does not take anything from the grantor or his heirs.<sup>2</sup> An incorporated branch of the *Young Men's Christian Association* has been held not to be a corporation formed "for *religious purposes*," so as to be within the provision of a statute of Illinois limiting the power of corporations formed for religious purposes to take land by gift, devise, or purchase, to ten acres.<sup>3</sup> The reason is, that the society prescribes no form of worship, and subjects its members to no kind of discipline, for failure to conform to its rules.<sup>4</sup>

§ 5775. **Whether Exclusion of Power to Hold, Excludes Power to Take.**—It is reasoned in some cases that a limitation of the power of a corporation to *hold* property is neces-

<sup>1</sup> *Catholic Cathedral Church v. Manning*, 72 Md. 116, 123.

<sup>2</sup> *Ibid.* 127.

<sup>3</sup> *Hamsher v. Hamsher*, 132 Ill. 273; s. c. 23 N. E. Rep. 1123; 8 L. R. A. 556.

<sup>4</sup> *Ibid.*

sarily a limitation of its power to *take* such property.<sup>1</sup> But this is not necessarily so. Such was not the operation of the English statutes of mortmain: "But since those statutes," said Tighlman, C. J., "it is necessary, in order to enable a corporation to *retain* lands which it has purchased, to have a *license* for that purpose; otherwise, in England, the next lord of the fee may enter, within a year after the alienation; and if he do not, then the next immediate lord, from time to time, has half a year to enter; and for default of all the *mesne* lords, the King takes the land so aliened, forever. . . . But in Pennsylvania, where there are no *mesne* lords, the right would accrue immediately to the Commonwealth."<sup>2</sup> Moreover, as we shall presently see, although a corporation has no power to *hold* land, yet it may take and hold until the *State* intervenes;<sup>3</sup> and it may *transmit* a good title to a purchaser.<sup>4</sup> By far the greater volume of American judicial authority deals with this question in a manner similar to that in which the English courts dealt with the mortmain acts, by holding that a corporation, which takes in contravention of a statute, takes subject to the *risk* of being ousted by the State, and that is all. But the distinction between taking and holding has been repudiated by the Court of Appeals of New York, in a modern case of great importance, with reference to a *devise* to an educational corporation of a greater amount of property than it was permitted by its charter to hold,—the court holding that the heirs of the devisor could dispute the title of the devisee, although the State did not intervene.<sup>5</sup>

§ 5776. **Whether a Corporation can Take Land except by Deed.**—By the ancient common law, a corporation could not take title to land except by deed.<sup>6</sup> But this is clearly not

<sup>1</sup> Wood v. Hammond, 16 R. I. 98; s. c. 17 Atl. Rep. 324; Re McGraw's Estate, 111 N. Y. 66; s. c. 19 N. E. Rep. 233; 2 L. R. A. 387; affirming s. c. 45 Hun (N. Y.), 354.

<sup>2</sup> Leazure v. Hillegas, 7 Serg. & R. (Pa.) 313, 320.

<sup>3</sup> Post, § 5795.

<sup>4</sup> Post, § 5797.

<sup>5</sup> Re McGraw's Estate, 111 N. Y. 66; s. c. 19 N. E. Rep. 233; affirming s. c. 45 Hun (N. Y.), 354; followed in Wood v. Hammond, 16 R. I. 98; s. c. 17 Atl. Rep. 324.

<sup>6</sup> It was said in an old case: "If a lease for years be made by a corpo-

the modern law. A corporation can acquire title to land in any manner in which a natural person can acquire it, and in modes in which a natural person cannot. It can acquire such title by a *parol dedication* for public purposes,<sup>1</sup> by *adverse possession* under the *statute of limitations*,<sup>2</sup> by *prescription* in the case of *easements*,<sup>3</sup> by the exercise of the right of *eminent domain*,<sup>4</sup> by *devise*,<sup>5</sup> and in still other ways than by deed.

**§ 5777. Power to Acquire Land by Adverse Possession under the Statute of Limitations.** — Contrary to early conceptions,<sup>6</sup> a corporation aggregate may acquire title to land by *disseisin* and *exclusive adverse occupation*, although it did not authorize such disseisin and occupation by deed;<sup>7</sup> and this, although the existence of the corporation itself is proved merely by *prescription*.<sup>8</sup>

**§ 5778. Power to Acquire an Easement by Prescription.** — It seems, from the obscure report of an old case, to have been held that a corporation might have an *easement*, as, for instance, a *right of way*, by prescription;<sup>9</sup> and there is no possible doubt of this under the modern law.<sup>10</sup>

**§ 5779. Power to Take for the Purpose of Saving a Debt.** It seems clear that a corporation may take land for the purpose of saving a debt, and hold it until it can dispose of it

ration, he cannot take without deed and they grant it over, as he as grantee may entitle himself thereto without showing a deed; because the lease of the thing in its nature might have passed without deed; although the persons who take it could not take without deed. Also his possession is some privilege for his title." *Pridyman v. Wodry*, Cro. Jac. 109.

<sup>1</sup> *Hunter v. Sandy Hill*, 6 Hill (N. Y.), 407.

<sup>2</sup> *Post*, § 5777.

<sup>3</sup> *Post*, § 5778.

<sup>4</sup> *Ante*, § 5589.

<sup>5</sup> *Post*, § 5782.

<sup>6</sup> *Weston v. Hunt*, 2 Mass. 500, 502.

<sup>7</sup> *Rehoboth v. Rehoboth*, 23 Pick. (Mass.) 139.

<sup>8</sup> *Robie v. Sedgwick*, 35 Barb. (N. Y.) 319. It was at one time a refinement of the old law, that a corporation aggregate could not commit a disseisin or any other *tort*, because it could *only act by its seal*, — a doctrine long since exploded. *Post*, § 6302, *et seq.*

<sup>9</sup> *Slackman v. West*, Cro. Jac. 673.

<sup>10</sup> That a *municipal corporation*, as representing the public, may acquire *streets* by *prescription*, see 2 Beach Pub. Corp., § 1458, and cases cited.



at a reasonable price, and on reasonable terms. We have already seen that all judicial authority concedes to corporations the power to acquire and hold *their own shares* for this purpose.<sup>1</sup> This power is, however, guarded and limited by charter in many instances. Thus, the charter of the State Bank of Illinois provided that,—“The real estate which it shall be lawful for said bank to purchase, hold, and convey, shall be,—(1) such as shall be required for its immediate accommodation in the transaction of its business; or (2) such as shall have been mortgaged to it in good faith by way of security for loans previously contracted, or for moneys due; or (3) such as shall have been conveyed to it in satisfaction of debts previously contracted, in the course of its dealings; or (4) such as shall have been purchased at sales upon judgments, decrees, or mortgages, obtained or made for such debts; and said bank shall not purchase, hold, or convey real estate in any other case, or for any other purpose; and all such real estate, not absolutely necessary for the convenient discharge of its business, shall be set up at least once a year at public sale, and if the sum offered therefor shall be sufficient to reimburse the principal and interest of the debt for which it was taken by said corporation, it shall be absolutely sold.”<sup>2</sup> Under this provision, the bank had the power to *purchase a judgment* which was a *prior lien upon lands* which had been *mortgaged* to it to secure the payment of an existing debt, if the object was to protect itself and to secure the payment of its own claim; and in such a case it might purchase the lands of the debtor on an *execution* founded on such judgment.<sup>3</sup> Numerous other statutes of the same kind have received judicial interpretation.<sup>4</sup>

§ 5780. Power to Purchase Land at Judicial Sales. — We shall elsewhere see,<sup>5</sup> that the right of a corporation to make *contracts* and consequently to become a *creditor*, carries with

<sup>1</sup> *Ante*, § 2068.

<sup>3</sup> *Brown v. Hogg, supra*.

<sup>2</sup> See *Brown v. Hogg*, 14 Ill. 219, 220, where this provision is quoted and construed.

<sup>4</sup> See, for instance, *Merritt v. Lambert*, 1 Hoffm. Ch. (N. Y.) 166; *Home Ins. Co. v. Head*, 30 Hun (N. Y.), 405.

<sup>5</sup> *Post*, § 7360.

it, by implication of law, the right to the use of the *remedies* for the collection of debts due to it, which are accorded to natural persons; and it is necessary to the efficiency of these remedies that it should have the same right to buy in property at execution sales under judgments in which it is the plaintiff, which any other plaintiff has,<sup>1</sup> and the same right to secure its debt by purchasing property at sales foreclosing a mortgage made to it, which any other mortgagee has.<sup>2</sup> Statutory limitations, as we have already seen,<sup>3</sup> have been put upon the length of time during which corporations may hold property so purchased; but even in this case, where the corporation holds the property for a greater length of time than that prescribed by the statute, it is not disabled from selling it and from passing a good title to the purchaser, providing the State has not intervened.<sup>4</sup> It has further been held, in conformity with a well-known general principle,<sup>5</sup> that where a corporation has a general power to purchase real estate, but is restrained by a *proviso* to purchases for corporate uses only, and it purchases land at a sheriff's sale, the *presumption* is that the purchase is within the power conferred, and the party that denies it must show the contrary.<sup>6</sup>

§. 5781. **Power to Take by Mortgage.**—The power of corporations to take *mortgages* of land to secure debts due to them has been the subject of more or less controversy, and this has been especially true of *banking* and other *financial* corporations, not excepting *national banks*. Excluding the

<sup>1</sup> *Ante*, § 4070. Compare *Crutcher v. Nashville Bridge Co.*, 8 Humph. (Tenn.) 403.

<sup>2</sup> *Post*, § 6222, *et seq.*

<sup>3</sup> *Ante*, § 5775.

<sup>4</sup> *Home Ins. Co. v. Head*, 30 Hun (N. Y.), 405. Where the charter of a corporation authorized a purchase by them of lands sold under judgments or decrees in their favor, and required them to *sell* all land so purchased *within five years*, giving the mortgagees the right of redemption while

the property remained unsold in the hands of the corporation,—it was held that the purchases should be made and the deeds taken directly to the company, or expressly to their use, and that a mere contract by the company to sell was not sufficient to bar the right of *redemption*. *Merritt v. Lambert*, 1 Hoffm. Ch. (N. Y.) 166.

<sup>5</sup> *Post*, §§ 5798, 5967.

<sup>6</sup> *Ex parte Peru Iron Co.*, 7 Cow. (N. Y.) 540.

question of the power of a corporation to *lend money* on this species of security, and taking the case of a corporation organized to effectuate a particular purpose, such as building a *railroad*,—it is a just conclusion that, wherever the corporation has the power to become a *creditor*, it has the power to take a mortgage on land to secure itself, except to the extent to which the power may be limited by statute. Thus we have seen,<sup>1</sup> a class of holdings to the effect that railroad corporations have, without any express power thereto in their charters, the power to take mortgages of land from *subscribers to their shares* to secure the payment of their subscriptions.<sup>2</sup>

§ 5782. **Power to Take by Devise.**—The power of a corporation at common law to take land by *devise*, is equally clear.<sup>3</sup> But this power was restrained in England, as already seen,<sup>4</sup> by the statutes of *mortmain*. It has been restrained by similar statutes in some of the States of the American Union, notably in New York.<sup>5</sup> And in the absence of any express statutory restraint, it is restrained by the principle of American jurisprudence already referred to,<sup>6</sup> with qualifications hereafter considered, which limits the power of corporations to take and hold land to the purpose for which they were created.

§ 5783. **Operation of Statutes of Wills.**—The *English statutes of wills*,<sup>7</sup> authorizing devises of land to any *person or persons*, expressly excepted *bodies politic and corporate*. The same exception was incorporated into the *New York statute of wills*, without variation, from the English statutes just cited. Under the operation of that statute, *devises of land* to corporations have been uniformly held *void* in that State, unless the charter expressly empowered the corporation to take by devise,

<sup>1</sup> *Ante*, § 1654.

<sup>2</sup> *Clark v. Farrington*, 11 Wis. 306; *Blunt v. Walker*, 11 Wis. 334; *s. c.* 78 Am. Dec. 709; *Cornell v. Hichens*, 11 Wis. 353, 368; *Andrews v. Hart*, 17 Wis. 297.

<sup>3</sup> *Re McGraw's Estate*, 111 N. Y.

66; *s. c.* 19 N. E. Rep. 233; 2 L. R. A. 387.

<sup>4</sup> *Ante*, § 5771.

<sup>5</sup> *Post*, § 5783.

<sup>6</sup> *Ante*, § 5772.

<sup>7</sup> 32 Hen. VIII., ch. 1; and 34 Hen. VIII., ch. 5.

which provision, of course, brought the corporation within an *exception* to the prohibition in the statute of wills.<sup>1</sup> It is believed that this provision has not been generally re-enacted in the statutes of wills of the different American States. There was no such provision in the *Virginia statute of wills* in force in 1846,<sup>2</sup> nor in the *Kentucky statute*, which seems to have been like that of Virginia.<sup>3</sup>

§ 5784. **Devises to Foreign Corporations.**—As the devolution of title to land depends upon the *lex rei sitæ*, no matter where the deed, will, or other instrument under which it is sought to affect a devolution of the title is made,<sup>4</sup> it follows that under the operation of the *statute of wills of New York*, already considered,<sup>5</sup> a devise by a citizen of that State of land, situated in the State, to a foreign corporation, is void.<sup>6</sup> And so, a devise by a citizen of Missouri, to the city of St. Louis, in that State, for a charitable purpose, of lands situated in the State of New York, was void under the operation of the New York statute of wills,<sup>7</sup> although the Supreme Court of Missouri held that the will was valid, and that the city had capacity to take under it.<sup>8</sup> In other words, a devise of land situated in New York, to a corporation organized under the laws of another State, is void, unless such corporation is authorized to take *by the statute law of New York*, although it may have such

<sup>1</sup> *McCartee v. Orphan Asylum Soc.*, 9 Cow. (N. Y.) 437; s. c. 18 Am. Dec. 516; *Theological Seminary v. Childs*, 4 Paige (N. Y.), 419, 422; *Kuypers v. Reformed Dutch Church*, 6 Paige (N. Y.), 570, 574; *Attorney-General v. Reformed Protestant Dutch Church*, 33 Barb. (N. Y.) 313; *Van Kleeck v. Reformed Dutch Church*, 6 Paige (N. Y.), 600; *McCaughal v. Ryan*, 27 Barb. (N. Y.) 376, 385; *Bascom v. Albertson*, 34 N. Y. 584; *King v. Rundle*, 15 Barb. (N. Y.) 139, 150; *Downing v. Marshall*, 23 N. Y. 366; s. c. 80 Am. Dec. 290; *White v. Howard*, 46 N. Y. 144; *Holmes v. Mead*, 52 N. Y. 332.

<sup>2</sup> *Rivanna Nav. Co. v. Dawsons*, 3 Gratt. (Va.) 19; s. c. 46 Am. Dec. 183.

<sup>3</sup> *Moore v. Moore*, 4 Dana (Ky.), 354; s. c. 29 Am. Dec. 417.

<sup>4</sup> *Hosford v. Nichols*, 1 Paige (N. Y.), 220; *White v. Howard*, 46 N. Y. 144, 159; *Christian Union v. Yount*, 101 U. S. 352, 356; *Runyan v. Coster*, 14 Pet. (U. S.) 122; *Lathrop v. Commercial Bank*, 8 Dana (Ky.), 114; s. c. 33 Am. Dec. 481.

<sup>5</sup> *Ante*, § 5783.

<sup>6</sup> *Draper v. Harvard College*, 57 How. Pr. (N. Y.) 269.

<sup>7</sup> *Ante*, § 5783.

<sup>8</sup> *Chambers v. St. Louis*, 29 Mo. 543.

authority by its own charter or governing statute.<sup>1</sup> It has been held that, if the *statute of wills* of the State creating the corporation disables it from taking land by devise, this disability will follow it into other States; so that, by reason of the disability imposed by the general statute law of the State of its domicile, it will not be able so to acquire land in another State.<sup>2</sup> But this appears to be unsound.<sup>3</sup> Where the disability is created by the *general statute law of the State of the domicile* of the corporation, then the sound view is, that it is merely a question of the policy of that State, as declared by its legislature, relating to the devolution of title to land *within its own limits*, and that it has no extra-territorial operation. It is only where the disability is created by the *charter* of the corporation itself, or by the general statute under which the corporation is organized, so that there is an *entire want of power* in the artificial person so to acquire title to land, that the disability will follow it into another State. In such case the disability attends it everywhere, on the principle that a corporation cannot exercise in a foreign State, except by an express provision of the legislation of that State, larger powers than have been granted to it by the sovereign which has created it.<sup>4</sup> In like manner, a *statute, limiting the amount of land* which a person can devise to a corporation, has no extra-territorial operation. Therefore, a statute of New York providing that "no person having a husband, wife, child, or parent, shall by his will bequeath to any charitable corporation more than one-half of his estate after the payment of his debts, such bequest to be valid to the extent of one-half, and no more," did not prevent a bequest from being made by a testator domiciled in Connecticut to a charitable corporation domiciled in New York.<sup>5</sup> In the absence of any express statutory expression on the subject, it will not be presumed that it is against the public policy of a State that one of its citizens, owning real estate there situated, should convey it to a foreign

<sup>1</sup> *White v. Howard*, 46 N. Y. 144.

<sup>2</sup> *Starkweather v. American Bible Soc.*, 72 Ill. 50; *s. c.* 22 Am. Rep. 133.

<sup>3</sup> *Post*, ch. 194.

<sup>4</sup> *Post*, ch. 194; *American Bible Soc. v. Marshall*, 15 Ohio St. 537; *Christian Union v. Yount*, 101 U. S. 352.

<sup>5</sup> *Crum v. Bliss*, 47 Conn. 592.

corporation for benevolent purposes, where the State permits her own corporations, organized for like purposes, to take real estate by purchase, gift, devise, or in any other manner.<sup>1</sup>

§ 5785. **Devises to the United States.**—The United States is a *political corporation*,<sup>2</sup> possessing defined and limited corporate powers, with capacity to contract and be contracted with, and to sue in its corporate name;<sup>3</sup> but it *cannot take by a devise*, land situated in a State whose statute of wills, as in New York, prohibits devises of lands to corporations;<sup>4</sup> but otherwise where, as in Massachusetts, there is no such prohibitory statute.<sup>5</sup>

§ 5786. **Whether the Power to Take by Purchase Includes the Power to Take by Devise.**—The word "*purchase*," when used in connection with real property, has long been construed as embracing all modes of acquiring such property except by descent. It hence includes the acquisition of land by *devise*.<sup>6</sup>

<sup>1</sup> *Christian Union v. Yount*, 101 U. S. 352; distinguishing *Carroll v. East St. Louis*, 67 Ill. 568; *s. c.* 16 Am. Rep. 632; and *Starkweather v. American Bible Soc.*, 72 Ill. 50; *s. c.* 22 Am. Rep. 133.

<sup>2</sup> *United States v. Maurice*, 2 Brock. (U. S.) 96, 109, *per* Marshall, C. J.; *Ableman v. Booth*, 21 How. (U. S.) 506.

<sup>3</sup> *Cohens v. Virginia*, 6 Wheat. (U. S.) 264. See preface to *Beach Pub. Corp.*, from which I have adopted this statement. See also *United States v. Tingey*, 5 Pet. (U. S.) 115, 128; *United States v. Bradley*, 10 Pet. (U. S.) 343, 359; *United States v. Linn*, 15 Pet. (U. S.) 290, 311; *Neilson v. Lagow*, 12 How. (U. S.) 98, 107, 108; *United States v. Hodson*, 10 Wall. (U. S.) 395, 407, 408; *Dickson v. United States*, 125 Mass. 311, 314.

<sup>4</sup> *Will of Fox*, 52 N. Y. 530; *s. c.* 11 Am. Rep. 751; affirmed, *sub nom.* *United States v. Fox*, 94 U. S. 315.

<sup>5</sup> *Dickson v. United States*, 125

Mass. 311; *s. c.* 28 Am. Rep. 230. In this case the devise to the United States was: "Wishing to contribute my mite towards suppressing the Rebellion and restoring the Union, I give and devise the rest and residue of my estate to the United States of America." The devise being *absolute*, it was held to be good, notwithstanding that the Rebellion had been suppressed and the Union restored before the death of the testator. The opinion in this case, by Mr. Justice Gray, also recalls the fact that the Smithsonian Institution, at Washington, was created by the bequest of an Englishman named Smithson, established by a decree of Lord Langdale as Master of the Rolls, and accepted by act of Congress. *President of the United States v. Drummond*, cited in *Whicker v. Hume*, 7 H. L. Cas. 124, 155.

<sup>6</sup> *Radcliffe v. Ruper*, 10 Mod. 89; *s. c.* 10 Mod. 230; *Ratcliffe's Case*, 1 Strange, 267; *McCartee v. Orphan*

Hence, although the statute of wills may except corporations generally from the power to take lands by devise, yet if the charter of a particular corporation empowers it to *purchase*, hold, and convey any estate, real or personal, this will enable it to take land by devise;<sup>1</sup> and so it may where its charter empowers it "to hold, *purchase*, and convey real estate."<sup>2</sup>

§ 5787. **Devises to Corporations where their Statutory Limit has been Reached.**—According to one view, if the *amount* of land which a corporation may hold is prescribed by its governing statute, and if it has already acquired lands to such an extent that a further devise to it will exceed that limit, then, *in so far as the devise is in excess of that limit, it is void, and the title vests in the heirs.* In such a case, the principle that the State alone can question the right of the corporation to hold the lands does not, in the opinion of some of the courts, apply, but the heirs of the testator can raise the question. Nor, in such a case, is the construction put upon the language of the statutes of *mortmain* applicable, making a distinction between the power to *take* and the power to *hold*; but such a statute, in the absence of some plain expression showing the contrary intent, is construed as prohibiting a *taking* where the prescribed limit has been reached.<sup>3</sup> But other

Asylum Soc., 9 Cow. (N. Y.) 437; *s. c.* 18 Am. Dec. 516, 523. See, also, Attorney-General v. Bowyer, 3 Ves. 714, 728, where it is intimated that a corporation authorized by *license* to hold real estate may take lands by devise.

<sup>1</sup> McCartee v. Orphan Asylum Soc., 9 Cow. (N. Y.) 437; *s. c.* 18 Am. Dec. 516.

<sup>2</sup> American Bible Soc. v. Marshall, 15 Ohio St. 537.

<sup>3</sup> Re McGraw's Estate, 111 N. Y. 66; *s. c.* 19 N. E. Rep. 233; 2 L. R. A. 387; affirming *s. c.* 45 Hun (N. Y.), 354; Cornell University v. Fiske, 136 U. S. 152; Wood v. Hammond, 16 R. I. 98; Cromie v. Louisville Orphans' Home Soc., 3 Bush (Ky.), 365;

Chamberlain v. Chamberlain, 43 N. Y. 424. Compare Christian Union v. Yount, 101 U. S. 352. The decision in Wood v. Hammond, *supra*, was rendered March 16, 1889. On the 25th of April of the same year, the legislature took hold of the matter by enacting a statute providing, in substance, that corporations might take and hold real or personal property given to them by will, "for any charitable uses or purposes authorized or permitted by" their charters, notwithstanding the limitation therein as to amount, upon condition "that such corporation shall obtain from the general assembly authority to take and hold real and personal estate to an

courts have taken the view that here, as in other cases,<sup>1</sup> the *question* of the capacity of the corporation to take is one which can be *raised by the State alone*.<sup>2</sup> And this is the only view sustainable on the analogies of this question. That view is, that a devise to a corporation, incapable for that or any other reason from taking, is *good as against every one save the State*, just as is a deed to a corporation or to an alien; so that whenever the State waives its objection to it, that is an end of the discussion. But under the former view the devise is void only as to the excess; it is good up to the statutory limit, though there may be difficulty in determining that limit.<sup>3</sup> Moreover, under this doctrine, an act of the legislature passed subsequently to the death of the testator, enlarging the power of the corporation to take, will not affect the rights of the heirs, because the title vests in them instantly on the death of the testator, and it is not competent for the legislature to divest it.<sup>4</sup>

§ 5788. **Devise to a Corporation where there are Two Corporations of the Same Name.**—Where there are different corporations of the same or of a similar name, and a devise is made to one of them, naming it in such a way as not to distinguish it from the others, then the will presents a case of *latent ambiguity*, where *parol evidence* is admissible to explain the real meaning of the testator.<sup>5</sup>

amount large enough to include, in addition to its other property, the property given to such corporation by will as aforesaid, and that the application to the general assembly shall be made within one year from the final probate of the will under which the gift is taken as aforesaid." Pub. Laws, R. I. 1889, ch. 76, p. 65. This statute could not, of course, operate upon the rights settled in the case decided in *Wood v. Hammond*, *supra*; it could not operate to divest an estate already vested in the heirs, as held in that case.

<sup>1</sup> *Post*, § 5795.

<sup>2</sup> *De Camp v. Dobbins*, 29 N. J. Eq. 36.

<sup>3</sup> *Wood v. Hammond*, 16 R. I. 98; *s. c.* 17 Atl. Rep. 324; *Re McGraw's Estate*, 111 N. Y. 66; *s. c.* 2 L. R. A. 387; 19 N. E. Rep. 233; affirming *s. c.* 45 Hun (N. Y.), 354.

<sup>4</sup> *Re McGraw's Estate*, *supra*.

<sup>5</sup> *Gilmer v. Stone*, 120 U. S. 586, 590. See to this principle in the law of wills, *Wilkins v. Allen*, 18 How. (U. S.) 385, 393; *Hinckley v. Thatcher*, 139 Mass. 477; *s. c.* 52 Am. Rep. 719; *Breckinridge v. Duncan*, 2 A. K. Marsh. (Ky.) 50; *s. c.* 12 Am. Dec. 359; *Morgan v. Burrows*, 45 Wis. 211, 217; *s. c.* 30 Am. Rep. 717; *Brewster v. McCall*, 15 Conn. 274; *Tilton v. American Bible Soc.*, 60 N. H. 377,



§ 5789. **Whether the Power to Take Subscriptions or Contributions Includes the Power to Take by Devise.** — It has been held in Maryland that the power conferred upon a corporation, by an act of the legislature, to take and hold "*subscriptions or contributions, in money or otherwise,*" when construed, as it must be, with reference to the restriction imposed upon religious corporations by section 38 of the Bill of Rights, already quoted,<sup>1</sup> does not include the power to take by *devise*.<sup>2</sup>

§ 5790. **Doctrine of Equitable Conversion where Corporation is not Capable of Taking Land.** — If, then, the corporation is not capable of taking land, but, nevertheless, a devise of land is made directly to it, the devise will be void, and the land will revert to the heirs of the grantor, under the theory of his having died intestate as to it; or will pass, under other theories, to other devisees under other provisions of the will. But this is not so where the will directs the executors to *convert the land into money*, and to hand the money over to the corporation. Here, if the corporation is capable of taking personalty, the devise will be good; for, when carried out according to its terms, it does not operate to vest land in the corporation, but merely operates as a bequest of money to it.<sup>3</sup> This is in accordance with the doctrine of *equitable conversion*, by which, in construing and applying a will, a court of equity will treat land as money or money as land, when it is plain from all the terms of the will that the testator intended land to be converted into money, or money into land, for the purposes of the will. An attempt to explore this doctrine would be outside the purposes of this work; but it may be stated, as

382; *s. c.* 49 Am. Rep. 321; *Patch v. White*, 117 U. S. 210. That the *misnomer* of the legatee will not defeat the *gift*, see *De Camp v. Dobbins*, 29 N. J. Eq. 36. It is said that such an ambiguity may arise, "either where it names a person as the object of a gift or a thing as the subject of it, or there are two persons or things that answer such name or description; or

secondly, it may arise when the will contains a misdescription of the object or subject." *Patch v. White*, *supra*.

<sup>1</sup> *Ante*, § 5774.

<sup>2</sup> *Brown v. Thompkins*, 49 Md. 423, 430. Compare *Catholic Cathedral Church v. Maning*, 72 Md. 116, 132.

<sup>3</sup> *Sherwood v. American Bible Soc.*, 4 Abb. App. Dec. (N. Y.) 227.

a general rule, that an equitable conversion is not to be presumed beyond the purposes of the will as plainly expressed therein, or further than is necessary to gratify the several legacies and bequests; and that when these fail or lapse, there is a resulting trust in favor of the heir, unless there is a clear and manifest expression in the will to the contrary.<sup>1</sup> In every case involving this doctrine, the paramount question is what the testator really meant, whether he meant to give to the produce of the real estate the quality of personalty to *all intents*, or only so far as respected the *particular purposes* of the will.<sup>2</sup>

### § 5791. What Estate in Lands a Corporation may Take.

In some cases a distinction is taken between the estate which a corporation may take for the purposes of *alienation*, and the estate which it may take for the purposes of *enjoyment*, — holding that it may take a *fee-simple* estate for the purposes of alienation, but can only take a *determinable fee* for the purposes of enjoyment.<sup>3</sup> We do not understand that there has ever been any doubt upon the former of these propositions, that is, upon the proposition that a corporation may take a grant of land in fee and convey it in fee, so that the title of its grantee will not be affected by its subsequent dissolution.<sup>4</sup> But the second proposition, namely, that a corporation can take only a *determinable fee* for the purposes of enjoyment is founded upon the premise that, upon its dissolution, its land reverts to the original grantor or his heirs.<sup>5</sup> But it is else-

<sup>1</sup> Orrick v. Boehm, 49 Md. 72, 104.

<sup>2</sup> Cox's note to Cruse v. Barley, 3 P. Wms. 20, 22; again quoted in Orrick v. Boehm, 49 Md. 72, 104. The rule has been said to be that "the heir at law must be effectually displaced, not by inference or implication, but there must be a clear, substantive, and undeniable intent on the part of the testator to exclude him." Amphlett v. Parke, 2 Russ. & M. 221; cited in 1 White & Tudor's Lead. Cas. 719; and in Orrick v. Boehm, 49 Md. 72, 105. See as to this doctrine of

*equitable conversion*, Given v. Hilton, 95 U. S. 591; Singleton v. Tomlinson, 3 App. Cas. 404.

<sup>3</sup> Nicoll v. New York & C. R. Co., 13 Barb. (N. Y.) 460; s. c. affirmed, 12 N. Y. 121; Buffalo Pipe Line Co. v. New York & C. R. Co., 10 Abb. N. Cas. (N. Y.) 107.

<sup>4</sup> People v. Mauran, 5 Denio (N. Y.), 389; People v. O'Brien, 111 N. Y. 1; s. c. 7 Am. St. Rep. 684.

<sup>5</sup> Blackstone's definition of the title which a corporation takes by grant is "an estate for life which may

where pointed out, that this is no longer the law, at least in respect of private joint-stock corporations, but that the law is that, upon the dissolution of such a corporation, all of its estate, whether consisting of lands or goods, passes into administration, for the benefit of its creditors first, and its stockholders afterwards.<sup>1</sup> It is therefore conceived that this doctrine of a corporation being incapable of taking an estate in fee-simple for the purposes of enjoyment, is an exploded refinement of the common law. Where there is a statute relating to conveyances providing that every grant shall pass all the estate or interest of the grantor, unless the intent to pass a less estate or interest shall appear by express terms or be necessarily implied in the terms of the grant,<sup>2</sup> a conveyance to a corporation and its successors will pass an estate in fee, although the corporation may be created for a limited period,<sup>3</sup> and it would have the same effect if no words of succession were used.<sup>4</sup> When, therefore, a corporation is empowered by its charter to acquire land, it may acquire an estate in fee although its own existence is limited to a term of years.<sup>5</sup> So, a railroad corporation which has the power, under its charter, to acquire by purchase such real estate as may be necessary for the construction of its road, may acquire title in fee to the same by a deed purporting to convey the fee; and when the land is no longer needed for this purpose, it may sell it and convey the fee.<sup>6</sup> So, a plank-road company, authorized to acquire land for the building and operation of its road, may acquire title to the same in fee-simple absolute, and no condition of *reverter*, in case of its ceasing to use the land for the purposes intended, will be implied.<sup>7</sup>

endure forever, or which reverts to the donor only when the life of the donee is terminated." 1 Bla. Com. 484.

<sup>1</sup> Heath v. Barmore, 50 N. Y. 302; *post*, § 6730.

<sup>2</sup> 1 Rev. Stat. N. Y. 748, § 1.

<sup>3</sup> Nicoll v. New York &c. R. Co., 12 N. Y. 121; affirming s. c. 12 Barb. (N. Y.) 460; People v. O'Brien, 111 N. Y. 1; s. c. 7 Am. St. Rep. 684.

Compare Webb v. Moler, 8 Ohio, 548.

<sup>4</sup> Nicoll v. New York &c. R. Co., 12 N. Y. 121; affirming s. c. 12 Barb. (N. Y.) 460, *per* Parker, J.

<sup>5</sup> Rives v. Dudley, 3 Jones' Eq. (N. C.) 126; s. c. 67 Am. Dec. 231; Nicoll v. New York &c. R. Co., *supra*.

<sup>6</sup> Yates v. Van De Bogert, 56 N. Y. 526.

<sup>7</sup> Heath v. Barmore, 50 N. Y. 302.

## § 5792. Illustrations in the Case of Railroad Companies.

Under the operation of the foregoing principles and in the absence of any prohibitory statute, a *railroad corporation* may take by purchase and hold, in *fee-simple*, such land as may be necessary for its purposes.<sup>1</sup> This principle has been carried to the length of holding that a railroad corporation may purchase a tract of land containing *gravel*, in furtherance of a contract between it and a third person, whereby the gravel is to be excavated and hauled over its railroad to a distant place, for which it is to receive compensation; and the court decreed a specific performance of such a contract.<sup>2</sup> On the other hand, it is a sound conclusion that a railroad corporation cannot be allowed to *speculate in real estate*, and that it has no power to buy and hold lands situated at a distance from its road, which it cannot possibly use in constructing or operating its road.<sup>3</sup>

## § 5793. Power to Take as Joint Tenant or Tenant in Common.

— A corporation cannot take an estate in *joint tenancy*, either jointly with another corporation, or with a natural person;<sup>4</sup> but it can take and hold as a *tenant in common* with another corporation or natural person.<sup>5</sup> Thus it is said that “insurance companies may own pilot boats in common, and canal com-

<sup>1</sup> Buffalo Pipe Line Co. v. New York &c. R. Co., 10 Abb. N. Cas. (N. Y.) 107.

<sup>2</sup> Old Colony R. Co. v. Evans, 6 Gray (Mass.), 25; s. c. 66 Am. Dec. 394, 404. Compare Davis v. Old Colony R. Co., 131 Mass. 258, 272; s. c. 41 Am. Rep. 221.

<sup>3</sup> Waldo v. Chicago &c. R. Co., 14 Wis. 625, 632. And in Missouri, after construing the statutes relating to the power of a railroad company to acquire and hold lands, it was concluded that, “although this railroad company may receive grants of land, and sell and dispose of the same for the purposes of its construction and payment of its debts, etc., it cannot become a large landed proprietor for purposes not connected with its crea-

tion. But the amount of lands it may receive cannot be decided between these parties. Conceding the power to receive lands for the purposes aforesaid, no one, except the State, can raise the question as to the amount that may be received.” Land v. Coffman, 50 Mo. 243, 254.

<sup>4</sup> Co. Litt. 296; Telfair v. Howe, 3 Rich. Eq. (S. C.) 235; s. c. 55 Am. Dec. 637.

<sup>5</sup> 1 Wash. Real Prop. (4th ed.) 643; DeWitt v. San Francisco, 2 Cal. 289; Estell v. University, 12 Lea (Tenn.), 476; Bennet v. Holbech, 3 Saund. 316, 319; Justice Windham’s Case, Coke Rep. 8a; Willian v. Berkley, Plowd. 239. Compare New York &c. Canal Co. v. Fulton Bank, 7 Wend. (N. Y.) 412.

panies may be tenants in common of locks, canal boats, and other property, subserving their mutual interest.”<sup>1</sup>

§ 5794. **Transfer of Title to Corporations by Legislative Act.**—That an act of the legislature making a *proposition for a contract* when accepted by the grantees named therein, becomes binding and irrevocable, is a principle elsewhere considered.<sup>2</sup> In pursuance of this principle, it is obviously a sound conclusion that a transfer of property from an unincorporated association to a corporation composed of the same members, may be worked by a legislative enactment, accepted, sanctioned, and given effect to by the parties between whom the transfer is made.<sup>3</sup> But if the legislature, in an act of incorporation, intends that the property of the co-adventurers who are incorporated shall be vested in the corporation without a deed of conveyance, it will of course say so in direct language. Thus, an act *incorporating tenants in common*, to enable them to carry on more conveniently a common purpose, does not of itself vest in the corporation a title to the land previously owned by the individuals, and used by them for the same purpose.<sup>4</sup> A statute incorporating the tenants in common of a *wharf*, their heirs and assigns, upon their own petition, for the purpose of enabling them the better to manage and improve the wharf, did not therefore transfer the title in the wharf to the corporation.<sup>5</sup> So, the organization of a *voluntary loan association*, under a statute,<sup>6</sup> does not transfer the property of the associates to the corporation without a formal conveyance, because the statute does not say so.<sup>7</sup> And in general, a clause in a charter declaring that the corporators are constituted a body corporate for a specified purpose, does not give them any rights of property with respect to such purpose. It only confers corporate existence, and limits the pur-

<sup>1</sup> DeWitt v. San Francisco, 2 Cal. 289, 298, *per* Wells, J.

<sup>2</sup> *Ante*, § 5380, *et seq.*

<sup>3</sup> Ladies' Benevolent Soc. v. Benevolent Soc., 2 Tenn. Ch. 77.

<sup>4</sup> Leffingwell v. Elliott, 8 Pick. (Mass.) 455; *s. c.* 19 Am. Dec. 343.

<sup>5</sup> Holland v. Cruft, 3 Gray (Mass.), 162.

<sup>6</sup> Mass. Stat. 1854, ch. 454.

<sup>7</sup> Manahan v. Varnum, 11 Gray (Mass.), 405.

pose for which such existence is given. If lands are necessary for carrying the purpose into effect, they must be acquired under some other authority, grant, or conveyance.<sup>1</sup> On the other hand, the books present cases where corporations have been created by the legislature and property vested in them by the statute, without any formal conveyance. This was held to have taken place where the provincial legislature of Georgia passed an act declaring that the rector of a certain church was thereby created a body politic and corporate, and that he should be in the actual possession of the church, with its cemetery and appurtenances, to hold and to enjoy the same to him and his successors, etc. This was held to be a *statutory investiture* in the corporation thus created, of title, not only to the church, but also to the cemetery; and a subsequent statute perpetuated the same title, in substantially the same corporation, under a different name.<sup>2</sup> In some of these cases the question will depend upon the body which is incorporated, whether the *trustees*, or the *beneficiaries* or *proprietors*.<sup>3</sup>

**§ 5795. Doctrine that the State alone can Question the Title of the Corporation.**—The limitations imposed by the principles of the common and the statute law upon the power of corporations to hold land, as elsewhere explained in this chapter, are greatly modified by a principle of extensive application now to be considered,—which is that, although a corporation may be disabled or forbidden from holding land at all, or from holding land except for particular purposes, or

<sup>1</sup> Keyport &c. Steamboat Co. v. Farmers' Transportation Co., 18 N. J. Eq. 13.

<sup>2</sup> Christ Church v. Savannah, 82 Ga. 656; s. c. 9 S. E. Rep. 537.

<sup>3</sup> *Ante*, § 16. Where the *proprietors* of certain lands were incorporated, and the *trustees* were endowed with a power of superintendence and management, it was held that the act of incorporation did not give the trustees title or possession, nor power to make contracts of *agistment* binding the cor-

poration, nor power to sell *grass* or *herbage*; and consequently, that one who had agreed with the trustees for the pasturage of his horse, which died through their negligence, had no action against the corporation. Appley v. Montauk, 38 Barb. (N. Y.) 275. But while the trustees were not the corporation, the conclusion of the court is obviously a *non sequitur*; for they were its managing agents, and it was responsible for their contracts and neglects.

from holding land beyond a prescribed limit, yet if it does hold land in the face of such disabilities or prohibitions, its title will be good except as against the State alone, and that it will be deemed to have a good title until its title is invalidated in a direct proceeding instituted by the State for that purpose.<sup>1</sup> In this respect the *status* of a corporation is similar to that of an *alien*, and the latter can take and hold title to real estate until the State proceeds to escheat it by what is sometimes called "*office found*."<sup>2</sup> The reason of the rule was well stated by Mr. Justice Field: "It would lead to infinite inconveniences and embarrassments if, in suits by corporations to recover the possession of their property, inquiries were permitted as to the necessity of such property for the purposes of their incorporation, and the title made to rest upon the existence of that necessity."<sup>3</sup> Thus, under a statute of Georgia,<sup>4</sup> providing that the State of Georgia will not consent to foreign corporations owning 5,000 or more acres of land in that State, unless they shall become incorporated under the laws thereof, it is held that the State alone can question the right of foreign corporations to hold land in con-

<sup>1</sup> *Leazure v. Hillegas*, 7 Serg. & R. (Pa.) 313; *Goundie v. Northampton Water Co.*, 7 Pa. St. 233; *Banks v. Poitiaux*, 3 Rand. (Va.) 136; *s. c.* 15 Am. Dec. 706; *Runyan v. Coster*, 14 Pet. (U. S.) 122; *National Bank v. Whitney*, 103 U. S. 99; *Mallet v. Simpson*, 94 N. C. 37; *s. c.* 55 Am. Rep. 594; *Barrow v. Nashville &c. Turnp. Co.*, 9 Humph. (Tenn.) 304; *Chambers v. St. Louis*, 29 Mo. 543, 576; *Silver Lake Bank v. North*, 4 Johns. Ch. (N. Y.) 370; *Baird v. Bank of Washington*, 11 Serg. & R. (Pa.) 411, 418; *Whitman Gold &c. Mining Co. v. Baker*, 3 Nev. 386, 391; *Natoma Water &c. Co. v. Clarkin*, 14 Cal. 544; *Alexander v. Tolleston Club*, 110 Ill. 65; *Ragan v. McElroy*, 98 Mo. 349; *Fritts v. Palmer*, 132 U. S. 282;

*Southern Pacific R. Co. v. Orton*, 6 Sawy. (U. S.) 157; *Russell v. Texas &c. R. Co.*, 68 Tex. 646; *Missouri Valley Land Co. v. Bushnell*, 11 Neb. 192; *Hough v. Cook County Land Co.*, 73 Ill. 23; *s. c.* 24 Am. Rep. 230; *Hayward v. Davidson*, 41 Ind. 212; *Land v. Coffman*, 50 Mo. 243; *De Camp v. Dobbins*, 29 N. J. Eq. 36; *Bogardus v. Trinity Church*, 4 Sand. Ch. (N. Y.) 633; *Farmers' Loan &c. Co. v. Curtis*, 7 N. Y. 466; *Blunt v. Walker*, 11 Wis. 334; *s. c.* 78 Am. Dec. 709; 1 Wash. Real Prop. 76.

<sup>2</sup> *Fairfax v. Hunter*, 7 Cranch (U. S.), 603.

<sup>3</sup> *Natoma Water &c. Co. v. Clarkin*, 14 Cal. 544, 553; reaffirmed in *Hough v. Cook County Land Co.*, 73 Ill. 23; *s. c.* 24 Am. Rep. 230, 234.

<sup>4</sup> Ga. Act Feb. 28, 1877.

travention of the statute.<sup>1</sup> A leading *exception* to this doctrine, or rather an indefensible violation of it, is found in cases of devises to corporations which are prohibited by the *statute of wills*, or otherwise by the statute law. Here the prevailing doctrine is that, the devise being void, the title vests in the heirs immediately upon the death of the ancestor, and they may assert their title as against the corporation in any proper judicial proceeding.<sup>2</sup>

**§ 5796. Rule Enables Corporations to Defend against Trespassers.**—The foregoing rule enables a corporation, which has received a grant of land, to maintain an action against a *trespasser* to recover possession of it; and the trespasser will not be heard to question the title of the corporation on the ground that it has no authority to take the lands.<sup>3</sup>

**§ 5797. And to Pass a Good Title to its Grantee.**—The rule also operates in such a way that, although the State might, in a direct proceeding for that purpose, have overthrown the title of the corporation and escheated the property to its own use,—yet, not having done so, the corporation may in the mean time convey an indefeasible title to another, of whatever estate in the lands had been conveyed to or acquired by it.<sup>4</sup>

**§ 5798. Power to Hold and Convey Presumed.**—This conclusion is sometimes reached by resorting to the aid of the *presumption of right-acting*, which applies generally in respect of the exercise of corporate powers;<sup>5</sup> so that if a corporation is *authorized, under some circumstances*, to hold and convey real estate, it will be presumed, in the absence of evidence to the contrary, that the real estate which it undertook to convey was held and conveyed under those circumstances and in

<sup>1</sup> American Mortgage Co. v. Ten-  
nille, 87 Ga. 28; s. c. 13 S. E. Rep. 158.

<sup>2</sup> *Ante*, § 5783.

<sup>3</sup> Southern Pac. R. Co. v. Orton,  
6 Sawy. (U. S.) 157.

<sup>4</sup> Blunt v. Walker, 11 Wis. 334;  
s. c. 78 Am. Dec. 709; Farmers' &c.  
Co. v. Curtis, 7 N. Y. 466; Shewalter  
v. Pirner, 55 Mo. 218.

<sup>5</sup> *Ante*, § 5741.



pursuance of its power.<sup>1</sup> The force of this presumption is such that where a corporation, authorized by its charter to purchase and hold real estate for the convenient transaction of its business, entered into an executory contract of purchase, by which it agreed to make payment at any time within one hundred years, and to pay taxes and interest in the mean time, taking no right of possession until payment was made, — it was held that, in the absence of proof to the contrary, the court must infer such purchase to have been for its legitimate uses.<sup>2</sup>

§ 5799. **And cannot be Questioned Collaterally.** — Another way of expressing the same doctrine is to say that, whether a corporation has violated its charter or exceeded its powers in taking a conveyance of land, will not be inquired into *collaterally*, in an action between private parties contesting the title to the land.<sup>3</sup> This, it is perceived, is merely a different way of stating the proposition that the title of the corporation in such a case can be *questioned only by the State*. Under the operation of this principle, where property which a corporation, *under certain circumstances*, is authorized by its charter to acquire, is purchased in a mode or for a purpose not authorized, the title of the corporation to the property cannot be defeated by a party who is a stranger to the agreement by which the property was acquired, and who is not injured by the transfer.<sup>4</sup> And so when a corporation was authorized by its charter to purchase real estate *for certain purposes*, but for no other, a deed executed to it, by one having capacity to convey, vested title in the corporation, and such title could be assailed, on the ground that the purchase was *ultra vires*, only

<sup>1</sup> Farmers' Loan & Co. v. Curtis, 7 N. Y. 466.

<sup>2</sup> Regents &c. v. Detroit &c. Soc., 12 Mich. 138.

<sup>3</sup> Shewalter v. Pirner, 55 Mo. 218; Chambers v. St. Louis, 29 Mo. 543; Land v. Coffman, 50 Mo. 243; McIndoe v. St. Louis, 10 Mo. 575; People v. Mauran, 5 Denio (N. Y.), 389; Sil-

ver Lake Bank v. North, 4 Johns. Ch. (N. Y.) 370; Baird v. Bank of Washington, 11 Serg. & R. (Pa.) 411, 418; Banks v. Poitiaux, 3 Rand. (Va.) 136; s. c. 15 Am. Dec. 706; Leazure v. Hillegas, 7 Serg. & R. (Pa.) 313, 319; Ang. & Ames Corp., § 152.

<sup>4</sup> Ehrman v. Union Central Life Ins. Co., 35 Ohio St. 324.

by the State, or by a stockholder, but not by the grantor.<sup>1</sup> The doctrine on this subject may therefore be summed up in the proposition that the power of a corporation to acquire and hold title to land, cannot be questioned by any party except the State, where it has the power to hold land under any circumstances or *for any purpose*;<sup>2</sup> and we have seen that it has at common law the *implied power* to hold land for the purposes of its creation.<sup>3</sup>

§ 5800. **Cases in Which the Rule does not Apply.**—This principle has no application where the corporation is *seeking the aid of a court* of justice to enable it to *acquire* lands which it has no power to acquire and hold. Here the principle is, that a court of justice will not aid a corporation to do that which is impliedly forbidden by its charter, or by the law.<sup>4</sup> It has, for instance, no application to a case where a suit in equity is brought to compel the *specific performance of a contract to convey* land to a railroad company, which the latter has attempted to acquire, not for any purpose connected with the building and operating of its road, but merely for speculative purposes. In such a case the *specific performance* was refused on the ground, among others, that the company had no power under its charter to take and hold land for such purposes.<sup>5</sup>

§ 5801. **Curing the Incapacity of the Corporation to Take.**—Although the supposed corporation which is to be the recipient of the devise or bequest may not have the capacity to take at the time when the devise or bequest is created, yet this will be immaterial, provided it becomes legally qualified to take before the happening of the event upon which the devise or bequest is to become vested.<sup>6</sup> Thus, although a

<sup>1</sup> *Hough v. Cook County Land Co.*, 73 Ill. 23; *s. c.* 24 Am. Rep. 230.

<sup>2</sup> *Hamsher v. Hamsher*, 132 Ill. 273; *s. c.* 8 L. R. A. 556; 23 N. E. Rep. 1123; *Gilbert v. Hole*, 2 S. Dak. 164; *s. c.* 49 N. W. Rep. 1; *Alexander v. Tolleston Club*, 110 Ill. 65; *Hayward v. Davidson*, 41 Ind. 212, 214.

<sup>3</sup> *Ante*, § 5770.

<sup>4</sup> *Case v. Kelly*, 133 U. S. 21.

<sup>5</sup> *Pacific &c. R. Co. v. Seelcy*, 45 Mo. 212, 220; *s. c.* 100 Am. Dec. 369.

<sup>6</sup> *Plymouth Soc. v. Hepburn*, 57 Hun (N. Y.), 161; *s. c.* 32 N. Y. St. Rep. 943; 10 N. Y. Supp. 817.

bequest to an *unincorporated* religious body may be void, by reason of its incapacity to take under a will,<sup>1</sup> yet if it *becomes incorporated* at the time when the devise is to vest and take effect, that will be sufficient.<sup>2</sup> And whichever way the question is viewed, a devise is *contingent* upon the existence of a devisee capable of taking at the time when the devise is to vest. Thus, a devise to a church society, which is to take effect at the death of the testator's wife, of land to be used as a parsonage, which is to revert to the heirs at law when it shall cease to be so used, is contingent upon the existence of a devisee capable of taking at the termination of the life estate of the wife; but, if the society is then incorporated, it will take, although not incorporated at the death of the testator.<sup>3</sup> But where the view is taken that a bequest to a corporation which has no power to take under the *statute of wills*, is absolutely void so that the title to the property vests, on the death of the testator, immediately in his heirs,<sup>4</sup> then it follows that an act of the legislature passed subsequently to his death, enlarging the capacity of the corporation to take, will not enable it to take; because, prior to the passage of the act, the title has *vested* in the heirs, and it is not competent for the legislature to divest it.<sup>5</sup>

### § 5802. Grants to Corporations before being Organized.

On the same principle, a deed of conveyance of land to an *intended corporation*, before its organization, will take effect upon the event of its organization; for its *acceptance* of the deed, when it becomes capable of accepting, will be *presumed*;<sup>6</sup> whereas, *onerous contracts* made by promoters will not bind the future corporation, in the absence of an affirmative ratifica-

<sup>1</sup> Wilmoth v. Wilmoth, 34 W. Va. 426; s. c. 12 S. E. Rep. 731.

<sup>2</sup> Loughed v. Dykeman's Baptist Church, 58 Hun (N. Y.), 364; s. c. 35 N. Y. St. Rep. 270; 12 N. Y. Supp. 207.

<sup>3</sup> Loughed v. Dykeman's Baptist Church, *supra*.

<sup>4</sup> *Ante*, § 5783.

<sup>5</sup> Re McGraw's Estate, 111 N. Y. 66; s. c. 19 N. E. Rep. 233; 2 L. R. A. 387; affirming s. c. 45 Hun (N. Y.), 334.

<sup>6</sup> Rotch's Wharf Co. v. Judd, 108 Mass. 224. Facts from which the *acceptance of a charter* will be *presumed*, see *ante*, §§ 60, 61; Bank of United States v. Dandridge, 12 Wheat. (U. S.) 64, 71.

tion.<sup>1</sup> Thus, a *deed* of land to a corporation, dated after its charter, but before its organization, and recorded after its organization, though before the institution of the suit, is admissible as *evidence* of title in the corporation, in an action by it for a trespass upon the land.<sup>2</sup> So, after *letters-patent*, — another expression for a charter, — have been issued by the Governor, as required by the law of Pennsylvania, to a corporation, a deed of conveyance to the company will vest the estate in it, although the corporation has not been organized by the election of its officers. The assent of the corporation to the grant will be presumed.<sup>3</sup> So, where a purchase is made by several persons representing a *voluntary association* of Christians, for the common benefit of all the persons composing the association, and the purchase-money is paid, and possession of the land given, equity raises a promise by the vendor to make a title, either to the persons making the payment, or to the corporation, if one be created. In such case, the vendor, as to the title, becomes a trustee for the purchasers; and, they being the mere agents of the voluntary association, the moment the association is incorporated it has a right to a conveyance from the vendor.<sup>4</sup>

§ 5803. **Conveyances to Non-existent and de Facto Corporations.** — As already seen,<sup>5</sup> there must be *two parties to every contract*, and to every deed of conveyance, a grantor and a grantee. A deed to a person having no existence is generally inoperative, and passes no present title from the grantor.<sup>6</sup> If a man grant his estate to an imaginary person, which exists only in his own mind, no title passes. But the mere fact that a corporation has been *irregularly organized* will not render invalid the title to land which has been derived from it in

<sup>1</sup> *Ante*, § 480, *et seq.*

<sup>2</sup> *Rotch's Wharf Co. v. Judd*, 108 Mass. 224.

<sup>5</sup> *Ante*, § 5114.

<sup>3</sup> *Rathbone v. Tioga Nav. Co.*, 2 Watts & S. (Pa.) 74.

<sup>4</sup> *African M. E. Church v. Conover*, 17 N. J. Eq. 157.

<sup>6</sup> *African Methodist Episcopal Church v. Conover*, 27 N. J. Eq. 157; *Russell v. Topping*, 5 McLean (U. S.), 202; *Harriman v. Southam*, 16 Ind. 190.

good faith.<sup>1</sup> In applying this principle it will often be difficult to distinguish between a *non-existent*, or *imaginary*, and a *de facto corporation*;<sup>2</sup> but the distinction is said to be that if there is a law authorizing the organization of the supposed corporation, then, whether it has been properly organized is a *question of fact*, and a party contracting with it is *estopped* from disputing the fact that it has been properly organized. But where there is *no law* authorizing it to be organized, or if the statute organizing it is unconstitutional and void, then a contract with it will not estop the party making it from disputing its existence.<sup>3</sup> If, therefore, the owner of land conveys the same to a *de facto* railroad corporation in settlement of his subscription to its capital stock, and it conveys it for value to an innocent purchaser, the original grantor cannot maintain ejectment for the land, against such innocent purchaser, by setting up that the corporation was in fact non-existent.<sup>4</sup> Nor can he maintain a bill in equity to set aside such conveyance and have the title revested in him.<sup>5</sup>

§ 5804. **Rescission of Conveyances to Corporations not Empowered to Take.**—An attempt to *rescind* a conveyance or an agreement to convey land to a corporation, on the ground that it has no capacity to take and hold land, or on the ground that it is non-existent as a corporation, will generally be met by the principle of *estoppel*, whichever party seeks the rescission. Thus, if the corporation is the vendor, the

<sup>1</sup> *Brown v. Philipps*, 16 Iowa, 210; *Snyder v. Stuebaker*, 19 Ind. 462; *s. c.* 81 Am. Dec. 415.

<sup>2</sup> *Ante*, § 495, *et seq.*

<sup>3</sup> *Snyder v. Stuebaker*, 19 Ind. 462; *s. c.* 81 Am. Dec. 415; overruling *Harriman v. Southam*, 16 Ind. 190, and *Evansville &c. R. Co. v. Evansville*, 15 Ind. 395.

<sup>4</sup> *Snyder v. Stuebaker*, 19 Ind. 462; *s. c.* 81 Am. Dec. 415.

<sup>5</sup> *Brown v. Philipps*, 16 Iowa, 210. This case was that certain lands were conveyed to a railroad corporation,

created by a special act passed by the Legislature of *Indiana* before the present constitution of that State, under which such corporation cannot be created by a special act, went into effect, but the act of incorporation was not accepted, and no organization was made under the charter, until after such constitution was adopted. The corporation afterwards conveyed the lands to the third parties. It was held that a bill in equity would not lie to set aside such conveyances to the corporation.

vendee cannot set up its want of capacity to take and hold land as a defense to an action to recover the purchase price; because, on a principle already seen,<sup>1</sup> the question of the capacity of the corporation is merely a question between it and the State.<sup>2</sup> But there are cases proceeding in seeming violation of this principle. Thus, where a man had given a bond to convey certain salt marsh lands to a turnpike company, not needed by it in constructing or operating its road, his grantee of the same lands was allowed to maintain a suit to cancel the bond as a cloud upon his title, although his deed mentioned the bond, and the conveyance was made to him subject to it.<sup>3</sup> So, where a corporation advanced money on a purchase of real estate at a sale on execution, and then, perceiving that by its charter it could not hold land, relinquished the purchase to a third person, who agreed to take the bid and repay the money, it was held that the corporation could recover from such person the amount advanced.<sup>4</sup>

§ 5805. **Rescission on the Ground of Misuser.**— So, it is no ground for the rescission of a contract for the sale of land to a corporation, upon a bill in equity by the vendor, that the corporation has *used the land* for different purposes from what it was authorized to use real estate for by its charter,<sup>5</sup>— this misuser being likewise a question with which the State alone is concerned. So, where a corporation brings a suit in equity for the purpose of restraining one who has conveyed land to it from violating the contract, he will not be heard to set up the defense that the purchase was *ultra vires*,— as where the land had been conveyed to a *railroad company* for the purpose of being used as an *excursion ground*.<sup>6</sup> When, therefore, land was conveyed to a corporation with the declared purpose of

<sup>1</sup> *Ante*, § 5795.

<sup>2</sup> *Missouri Valley Land Co. v. Bushnell*, 11 Neb. 192. But see *Russell v. Topping*, 5 McLean (U. S.), 194.

<sup>3</sup> *Coleman v. San Rafael &c. Turnp. Co.*, 49 Cal. 517.

<sup>4</sup> *Crutcher v. Nashville Bridge Co.*, 8 Humph. (Tenn.) 403.

<sup>5</sup> *Barrow v. Nashville &c. Turnp. Co.*, 9 Humph. (Tenn.) 304; *Hamilton v. Annapolis R. Co.*, 1 Md. Ch. Dec. 107.

<sup>6</sup> *Shelby v. Chicago &c. R. Co.*, 143 Ill. 385; *s. c.* 32 N. E. Rep. 438; affirming *s. c.* 42 Ill. App. 339. But compare *ante*, § 5800.

establishing a *gate* and *toll-house* thereon, and the vendor sold it for that purpose alone, and the corporation afterwards abandoned that purpose and rented the land to a *blacksmith*, — in the absence of any condition in the deed restricting the purpose for which the grantee might use the land, it was held that a court of chancery would not *rescind* the conveyance.<sup>1</sup>

§ 5806. **Rescission on Ground that Grantee Corporation is Non-existent.** — So, one who has conveyed land to a corporation will not, especially after the corporation has conveyed it to a second purchaser for value, be allowed to recover possession of the land on the ground that the corporation was *non-existent*, provided it was a *corporation de facto*, that is, such a corporation as *might* have been properly organized under some existing law.<sup>2</sup> Nor, in such a case, can the vendor maintain a suit in equity to cancel the conveyance and revest the title in himself, there being no equity in such a bill.<sup>3</sup> The estoppel works against the corporation, as well as for it. It will not, for example, be permitted to repudiate a purchase, as not falling within the scope of its charter, where the mass of the property so purchased does fall within the general scope of the charter, and the only objection is that *some articles* apparently unnecessary are included.<sup>4</sup>

§ 5807. **Statutory Limitations upon the Amount of Land Which may be Held.** — Where there is a limitation in the charter or other governing statute of the corporation as to the amount of land which it may hold, and land is conveyed or devised to it in excess of that limit, will the conveyance be void, or will the question be one which the State alone can raise? This question, as we have already seen when dealing with the subject of *devises*,<sup>5</sup> has been answered in two ways. In respect of land acquired by a corporation other than by devise, the books seem to answer it in but one way, by hold-

<sup>1</sup> Barrow v. Nashville &c. Turnp. Co., 9 Humph. (Tenn.) 304.

<sup>2</sup> Snyder v. Studebaker, 19 Ind. 462; s. c. 81 Am. Dec. 415.

<sup>3</sup> Brown v. Phillipps, 16 Iowa, 210.

<sup>4</sup> Moss v. Averell, 10 N. Y. 449.

<sup>5</sup> Ante, § 5782, et seq.

ing that the right of the corporation to hold lands in excess of the statutory limit can be questioned by no one except the State.<sup>1</sup> A *trespasser* will not be allowed for this reason to trespass upon any portion of such land.<sup>2</sup>

§ 5808. **Taking in the Name of Another as Trustee.**— Let us suppose now that there is an *entire want of power* in a corporation to acquire and hold real estate in a particular instance, or a *statutory prohibition* against it, — can the corporation acquire such power, or evade the statute, by taking and holding the title in the name of a *trustee* to its use? By a disgraceful line of decisions, the English courts allowed the *statutes of wills* to be evaded in this way.<sup>3</sup> This was accomplished by resorting to a device in use long before the statute of wills, whereby lands were *conveyed to feoffees to the use of the feoffors of the will*, under which the feoffor declared by his will the uses upon which the feoffees should hold the property. The refinements which disgraced the jurisprudence of those days drew a distinction between the property itself and the use or trust of the property, making the latter a distinct interest from the land and collateral to it, and holding that the statute of wills extended no further than to disable the

<sup>1</sup> *Hamsher v. Hamsher*, 132 Ill. 273; s. c. 23 N. E. Rep. 1123.

<sup>2</sup> *Whitman Gold Mining Co. v. Barker*, 3 Nev. 386. Statutes are being continually enacted, changing and generally enlarging the power of corporations to hold land. Thus, a statute of Pennsylvania enacts that "any literary, religious, charitable, or beneficial society, congregation, or corporation, having capacity to take and hold real and personal estate within this Commonwealth, may acquire and hold the same to the extent in the aggregate of the clear yearly value of \$30,000, and to no greater extent, without an express legislative sanction." Pa. Laws 1889, No. 40, p. 42. So a New York statute enacts that

"any religious, educational, literary, scientific, benevolent, or charitable corporation, or corporation organized for hospital, infirmary, or other than business purposes, may take and hold property not exceeding in value \$2,000,000 or the yearly income derived from which shall not exceed \$100,000, notwithstanding the provisions of any special or general act heretofore passed, or certificate of incorporation affecting such corporations." Gen. Stats. N. Y. 1889, ch. 191, p. 57.

<sup>3</sup> See, in confirmation of this statement, the opinion of Chancellor Jones, in *McCartee v. Orphan Asylum Soc.*, 9 Cow. (N. Y.) 437, as condensed in 18 Am. Dec. 518.



testator from conveying the land directly to the corporation, but did not disable him from conveying it to a feoffee or trustee upon a trust for the corporation, — thus defeating the statute and enabling the corporation to hold by a trustee in direct violation of its policy and purposes.<sup>1</sup> In our day courts pay more deference to acts of the legislature; and what the legislature has prohibited from being done directly, the courts will not allow to be accomplished indirectly. If the legislature has limited the amount of land which a corporation may hold, or the purposes for which it may hold it, the courts will not allow the statute to be evaded by the corporation resorting to the simple device of thrusting a trustee between itself and the law.<sup>2</sup> Thus, where the power of a railroad company was limited by its governing statute to acquiring and holding land for its right of way, depot buildings, etc., it was held that it could not sue to recover lands conveyed to a third person, in trust for it, to be used for purposes not authorized by its act of incorporation.<sup>3</sup> So, where an act of Congress<sup>4</sup> limited the amount of real estate which could be held by any religious corporation in a *Territory* of the United States, and forfeited to the use of the United States real estate held contrary thereto (which was a valid exercise of congressional power), it was held that the prohibition could not be evaded by putting the property of a corporation into the hands of trustees.<sup>5</sup>

§ 5809. **Power of Educational Corporations to Hold.** — The English statutes of *mortmain* not being in force in this

<sup>1</sup> See Co. Litt. 272; Clere's Case, 6 Coke Rep. 18; 1 Saund. Uses, 72.

<sup>2</sup> Coleman v. San Rafael Turnp. Co., 49 Cal. 517; Cox v. Gould, 4 Blatchf. (U. S.) 341.

<sup>3</sup> Case v. Kelly, 133 U. S. 21.

<sup>4</sup> Rev. Stat. U. S., § 1890.

<sup>5</sup> Church of Jesus Christ v. United States, 136 U. S. 1. That a purchase of real property by a syndicate of the stockholders of a corporation, for the purpose of paying off its indebtedness

by profits to arise from the sale, is not such a violation of 2 Utah Comp. Laws 1888, p. 4, § 6, prohibiting corporations from entering into the buying and selling of real estate as a business, as to forfeit its property and enable one of such stockholders in whom the title was placed as trustee to appropriate the property to his own use, — was held in Fisk v. Patton, 7 Utah 399; s. c. 27 Pac. Rep. 1.

country, except as already stated,<sup>1</sup> it follows that, in the absence of other statutory restraint, a corporation aggregate, created for educational purposes, may take and hold land in trust for those purposes.<sup>2</sup>

§ 5810. **Power of Religious Corporations to Hold.**—The English statutes of *mortmain* not being in force in this country except as already seen,<sup>3</sup> it follows that, unless otherwise restrained, a corporation formed for *religious purposes* may take and hold land as a *trustee for pious uses*.<sup>4</sup> The only limitation not statutory is found in the general principle already

<sup>1</sup> *Ante*, § 5771.

<sup>2</sup> *Phillips Academy v. King*, 12 Mass. 546. Thus, the regents of the University of Michigan have power to take, hold, and convey real estate, for any purpose clearly tending to promote the interests of the university, or in any way to further the public objects for which the corporation was created. *Regents &c. v. Detroit &c. Soc.*, 12 Mich. 138. But the title to lands reserved by Congress "for the use and support of a State university" is, in so far as those lands lie within the State of Minnesota, *in the State*, and not in the regents of the State university. Moreover all the property, real or personal, acquired by the regents, with the fund placed at their disposal, belongs to the State; the corporation being a mere trustee or agent, with specified and limited powers, to be used in a particular manner, for a certain end. *Regents &c. v. Hart*, 7 Minn. 61. Power of *Nashville University* to enter land under a statute, authorizing entries by "any person or persons": *State v. Nashville University*, 4 Humph. (Tenn.) 157. Power of *Corvallis College* to take title to a farm paid for by subscription, stated to be for the purpose of purchasing an agricultural

farm for it, and to convey the same to the regents of the State Agricultural College, which is a corporation and capable of taking and holding title to the same, upon the college discontinuing the teaching of agriculture: *Liggett v. Ladd*, 23 Or. 26; *s. c.* 31 Pac. Rep. 81. Statutory limitations upon the value of real and personal property which may be held by *Cornell University*, and effect of a devise to the university in excess of such value, and mode of ascertaining such value: *Re McGraw's Estate*, 111 N. Y. 66; *s. c.* 19 N. E. Rep. 233; 2 L. R. A. 387; followed in *Cornell University v. Fiske*, 136 U. S. 152. Construction of the act of Congress of 1862, granting to each of the States public lands with certain conditions to which the State or States were required to assent, one of which was that all moneys derived from the sale of the lands or land scrip should be invested by the State in certain stocks, the capital to constitute a perpetual fund, and the interest to be appropriated to the endowment and maintenance of at least one college, etc. *Ibid*.

<sup>3</sup> *Ante*, § 5771.

<sup>4</sup> *Phillips Academy v. King*, 12 Mass. 546.

adverted to,<sup>1</sup> that a corporation cannot be seised of land in trust for purposes foreign to its institution.<sup>2</sup>

§ 5811. **Power of Turnpike and Plank-road Companies to Hold.**—Where a *turnpike company* is authorized, under its governing statute, to hold such real estate as its purposes may require, it cannot acquire title to a tract of salt marsh swamp land lying adjacent to its road, not necessary for its right of way, or for maintaining and operating its road; and it has been held that a bond to convey such property to such a corporation is void; and that a grantee of the obligor in such a bond may maintain an action to cancel the bond as a cloud upon his title, although his deed was made and accepted subject to the bond.<sup>3</sup> A *plank-road company*, which is organized and has acquired a *right of way* under the general statutes of New York respecting such companies, has a mere *easement* in the land over which it has procured the right of way. The *fee* remains in the former owners of the land.<sup>4</sup> The rule being that a corporation authorized to take and hold land for the purposes of its creation, may take a grant of land *in fee*,<sup>5</sup> it follows that a turnpike corporation takes such a title *by deed* as will enable it to convey the *fee-simple* prior to its *dissolution*.<sup>6</sup> Nor does it take it with any implied condition of *reverter* in case it ceases to use it for the purpose of maintaining and operating its road.<sup>7</sup> But the rule is different where it acquires a right of way *by condemnation*.<sup>8</sup>

§ 5812. **Power of Canal Companies to Hold.**—The foregoing principles do not restrain a *canal company* from purchasing and

<sup>1</sup> *Ante*, § 5772.

<sup>2</sup> *Jackson v. Hartwell*, 8 Johns. (N. Y.) 422.

<sup>3</sup> *Coleman v. San Rafael &c. Turnp. Co.*, 49 Cal. 517. This case was badly decided on principle, because the principle of estoppel, binding both the obligor in the bond and his *privies*, would prevent him from rescinding the contract (*post*, § 6015),—would leave the question of the power

of the turnpike company to acquire the land to be determined *between it and the State*. *Post*, § 6033.

<sup>4</sup> *People v. Lawrence*, 54 Barb. (N. Y.) 589; *ante*, § 5791.

<sup>5</sup> *Ante*, § 5791.

<sup>6</sup> *People v. Mauran*, 5 Denio (N. Y.), 389, 401.

<sup>7</sup> *Heath v. Barmore*, 50 N. Y. 302.

<sup>8</sup> *Ante*, § 5627.

holding land not intended as a mere passage for its canal, but allows a *reasonable discretion* to it in respect of what lands it may purchase and hold. When, therefore, the canal passed through the dwelling-house of a land-owner, destroying the same, the canal company might acquire its right of way by purchasing from the land-owner an *excess* of land over what was necessary "for the mere thread of its canal."<sup>1</sup>

§ 5813. **Titles of British Eleemosynary Corporations not Affected by the Revolution.**—The sixth article of the treaty of 1783 between Great Britain and the United States protected the title to lands in the United States, of proprietors, whose titles otherwise might have been liable to forfeiture by *escheat*, by reason of their *alienage*, or to confiscation *jure belli*, not only in respect of natural persons,<sup>2</sup> but also in respect of corporations.<sup>3</sup> A treaty made between the United States and a foreign country being, under the constitution, "the supreme law of the land," it followed that a State law granting the lands of such a British corporation to the respective towns in which the lands lie, was void, and no title could be acquired under it.<sup>4</sup> Incidentally, the court adjudged that the capacity of private individuals (British subjects), or of corporations, created by the Crown, in this country or in Great Britain, to hold lands or other property in this country, was not affected by the Revolution; and that, while the courts in this country will interfere to prevent an abuse of the *trusts* confided to British corporations, holding lands here to charitable uses, and will aid in enforcing the due execution of the trusts,—yet neither those courts, nor the legislatures of the

<sup>1</sup> *Spear v. Crawford*, 14 Wend. (N. Y.) 20; *s. c.* 28 Am. Dec. 513.

<sup>2</sup> *Orr v. Hodgson*, 4 Wheat. (U. S.) 453.

<sup>3</sup> *Society for the Propagation of the Gospel v. New Haven*, 8 Wheat. (U. S.) 464, 489. The language of the article "that there shall be no future confiscations made, nor any prosecutions commenced, against any

person or persons, for, or by reason of, the part which he or they may have taken in the present war,"—was held large enough to include corporations, and the language, being free from ambiguity, left no room for construction. *Ibid.*

<sup>4</sup> *Society for the Propagation of the Gospel v. New Haven*, 8 Wheat. (U. S.) 464.

## 5 Thomp. Corp. § 5815.] POWERS AND ULTRA VIRES.

States within which the lands lie, can adjudge a forfeiture of the franchises of a foreign corporation or of its property.<sup>1</sup>

§ 5814. **Banking Companies.**—The principles stated in this chapter are liberally applied in favor of banking corporations, so as to enable them to take mortgages of land as security for their loans, to enforce the foreclosure of such mortgages, and, if necessary to protect their rights, to become the purchasers at the foreclosure sale. *Presumptions* are indulged in favor of the title of a bank to lands fairly acquired, where it has power to acquire land in “satisfaction of its debts.”<sup>2</sup> The principle, already considered,<sup>3</sup> which precludes a corporation, incapable of taking title to land by direct conveyance or devise to it, from taking and holding such title by means of a *trustee*, does not extend so far as to prevent a banking corporation from having a mortgage made to its *officers* in their own names, upon their promise to enforce the security for the benefit of the bank;<sup>4</sup> and it has been held that a purchase of lands by a *bank cashier*, for the benefit of his bank, is not necessarily invalid because the bank, by its charter, is disabled from purchasing lands.<sup>5</sup> And, in general, the right of such a corporation so to acquire and hold land is one against which the *sovereign* alone can object.<sup>6</sup>

§ 5815. **Conveyances to Corporations upon Conditions Subsequent.**—Conveyances of land are frequently made to corporations upon certain trusts, or to be used for certain purposes, the grantor reserving, as a security for the performance of the trusts, or for the undertaking of the corporation to use the land for the purposes named, the right to *re-enter*,

<sup>1</sup> Society for the Propagation of the Gospel v. New Haven, 8 Wheat.(U.S.) 464.

<sup>2</sup> Chautauque Co. Bank v. Risley, 119 N. Y. 369; s. c. 75 Am. Dec. 347.

<sup>3</sup> *Ante*, § 5808.

<sup>4</sup> Apperson v. Exchange Bank (Ky.), 10 Ky. L. Rep. 943; s. c. 10 S. W. Rep. 801.

<sup>5</sup> White v. Lester, 4 Abb. App. Dec. (N. Y.) 585.

<sup>6</sup> National Bank v. Matthews, 98 U. S. 621, 628; Banks v. Poitiaux, 3 Rand. (Va.) 136; s. c. 15 Am. Dec. 706. Compare Gold Mining Co. v. National Bank, 96 U. S. 640.

by himself or by his heirs. Where a deed conveys land upon condition that it shall be used in a certain way, or for certain purposes, in default of which the estate conveyed shall *revert* to the grantor or his heirs, the condition is called, in legal phraseology, a *condition subsequent*. The distinction between a *condition precedent* and a *condition subsequent* is that a condition precedent is one which must be performed before the estate passes and vests in the grantee at all; whereas a condition subsequent is one which, if not performed, the estate will revert to the grantor, or his heirs.<sup>1</sup> Courts do not favor conditions which result in the *forfeiture* of an estate, and courts of equity frequently relieve against forfeitures produced by such conditions; and a tendency is hence discovered to hold that clauses in deeds imposing the performance of future acts upon the grantee as a part of the consideration of the grant, are not conditions at all, but collateral obligations.<sup>2</sup> Where the language of the deed makes the intention of the parties plain and clear, the courts have no other office to perform than to give effect to that intention.<sup>3</sup> It ought to be added that, where the condition subsequent is the payment of money or the performance of some act in favor of the grantor, involving a benefit which accrues to his estate upon his death, the fact that the obligation is embodied in the form of a condition subsequent in the deed, does not exclude the remedy of the personal representative of the deceased grantor, by *action*,

<sup>1</sup> In *St. Louis v. Wiggins Ferry Co.*, 15 Mo. App. 227, 234, Lewis, P. J., states the distinction thus: "We must here discriminate between conditions precedent and undertakings which may constitute an executed consideration. Without a performance of the first, no title passes. Failure to perform the second may subject the delinquent to an action, but will have no effect upon the title already passed." But this is not accurate; because the failure to perform a condition subsequent may have the effect *either* of subjecting the grantee to an

action, or of forfeiting his title; or in some cases it may have either effect, as stated in *Weinreich v. Weinreich*, 18 Mo. App. 364.

<sup>2</sup> *Platt v. Platt*, 42 Conn. 330, 347; *Risley v. McNiece*, 71 Ind. 434; *Martin v. Martin*, 131 Mass. 547. See also *Jones v. Railroad Co.*, 14 W. Va. 514; *Parker v. Parker*, 123 Mass. 584; *Stilwell v. St. Louis &c. R. Co.*, 39 Mo. App. 221; *Morrill v. Railroad Co.*, 96 Mo. 174; *Laberee v. Carleton*, 53 Me. 211.

<sup>3</sup> *Weinreich v. Weinreich*, 18 Mo. App. 364, 370.

in those States where the law of procedure is such that a right of action accrues to a third party upon a contract made not with him, but with a third party, for his benefit.<sup>1</sup>

§ 5816. **Illustrations of Conveyances upon Conditions Subsequent.**—Perhaps the simplest illustration of a conveyance made upon a condition subsequent, which could be given, would be that of a deed conveying land upon the express condition that the grantee shall, within a specified time, *build a house* of a certain description thereon, under penalty of a forfeiture of the estate conveyed.<sup>2</sup> A deed to a grantee, in trust for a *railroad company*, upon the condition that if the railroad company “shall not construct said railroad through said tract, or if, when constructed, they shall not establish a freight or passenger station upon said tract, then the conveyance shall be null and void, but otherwise to remain in full force and effect,”—is likewise a conveyance upon a condition subsequent. Where a land-owner granted land to a railroad company for its right of way, in consideration of \$50, and for the further consideration that the railroad company should erect and maintain a crossing for wagons under the railroad where it passed through the farm,—it was held that the language of the deed, although using the words “on condition,” did not create a conditional estate, but that the deed was to be construed as *reserving an easement* to the grantor; so that where the railroad property passed, under a sale foreclosing a mortgage, to another railroad company, the latter was liable in an action for *damages* for obstructing the easement; and this right of

<sup>1</sup> Weinreich v. Weinreich, *supra*. In Missouri and many other States, the rule is that a party for whose benefit a stipulation in a *simple contract* is made, may maintain an action upon such stipulation in his own name. Bank v. Benoist, 10 Mo. 519; Robbins v. Ayres, 10 Mo. 538; s. c. 47 Am. Dec. 125; Meyer v. Lowell, 44 Mo. 328; Flanagan v. Hutchinson, 47 Mo. 237. This rule has been extended to *covenants in deeds made for the benefit of third persons*, and the old rule that no one but a covenantee can sue on such a covenant has been repudiated. Rogers v. Goswell, 51 Mo. 466. More

recently, the doctrine has been laid down that where a grantee accepts a *deed poll* containing a statement that the land conveyed is *subject to a mortgage, which the grantee assumes and agrees to pay*, a promise by the grantee for the benefit of the mortgagor is implied therefrom, and the grantee thereby becomes personally liable to the mortgagee for the mortgage debt. Hein v. Vogel, 69 Mo. 529; Fitzgerald v. Barker, 70 Mo. 685; Klein v. Isaacs, 8 Mo. App. 568.

<sup>2</sup> O'Brien v. Wagner, 94 Mo. 93; s. c. 4 Am. St. Rep. 362.

easement was held to pass to and accrue to the benefit and enjoyment of the dominant estate, as an easement running with the land and appertaining to it, though not mentioned in the conveyance to such purchaser; so that this right of action for destroying the easement vested in each subsequent predecessor of the land from the original grantor of the precedent railroad company.<sup>1</sup> Where a land-owner made a deed to a railroad company, granting land to be used for its right of way, reciting that the grant was made to the grantee, its successors and assigns, in consideration of the benefits and advantages arising from the location, construction, and operation of the railroad, and of the sum of one dollar, and that "this agreement is made for the location, construction, and maintenance of said railroad, and for that use and purpose only, and this license to operate in perpetuity, if said railroad company, its successors and assigns, shall continue to maintain and operate their railroad, and to cease with the *non-use* of the same for such purpose,"—it was held that, on the principle that such conditions are to be construed most favorably to the grantee so as to preserve his estate, this condition would not be held to mean that the road should be built over the entire charter route of the grantee, and that the failure so to build it would not work a forfeiture of its right of way thus granted.<sup>2</sup> The same principle of construction controlled the decision of a case where a deed of land "for church purposes" contained a condition that, if the seats of any church thereon should be rented or sold, the land should revert to the grantor, or his heirs. Thereafter the land, with the church erected thereon, was sold by *judicial proceedings* to pay debts of the church. It was held that this was not a breach of the condition.<sup>3</sup>

<sup>1</sup> *Stilwell v. St. Louis &c. R. Co.*, 39 Mo. App. 221, Rombauer, P. J., dissenting.

<sup>2</sup> *Morrill v. Wabash &c. R. Co.*, 96 Mo. 174.

<sup>3</sup> *Woodworth v. Payne*, 74 N. Y. 196; s. c. 30 Am. Rep. 298. It has been held that where *legacies* to a religious corporation consist of annual payments to be made to the trustees so long as the church shall *bear testimony against slavery and intemperance*, when such public testimony ceases the right to the legacy ceases, and the

principal of the legacies and the unexpended interest received should be divided *pro rata* among the residuary legatees. In the particular case the date at which the public testimony against slavery and intemperance ceased was fixed by a *referee*, and the court saw no occasion to disturb his finding. *Re Orthodox &c. Church*, 6 Abb. N. Cas. (N. Y.) 398. Where certain lands conveyed to the corporation for so long as they should be used for educational purposes, were sold, and other lands were purchased and



§ 5817. **Forfeiture of the Estate for Non-performance of Conditions Subsequent.**—The non-performance of a condition subsequent does not, *of itself*, divest the title of the grantee and re-invest it in the grantor, but *affirmative action* on the part of the grantor is required. He must *enter*, or do some act equivalent to an entry, until which he will be deemed to have *waived* performance of the condition on the part of the grantee.<sup>1</sup> But if the grantor is himself in possession of the premises when the breach of the condition arises, this rule does not apply, but the estate is deemed to re-vest in him at once without any formal act on his part; and he will be *presumed*, after the breach, to hold it for the purpose of enforcing his right of forfeiture.<sup>2</sup> This *presumption* is, however, *one of fact*, and may be overcome by evidence, and this evidence may consist of the acts, declarations, and the like, of the party in possession.<sup>3</sup>

§ 5818. **Courts will not Aid a Diversion of Such a Trust.** Another principle is that where land is conveyed to a corporation upon such a condition or upon such a trust, a court of *chancery*, in its superintendence of the trust, will not permit the land to be diverted from the purposes expressed in the grant, provided it is possible for those purposes to be carried out. Upon this principle, where lands had been granted to a religious society to be used as a *burial-place*, and a court having chancery powers was petitioned for an order of sale of the lands, on the ground that they had become unsuitable for burial purposes, and that it was necessary and would be for the interest and advantage of all the parties interested therein to have them sold,—the court ruled that the relief

conveyed to the corporation absolutely, it was held that these were not subject to the former restrictions. *Moss v. Harpeth Academy*, 7 Heisk. (Tenn.) 283.

<sup>1</sup> *Ellis v. Kyger*, 90 Mo. 600; *O'Brien v. Wagner*, 94 Mo. 93; *s. c.* 4 Am. St. Rep. 362; *Missouri Hist. Soc. v. Academy of Science*, 94 Mo. 459;

*Jones v. Railroad Co.*, 79 Mo. 92; *Iron Co. v. Erie*, 41 Pa. St. 341; *Towne v. Bowers*, 81 Mo. 491; *Warner v. Bennett*, 31 Conn. 468; *Chalker v. Chalker*, 1 Conn. 76; *s. c.* 6 Am. Dec. 209.

<sup>2</sup> *O'Brien v. Wagner*, 94 Mo. 93; *s. c.* 4 Am. St. Rep. 362.

<sup>3</sup> *Ibid.*

should not be granted, and said: "By the express terms of the deed, it was the intention of the parties to it, to dedicate the lot conveyed to the uses therein specially declared; and neither they, their heirs, the *cestuis que trust*, nor the lot-holders, have any right to divert it from those uses. The fact that a valuable consideration was paid for the grant can make no difference. The estate, conveyed and granted in express and exclusive terms, cannot be enlarged by the amount of the consideration paid. Where uses are declared, they are to be held as correspondent to the consideration."<sup>1</sup> So, if a religious society has sold land granted for a burial-place, and its grantee makes a contract of re-sale, and its vendee refuses to comply with the contract on the ground that the *title is not marketable*, a court of equity will not compel the *specific performance* of the contract, — for the reason that the heirs of the original grantor have a right of re-entry.<sup>2</sup>

§ 5819. **Donation of Land to a Corporation with a Condition against Alienation.**—An unlimited power of alienation is an inseparable incident of an estate in fee-simple, and cannot be restrained by any provision or condition whatever.<sup>3</sup> A condition repugnant to the nature of the estate to which it is annexed, as that a tenant in fee shall not alien, is void in its creation.<sup>4</sup> Applying this principle, and citing these authorities, it has been held that where property is conveyed to a *religious corporation* for a *price*, a condition inserted in the deed that the corporation should not have power to alienate it, is *void*.<sup>5</sup>

§ 5820. **Burial Certificates Issued by Religious Corporations.**—Certificates of lots in a cemetery issued by a religious corporation have been held to *convey no title* to the land, when *not acknowledged* in compliance with a statute which provides

<sup>1</sup> Reed v. Stouffer, 56 Md. 236, 253. Dig., tit. 32, ch. 23, §§ 1, 2; Co. Litt.

<sup>2</sup> Second Universalist Soc. v. Dugan, 65 Md. 460; s. c. 5 Atl. Rep. 415. 206 c, 223 a; Litt. 360.

<sup>3</sup> Cruise Dig., tit. 1, § 53; 4 Cruise 32. <sup>4</sup> 2 Cruise Dig., tit. 13, ch. 1, §§ 19,

<sup>5</sup> Magie v. German Evangelical Dutch Church, 13 N. J. Eq. 77.

that no estate in land of above seven years duration can pass, unless the deed conveying the same is acknowledged in a manner prescribed by law. The only effect, as well as the object of such burial certificates, is to grant the privilege of interment so long as the ground continues to be used for the purposes of burial. They do not operate to restrain the corporation from *removing the bodies* and discontinuing the use of the land as a cemetery, and selling and conveying it, if otherwise empowered so to do.<sup>1</sup>

§ 5821. **Construction of Enabling Statutes.**—It is a sound rule that a corporation having the power to *construct* a certain road,<sup>2</sup> or certain *works* for the purposes of its business,<sup>3</sup>—may *purchase* a road already built, or works already constructed. Statutes authorizing corporations to acquire property have sometimes been held in subordination to the provisions of general laws; and hence a statute authorizing a corporation to *take by purchase* was construed as not abrogating in its favor the general *statute of wills* prohibiting such corporations to *take by devise*.<sup>4</sup> But if the word “purchase” had been large enough to include “devise,” the rule would have been different, upon the principle of statutory interpretation that *generalia specialibus non derogant*.<sup>5</sup> Where the charter of a *lumber company* authorized it to purchase *timber lands* or any other lands, that might be necessary and convenient for the purpose of transacting its business,—it was held that the fact that a *part* of a tract of land purchased by it was cleared and used for *farming* purposes did not show that its purchase was *ultra vires*.<sup>6</sup> A corporation authorized to hold a given amount of real and personal property “in fee-simple or otherwise,” to

<sup>1</sup> Catholic Cathedral Church v. Manning, 72 Md. 116, 118.

<sup>2</sup> State v. Hannibal &c. Road Co., 37 Mo. App. 496; *ante*, § 5879.

<sup>3</sup> Gamble v. Queens County Water Co., 123 N. Y. 91; s. c. 25 N. E. Rep. 201; reversing s. c. 5 N. Y. St. Rep. 124.

<sup>4</sup> McCartee v. Orphan Asylum Soc.,

9 Cow. (N. Y.) 437; s. c. 18 Am. Dec. 516.

<sup>5</sup> *Ante*, § 5679. That it does include “devise,” when used according to the terminology of the *common law*, see *ante*, § 5786.

<sup>6</sup> Kentucky Lumber Co. v. Green, 87 Ky. 257; s. c. 8 S. W. Rep. 439.

employ its annual income, among other purposes, "to promote inventions and improvements in the mechanic arts, by granting premiums for said inventions and improvements," — may purchase land and erect a permanent building thereon, in which to hold its meetings and to give public exhibitions.<sup>1</sup> A statute vesting in a corporation "all such property as hath heretofore, or may hereafter *accrue* to the State," in a certain district, which, by another act regulating *escheats*, "hath escheated to the State," has been held to entitle it to property escheated to the State *after* the passage of the act.<sup>2</sup>

## ARTICLE II. POWER TO TAKE, HOLD, AND TRANSFER PERSONAL PROPERTY.

### SECTION

5827. Power to acquire and hold personal property.

5828. Make isolated purchase of goods.

### SECTION

5829. Bequests of personalty to foreign corporations.

§ 5827. **Power to Acquire and Hold Personal Property.** — The power ascribed to all corporations, by implication of law, of making *contracts*, and hence of becoming a *creditor*,<sup>3</sup> carries with it the power to take any customary evidence of debt.<sup>4</sup> A corporation may, therefore, without any express authority thereto in its charter or governing statute, become the *assignee of a bond*.<sup>5</sup> Therefore, in an action by a corporation on a bond, a defensive *pleading* which sets up that the power to purchase and hold the bond is not specifically granted to the plaintiff by any charter or act of incorporation, and that it does

<sup>1</sup> Richardson v. Massachusetts Charitable &c. Asso., 131 Mass. 174.

<sup>2</sup> Brown v. Chesterville Academy Soc., 3 Rich. Eq. (S. C.) 362. As to power of a corporation created for educational purposes and also for church purposes, to acquire land for collegiate purposes, and to transmit the same independently of any rights of the church, — see Liggett v. Ladd, 17 Or. 89; s. c. 21 Pac. Rep. 133. That a manufacturing corporation, under

Massachusetts law, created to manufacture gunstocks, has power to purchase a *patent* "for turning irregular forms, appropriate to be used in making gunstocks," — see Blanchard's Gunstock Turning Factory v. Warner, 1 Blatchf. (U. S.) 258.

<sup>3</sup> Ante, §§ 5642, 5645, 5697.

<sup>4</sup> Such as negotiable securities: Ante, § 5731, et seq.

<sup>5</sup> Bennington Iron Co. v. Rutherford, 18 N. J. L. 467.

not necessarily result from their proper business,—is bad on demurrer.<sup>1</sup> A corporation authorized by its charter “to receive deposits on trust,” may *receive money on deposit* and give certificates therefor; and this power is not affected by a proviso prohibiting the corporation from issuing bills, bonds, notes, or other securities to circulate in the community as money.<sup>2</sup> A *statute of wills*,<sup>3</sup> prohibiting *devises of land* to corporations, leaves them free to acquire personal property in any manner consistent with their charters or with law.<sup>4</sup>

§ 5828. **Make Isolated Purchases of Goods.**—A statute providing that “no corporation shall engage in mercantile or agricultural business, nor in commission, brokerage, stock-jobbing, exchange, or banking business of any kind,” is not construed as invalidating an isolated contract for the purchase of goods. It only refers to the buying and selling of articles of merchandise as an employment, and implies operations conducted with a view of realizing the profits which come from skillful purchase, barter, speculation, and sale.<sup>5</sup>

§ 5829. **Bequests of Personalty to Foreign Corporations.** For most purposes *other than taxation*,<sup>6</sup> and especially for the purpose of *devolution of title*, personal property is deemed to have *no situs except that of the domicile of the owner*; and therefore, as a general rule, the law of the domicile of the owner governs its transmission, either by last will and testament, or by succession in case of intestacy.<sup>7</sup> If, therefore, a will has all the forms and requisites to pass title to personalty, according to the law of the domicile of the testator, the validity of

<sup>1</sup> Bennington Iron Co. v. Rutherford, 18 N. J. L. 467.

<sup>2</sup> Talladega Ins. Co. v. Landers, 43 Ala. 115.

<sup>3</sup> *Ante*, § 5783.

<sup>4</sup> Sherwood v. American Bible Soc., 4 Abb. App. Dec. (N. Y.) 227.

<sup>5</sup> Graham v. Hendricks, 22 La. An. 523. An analogous rule of interpretation exists in respect of statutes prohibiting foreign corporations

from *doing or carrying on business* within the domestic State, without complying with certain prescribed conditions: *Post*, ch. 195;

<sup>6</sup> As to which, see *ante*, § 2847.

<sup>7</sup> 2 Kent's Com. 429; Moultrie v. Hunt, 23 N. Y. 394; Lawrence v. Kitteridge, 21 Conn. 577; s. c. 56 Am. Dec. 385; Chamberlain v. Chamberlain, 43 N. Y. 424, 433.

particular bequests will depend upon the law of the domicile of the legatee and of the government to which the fund is, by the terms of the will, to be transmitted for administration, and the particular purposes indicated by the testator.<sup>1</sup> Hence, if a bequest is made to a foreign corporation for charitable purposes, of personal property situated within the State of the domicile of the testator, the bequest will be valid, provided the foreign corporation, under its governing statute, is capable of taking such a bequest for such a purpose.<sup>2</sup> Nor will the courts of the State of the domicile of the testator administer the foreign charity, but they will direct the money devoted to it to be paid over to the proper recipient under the will, leaving it to the courts of the State where the charity is to be established, to provide for its due administration.<sup>3</sup> An exception to the foregoing principles exists in cases where the law of the domicile of the testator in terms forbids bequests for any particular purpose or in any particular manner; in which case a bequest of property situated within the domicile of the testator would be void everywhere.<sup>4</sup> This is in accordance with a principle applied most frequently in respect of *taxation*,<sup>5</sup> under which the positive action of the legislature of a State upon personal property within its limits, the ownership of which is in a non-resident, controls the fiction that the *situs* of such property is the residence of its owner. When, therefore, there is a statute, as in New York, which forbids any person, having a husband, wife, child, or parent, to devise or bequeath to any benevolent, charitable, literary, scientific, religious, or missionary society, association, or corporation, in trust or otherwise, *more than one-half part of his or her estate*, after the payment of his or her debts, but makes valid a devise or bequest to the extent of one-half and no more,—such a statute will be operative upon a bequest of personal property to a foreign corporation, for charitable purposes, providing the personal property is situated

<sup>1</sup> Chamberlain v. Chamberlain, 43 N. Y. 424, 433, per Allen, J.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ante*, § 2849.

within the limits of the State.<sup>1</sup> Nor, under such a statute, can a testator give to *two* or more corporations in the aggregate more than he can give to a single recipient, namely, one-half of his estate.<sup>2</sup> It must be concluded from what has just preceded, that *statutes of wills*, such as that of New York already considered,<sup>3</sup> do not prevent *bequests of personalty* from being made to *foreign corporations*; for although such corporations have no legal existence out of the State of their creation, yet their existence is so far recognized in other States that their non-residence creates no insuperable objection to receiving gifts of personalty, provided they have power to take such gifts under their own charters.<sup>4</sup> Accordingly, the provision of the Maryland Bill of Rights, already considered,<sup>5</sup> does not operate to restrain bequests of personal property for religious purposes, to corporations created under the laws of other States; and in that State bequests of *personal property* may accordingly be made to *foreign corporations* without limit.<sup>6</sup>

<sup>1</sup> Chamberlain v. Chamberlain, 43 N. Y. 424, 433.

<sup>2</sup> *Ibid.* For the purpose of ascertaining the estate under this statute, only one-half of which can be devised to a charitable or educational corporation, the *widow's dower* and the *debts* are first to be deducted. *Ibid.*

<sup>3</sup> *Ante*, § 5783.

<sup>4</sup> Sherwood v. American Bible Soc., 4 Abb. App. Dec. (N. Y.) 227.

<sup>5</sup> *Ante*, § 5774.

<sup>6</sup> Vansant v. Roberts, 3 Md. 119; Brown v. Thompkins, 49 Md. 423, 431; Church Extension v. Smith, 56 Md. 362, 389. For *devises* of land which have been held *void* under the operation of this provision, see Dashiell v. Attorney-General, 5 Har. & J. (Md.) 392; s. c. 9 Am. Dec. 572; 6 Har. & J. (Md.) 1; State v. Warren, 28 Md. 352; Orrick v. Boehm, 49 Md. 72, 105. Without going into the reasons on which the decisions proceed, — for

the question now under consideration relates rather to the law of *wills* than to the law of *corporations*, — it may be said that a bequest to a *town* in perpetuity, in trust for the *poor* of the town, not confined to those for whose support the town is under a statutory liability, is invalid *for want of an ascertained beneficiary*. Fosdick v. Hempstead, 125 N. Y. 581; s. c. 11 L. R. A. 715; 35 N. Y. St. Rep. 863; 19 Wash. L. Rep. 482; 26 N. E. Rep. 801. But a bequest to a society whose chartered purpose is to aid by public entertainments in establishing the right of all persons to entertain and express their cherished opinions, to promote just principles, disseminate scientific truth and aid human knowledge, such purposes not being confined to members of the society, but comprehending a dissemination of these principles among the masses, — is for a charitable use, and valid. Re

Knight's Estate, 48 Phila. Leg. Int. 288; *s. c.* 27 Week. Not. Cas. 265. The construction of a New York statute (N. Y. Laws 1848, ch. 319, 6), making invalid any devise or bequest to a corporation formed under such an act, made *less than two months before the death of the testator*: Kavanagh's Will, 125 N. Y. 418; *s. c.* 35 N. Y. St. Rep. 406; 26 N. E. Rep. 470. A devise to *slaves* of their *freedom* on condition of their being transported to Liberia by the American Colonization Society, and of a bequest to such society to be used for transporting such

slaves to Africa and in maintaining them there, has been held valid: *Wade v. American Colonization Soc.*, 7 Smedes & M. (Miss.) 663; *s. c.* 45 Am. Dec. 324. And so has a devise of the residue of an estate "to the North Reformed Church of Newark, in trust, that they may use the same to promote the religious interests of the said church, and to aid the missionary, educational, and benevolent enterprises to which the said church is in the habit of contributing": *De Camp v. Dobins*, 29 N. J. Eq. 36.



## CHAPTER CXXVIII.

### POWER TO DO VARIOUS ACTS.

SECTION	SECTION
5832. To appoint agents.	5841. Power to contract for the payment of a pension.
5833. Power to act as agent for another.	5842. Power to compromise disputed claims.
5834. Power to be attorney in fact.	5843. Power to create forfeitures.
5835. Power to act as trustee.	5844. Power to establish transportation lines.
5836. Power to be beneficiary in a trust.	5845. Power to make extra-territorial contracts.
5837. Power to act as executor or administrator.	5846. Liability of corporations for the acts of their dummy corporations.
5838. Power to enter into a partnership.	
5839. No power to take an oath.	
5840. Power to incur expense on account of injured employes.	

§ 5832. **To Appoint Agents.**—As a corporation can only act through agents, the power to appoint agents must be regarded as a power necessarily implied from the very fact of its creation. When, therefore, a person sues a corporation for his salary as its general agent, it is not necessary for him to prove, in order to recover, that the corporation was empowered by its charter to appoint an agent with general powers for the furtherance of the objects of the corporation.<sup>1</sup> So, a corporation has, as a mere incident of its common-law power of making contracts, the right to appoint an agent to obtain subscriptions to its capital stock, and to make an agreement with him in respect of its compensation.<sup>2</sup>

§ 5833. **Power to Act as Agent for Another.**—It is scarcely necessary to add that corporations are often endowed

<sup>1</sup> Kitchen v. Cape Girardeau &c. R. Co., 59 Mo. 514.

<sup>2</sup> Cincinnati &c. R. Co. v. Clarkson, 7 Ind. 595; ante, § 1361. Evidence supporting a finding of an

employment by the vice-president of a railroad company of agents to take care of its lands: Chicago &c. R. Co. v. James, 24 Wis. 388.

with the faculty of acting as agents for third persons,<sup>1</sup>—a common illustration of which is found in the case where a railroad company receives the goods of a shipper for carriage to the end of its own line, at which point it acts as his agent, in the character of a forwarder, by delivering them to a connecting line to continue or complete the transit. But whether they have the power to act as agents for others, and to what extent they have it, must, of course, depend upon their charters, governing statutes, articles of association, or other governing instruments. Where a corporation assumes to act as agent for undisclosed principals, and thereby to stand in a position of individual responsibility, then the question may arise whether it has power to embark its funds in such an agency and to pledge them to such a responsibility. That it has the power to raise this question, where it would have the power to raise it if acting as principal, is clear. When, therefore, a *savings bank* in Texas operated on the *cotton exchange* of New York in buying and selling cotton for a *future deal*, in behalf of undisclosed principals, and, the market having gone against it, or its principals, when sued to make good its contracts, set up the defense of *ultra vires*, it was held that it was in a position to urge that defense, as there was no principle of sound morals or public policy which would estop it from so doing; and it was none the less entitled to urge it from the fact that it may have been acting, not as principal for itself, but as agent for undisclosed principals.<sup>2</sup>

§ 5834. **Power to be Attorney in Fact.**—A corporation may execute a deed as an *attorney in fact* for another.<sup>3</sup>

§ 5835. **Power to Act as Trustee.**—The power of a corporation to act as trustee for any purpose within the scope of its charter,<sup>4</sup> or where it has itself an interest in the trust fund or

<sup>1</sup> Frostberg &c. Asso. v. Lowdermilk, 50 Md. 175.

<sup>2</sup> Jemison v. Citizens' Sav. Bank, 122 N. Y. 135; s. c. 19 Am. St. Rep. 482; 9 L. R. A. 708; 25 N. E. Rep. 264.

<sup>3</sup> Killingsworth v. Portland Trust Co., 18 Or. 351; s. c. 17 Am. St. Rep. 737; 7 L. R. A. 638; 23 Pac. Rep. 66.

<sup>4</sup> Sheldon v. Chappell, 47 Hun (N. Y.), 59; s. c. 13 N. Y. St. Rep. 35.

property,<sup>1</sup> is entirely free from doubt; though, of course, it cannot act as a trustee where it has no interest, and where the purposes of the trust are entirely foreign to its institution.<sup>2</sup> Upon this subject it has been said in a learned opinion by Sharkey, P. J.: "Before the statute of uses,<sup>3</sup> there was a limitation or restriction as to those who could stand seised to uses; but since the passage of that statute, trusts have been adopted to supply the place of uses, and the former inability to stand seised to a use no longer prevails. The general rule now is, that all persons capable of contracting, and of holding real or personal property, may hold as trustees. Corporations may now hold as trustees, although they could not be seised to a use before the statute."<sup>4</sup> The principle that a corporation cannot be a trustee for a purpose wholly foreign to the objects of its own institution is illustrated by a case where a devise had been made to a corporation which was chartered "to establish an institution in the town of Newmarket for the instruction of youth,"—and the will directed the corporation to hold the principal of the funds, and pay over the income for the support of *missionaries*.<sup>5</sup> Although a corporation, as a general rule, cannot be a trustee in a matter in which it has no interest, yet, where property is devised to a corporation partly for its own use, and partly in trust for others, the power to take the property for its own use carries with it the power to execute the trust in favor of others.<sup>6</sup> The power of a corporation to take as trustee under a devise or bequest in a will, does not, according to one view, depend upon the fact of its being incorporated so as to be capable of taking at the

<sup>1</sup> *Sheldon v. Chappell*, 47 Hun (N. Y.), 59; s. c. 13 N. Y. St. Rep. 35; *Re Howe*, 1 Paige (N. Y.), 214.

<sup>2</sup> *Trustees v. Peaslee*, 15 N. H. 317; *Re Howe*, 1 Paige (N. Y.), 214.

<sup>3</sup> 27 Henry VIII., ch. 10.

<sup>4</sup> *Commissioners v. Walker*, 6 How. (Miss.) 143; s. c. 38 Am. Dec. 433. A great array of cases might be cited, where bequests to corporations which have been made for charitable pur-

poses have been sustained. *Burbank v. Whitney*, 24 Pick. (Mass.) 146; s. c. 35 Am. Dec. 312; *Wade v. American Colonization Soc.*, 7 Smedes & M. (Miss.) 663; s. c. 45 Am. Dec. 324; *ante*, §§ 5782, 5809, 5810.

<sup>5</sup> *Trustees v. Peaslee*, 15 N. H. 317.

<sup>6</sup> *Re Howe*, 1 Paige (N. Y.), 214. See also *Sheldon v. Chappell*, 47 Hun (N. Y.), 59; s. c. 13 N. Y. St. Rep. 35.

time of the death of the testator; but where the bequest is made to an unincorporated society by name, it will be sufficient that it becomes incorporated after the death of the testator;<sup>1</sup> though some courts hold that a bequest to an *unincorporated society* is valid.<sup>2</sup>

§ 5836. **Power to be Beneficiary in a Trust.**—On the other hand, a corporation may be, and often is, the beneficiary in a trust,—of which an instance is found in the case where a corporation lends money and takes as security a note or bond secured by a deed of trust in the nature of a mortgage, which consists in the conveyance of real or personal property to a trustee, with a power of sale, upon a prescribed notice, in the case of default in the payment of principal or interest. Where a deed has been made to A. B., “treasurer of a corporation named,” and his successors in office, and expressed to be in trust for the corporation, and the special trust is particularly set forth, the corporation cannot, it has been held, maintain a *writ of entry*, because it is not the holder of the legal title. Nor, in such a case, according to the same holding, can the successor in office of the treasurer maintain the action, because he is not the corporation, and the legal title does not vest in his successors. Nor would any title vest in his heirs, they not being named as grantors; and therefore the estate would be merely in the treasurer for life, unless something in the character of the trust required its longer continuance. Even if such a deed were construed as not creating a trust, but as conveying an estate *to the use* of the corporation, which was executed by the statute of uses,—yet, according to another rule, equally technical and equally senseless, the estate granted would be an estate for the life of the grantee only, that is, for the life of the treasurer of the corporation; since the use executed in the society could be no greater than the estate granted to the treasurer, which was

<sup>1</sup> *Wade v. American Colonization Soc.*, 7 Smedes & M. (Miss.) 663; *s. c.* 45 Am. Dec. 324. (Mass.) 146; *s. c.* 35 Am. Dec. 312; *Bartlett v. Nye*, 4 Met. (Mass.) 378; *Jackson v. Hartwell*, 8 Johns. (N. Y.)

<sup>2</sup> *Burbank v. Whitney*, 21 Pick. 422.

for life only. It would be terminated with his life, and, he being dead, the corporation would have no title.<sup>1</sup> Thus, under an antiquated, technical, senseless, and unjust construction, defeating the plain purpose of the instrument, which purpose was not in itself unlawful,—a rule of construction which never ought to have been allowed to cross the Atlantic Ocean,—a beneficial title or interest, plainly intended to be vested in a corporation, was defeated, and, we suppose, reverted to the grantor or his heirs.

§ 5837. **Power to Act as Executor or Administrator.**—Blackstone, among the disabilities of a corporation, includes its inability to be an executor or administrator; “for it cannot take an oath for the due execution of the office.”<sup>2</sup> In Bacon’s Abridgment,<sup>3</sup> the same doctrine is laid down with a *semble*, and with these additional reasons: “1. Because corporations cannot be feoffees in trust for the use of others. 2. Because they are a body framed for a special purpose.” It is obvious that none of these reasons is insuperable, and that the legislature may entirely avoid them, by clothing corporations with this faculty, or by creating corporations for this purpose. The tendency of more recent juridical thought has been in favor of endowing trust companies with this capacity. In an authoritative work on executors it is said: “It now seems settled that corporations can be executors, and that, on their being so named, they may appoint persons, styled *syndics*, to receive administration with the will annexed, who are sworn like all other administrators. Such corporations as can take the oath of an executor are clearly competent,<sup>4</sup>—as, for instance, a *corporation sole*. “There is, then,” says Wales, J., “no inherent disability or disqualification, belonging to a corporation as such, which excludes it from acting as an administrator; and it may accept the office, if not prohibited by its charter, or forbidden by statute, whenever, from the ob-

<sup>1</sup> First Baptist Soc. v. Hazen, 100 Mass. 322.

<sup>2</sup> 1 Bla. Com. 477; Will. Ex. 268;  
Com. Dig. Adm., b, 2; Wentw. Ex.,  
ch. 1, p. 39.

<sup>3</sup> Tit. Executors and Administra-  
tors, 2.

<sup>4</sup> Toller Ex. 30.

jects of its corporation and the nature of its business, it may become necessary and proper, and it is able to comply with the conditions prescribed by law as to giving bond, etc.”<sup>1</sup> In fact, *trust companies* are incorporated in several States with the faculty of acting as executor or administrator of the estates of decedents.<sup>2</sup> A *foreign corporation*, authorized by the law of its creation to act as executor of the estate of a deceased person, may exercise the functions of a *foreign executor*, in like manner as it could do if it were a natural person, unless there is something in the statute law of the domestic State or country which renders the exercise of such functions inadmissible. In Delaware it has been found that there is nothing, either in

<sup>1</sup> *Fidelity Ins. &c. Deposit Co. v. Niven*, 5 Houst. (Del.) 416; *s. c.* 1 Am. St. Rep. 150, 157. In *President &c. v. Browne*, 34 Md. 450, it was said to be well settled that a corporation cannot become an executor or administrator, and that the English doctrine which allows the corporation to appoint one of their members as a *syndic* to take the oath of office is inadmissible in this country. To the same effect is *Re Thompson's Estate*, 33 Barb. (N. Y.) 334. In New Jersey this English doctrine is recognized (*Kirkpatrick's Will*, 22 N. J. Eq. 463); but whether a corporation aggregate can act as executor, when so nominated in the will, is left undecided in that State. *Porter v. Trall*, 30 N. J. Eq. 106. In the case of a *corporation sole* the difficulty raised by Blackstone, of the inability to take the oath, does not exist, and such a corporation might, even under the old theory, act as an executor. *Will. Ex.* 269, and authorities.

<sup>2</sup> 14 Del. Laws, 714. So stated in *Porter v. Trall*, 30 N. J. Eq. 106, as to a corporation in Philadelphia; in *Camden Safe Deposit &c. Co. v. Ingham*, 40 N. J. Eq. 3, as to one in New Jersey. See *Schoul. Ex.*, § 32;

1 Woern. Adm. 509. It has also been held that a *partnership firm* may be nominated as executors, and that letters testamentary will be granted to the *individual members* of the firm. *Re Fernie*, 6 Week. Not. Cas. 657, cited in 1 Woern. Adm., p. 510. That a person (and *a fortiori*, a corporation) will not be allowed to act as executor, although nominated to be such in the will, unless capable of taking the office, is shown by *Berry v. Hamilton*, 12 B. Mon. (Ky.) 191; *s. c.* 54 Am. Dec. 515. And see a learned note to this case, 54 Am. Dec. 518, *et seq.*, on the question who may act as executor or administrator. A decision of the Court of Appeals of Kentucky, not officially reported, is to the effect that a provision in the charter of a corporation, authorizing it to act as executor, administrator, etc., that the capital stock shall be taken and considered as security required by law for the faithful performance of its duties, and that other security shall not be required upon its appointment as administrator, except when required by the court or parties in interest,—is *not unconstitutional*. *Coleman v. Parrot* (Ky.), 11 Ky. L. Rep. 947; *s. c.* 13 S. W. Rep. 525.

the statute law of the State or in its public policy, which deprives a corporation created in another State, for the purpose of acting as executor or administrator, from exercising such functions in that State.<sup>1</sup>

§ 5838. **Power to Enter into a Partnership.**—Provisions are made by statutes, it may be assumed, in all the States, for the *consolidation* or *amalgamation* of corporations, providing schemes by which two or more corporations may unite or consolidate their funds into a single incorporated enterprise.<sup>2</sup> Outside of such provisions the general rule is that, although corporations may make joint contracts, by which they will be jointly or severally liable with other parties,<sup>3</sup> yet they cannot consolidate their funds with each other so as to form a *partnership*,<sup>4</sup> nor *amalgamate* themselves into a new corporation without the consent of the legislature,<sup>5</sup> nor enter into a *partnership* with a private individual,<sup>6</sup> unless the legislature has enabled them so to do.<sup>7</sup> When, therefore, certain manufacturing corporations selected a committee, and each corporation turned over to it all of its property, under a scheme called a “*trust*,” by which the committee was to operate the property for the common benefit so as to prevent injurious competition,—it was held that this was not a mere “*traffic arrangement*,” but a contract of *partnership*, which was *ultra vires* under an applicatory statute of the State,<sup>8</sup> and that any one of the corporations could withdraw from the arrangement at pleasure and maintain replevin for its personal property so turned over to the committee.<sup>9</sup> So, it has been held by two

<sup>1</sup> *Fidelity Ins. &c. Deposit Co. v. Nivens*, 5 Houst. (Del.) 416; s. c. 1 Am. St. Rep. 150.

<sup>2</sup> *Ante*, § 305, *et seq.*

<sup>3</sup> *Marine Bank v. Ogden*, 29 Ill. 248.

<sup>4</sup> *New York &c. Canal Co. v. Fulton Bank*, 7 Wend. (N. Y.) 412; *Mallory v. Hanaur Oil Works*, 86 Tenn. 598; s. c. 8 S. W. Rep. 396; *Marine Bank v. Ogden*, 29 Ill. 248.

<sup>5</sup> *Ante*, § 315; *Charlton v. Newcastle &c. R. Co.*, 5 Jur. (N. S.) 1097.

<sup>6</sup> *Central R. &c. Co. v. Smith*, 76 Ala. 572; s. c. 52 Am. Rep. 353; *Gunn v. Central R. &c. Co.*, 74 Ga. 509; *Whittenton Mills v. Upton*, 10 Gray (Mass.), 582; s. c. 71 Am. Dec. 681.

<sup>7</sup> 20 Am. & Eng. Corp. Cas. 485, n.

<sup>8</sup> Tenn. Acts 1875, ch. 142.

<sup>9</sup> *Mallory v. Hanaur Oil Works*, 86 Tenn. 598. See also *post*, § 6410.

courts that a corporation chartered to construct and *operate a railroad* between certain points, and also with additional power to organize and carry on the business of *banking*, has no implied or incidental power to form a partnership with a natural person for the purpose of running a steamboat, which is no part of its chartered line, but which would form an extension thereof; and the conclusion of the court was that, for an injury done to a passenger on such a steamboat, he would have no redress in an action for damages against the corporation.<sup>1</sup> On the other hand, we find decisions to the effect that corporations may enter into a copartnership with natural persons for the purpose of carrying on the business for which the corporation was created.<sup>2</sup> It is very clear that where two

<sup>1</sup> *Central R. &c. Co. v. Smith*, 76 Ala. 572; s. c. 52 Am. Rep. 353; *Gunn v. Central R. &c. Co.*, 74 Ga. 509. These decisions are senseless and unjust. It is a principle of law almost universally acceded to by the courts, that it is no defense on the part of a corporation to an action for a tort, that the commission of the tort was *ultra vires* (*post*, § 6279); and this is necessarily so, since all corporate torts are *ultra vires*, the law not having clothed any corporation with the faculty of doing wrong. The true principle is, that the rule which restrains corporations from embarking their funds in enterprises not authorized by their charters, is intended for the protection of their stockholders; and if, escaping from the implied restraint, they do so embark their funds, and the stockholders stand by and look on and receive dividends out of the profits, and take no legal steps, as they may, to restrain the *ultra vires* acts of their directors, then they are estopped, and the corporation through them and for them, from setting up such a defense. *Ante*, § 5314. If they allow the corporation to embark its funds in extrinsic enterprises, and the State

does not interfere, the corporate funds must take the burdens and responsibility as well as the benefits accruing therefrom. *Ante*, §§ 5258, 5303.

<sup>2</sup> Take, for instance, a case where an iron company leased its property to an individual for five years, reserving a part of it for rents, etc., with the privilege of purchasing the works at the end of the term. Drafts were drawn by the president of the corporation, and accepted by the individual, and it was held that the corporation was liable to be sued thereon as a partner. It had an interest in the profits as profits, and was liable to third persons as a partner, and could make such a contract as the one upon which the action was brought, and the recovery had. *Oatskill Bank v. Gray*, 14 Barb. (N. Y.) 471. In a case in Rhode Island a corporation was created, it seems by a special act of the legislature, under the name of the Woonsocket Company. The act of incorporation did not specify the business for which it was to be created, nor did anything in its corporate name suggest it. All the shares of its stock were held by a single individual. It entered into a partnership



corporations, or a corporation and a natural person, have assumed to enter into a partnership, and have done business jointly, they may *recover* upon obligations made to them *in their partnership name*, irrespective of their rights and duties as between themselves, or of the power of the corporation to enter into a partnership.<sup>1</sup> This is by analogy to the principle obtaining in respect of contracts made with bodies by an artificial name, that the other contracting party is *estopped by his contract* from denying the character and capacity assumed by the party with whom he has contracted.<sup>2</sup>

§ 5839. **No Power to Take an Oath.**—A corporation aggregate has not the legal capacity to take an oath.<sup>3</sup> The consequences of this infirmity are elsewhere considered.<sup>4</sup>

§ 5840. **Power to Incur Expense on Account of Injured Employés.**—An *implied power will be ascribed to any corporation employing labor*, to incur expense on account of injuries received by its employés in the line of their employment, in the absence of any express statutory grant of such power. This implication rests upon the most obvious grounds of justice and humanity.<sup>5</sup> A more difficult question arises as to the *power of particular officers or agents* of corporations to charge them with such expenses; and this has been already considered.<sup>6</sup>

§ 5841. **Power to Contract for the Payment of a Pension.**—It has been held that the trustees of a mutual life

with a firm of individuals, to be terminated at will by the corporation. It was held, after the fullest consideration, that it had power so to do; and the court accordingly sustained a bill in equity, by the surviving members of the partnership, against the corporation, for an account and settlement. The decree established the fact of the partnership as charged in the bill of the complainants, declared that they were entitled to a certain per centum of the profits under the terms of the

partnership agreement, and referred the cause to a master to take and state an account. *Allen v. Woonsoccket Co.*, 11 R. I. 288.

<sup>1</sup> *French v. Donahue*, 29 Minn. 111.

<sup>2</sup> *Ante*, §§ 518, 5275; *post*, ch. 184, art. 3.

<sup>3</sup> *Alabama &c. R. Co. v. Oaks*, 37 Ala. 694.

<sup>4</sup> *Post*, Ch. 178, art. III; Ch. 184, art. II.

<sup>5</sup> *Toledo &c. R. Co. v. Rodrigues*, 47 Ill. 188; *s. c.* 95 Am. Dec. 484.

<sup>6</sup> *Ante*, §§ 4855, 4984.

insurance company have no power to contract to pay a retiring president of the company a salary for life in consideration of his past services rendered by him.<sup>1</sup>

§ 5842. **Power to Compromise Disputed Claims.**—A corporation undoubtedly has, by mere implication of law, and without any statutory expression to that effect, the same power of *compromising claims* preferred against it which an individual has;<sup>2</sup> and we have already seen that *bona fide* compromises between a corporation and its stockholders, in respect of the amounts due upon their shares, will be upheld even against creditors.<sup>3</sup>

§ 5843. **Power to Create Forfeitures.**—A corporation cannot exercise the power of creating *forfeitures*, unless that power be expressly granted.<sup>4</sup> In the absence of a statutory authorization, a *municipal corporation* cannot, therefore, pass an ordinance authorizing its marshal to *seize without judicial process* a quantity of gunpowder kept within the city limits in excess of a prescribed amount.<sup>5</sup> In the absence of an enabling statute, no corporation has the power to make an *additional assessment* upon the shares of its capital stock, after they have been paid for in full, and to forfeit the shares for the non-payment of the same.<sup>6</sup>

§ 5844. **Power to Establish Transportation Lines.**—A charter conferring upon a corporation the power to make and keep in repair a *road* to the top of Mount Washington, to take

<sup>1</sup> *Beers v. New York L. Ins. Co.*, 66 Hun (N. Y.), 75; *s. c.* 49 N. Y. St. Rep. 182; 20 N. Y. Supp. 788. Power of *religious corporations* in New York to bind themselves to pay for services rendered, and effect on such power of New York Laws of 1813, ch. 60: *Pendleton v. Waterloo Baptist Church*, 49 Hun (N. Y.), 596; *s. c.* 18 N. Y. St. Rep. 581.

<sup>2</sup> *Bath's Case*, 8 Ch. Div. 334; *Elberman v. Chicago Junction R. &c.*

*Co.*, 49 N. J. Eq. 217; *s. c.* 23 Atl. Rep. 287.

<sup>3</sup> *Ante*, § 1553. See also *Re Accidental Death Ins. Co.*, 7 Q. B. Div. 568.

<sup>4</sup> *Cotter v. Doty*, 5 Ohio, 393.

<sup>5</sup> *Ibid.* As to *by-laws creating forfeitures*, see *ante*, §§ 1037, 1038.

<sup>6</sup> *Gresham v. Island City Sav. Bank* (Tex. Civ. App.), 21 S. W. Rep. 556. As to the *forfeiture of shares* for non-payment of assessments, see *ante*, § 1762, *et seq.*

tolls of passengers and for carriages, to build and own toll-houses, and to take land for the road, did not authorize the corporation to establish stage and transportation lines, or to buy carriages and horses for such a purpose. Nor did an additional act empowering it to erect and maintain, lease, and dispose of, any buildings found convenient for the accommodation of its business, and of the horses, carriages, and travelers passing over its road, authorize the purchase of carriages and horses for the purposes of transportation.<sup>1</sup>

§ 5845. **Power to Make Extra-territorial Contracts.**—A corporation chartered in one State for the purpose of manufacturing certain articles of commerce, “and disposing of and dealing in the same,” may lawfully make contracts for the sale of them, in any other State whose local laws had not prohibited such contracts.<sup>2</sup>

§ 5846. **Liability of Corporations for the Acts of their Dummy Corporations.**—It has been held that a *railroad company*, having power to conduct a telegraph business, and having a system of telegraph, will be charged in equity with the payment of a judgment for breach of contract obtained against a telegraph company which it has caused to be incorporated with a small capital, of which it is the sole stockholder, and which it has held out as authorized to contract with regard to its whole telegraph system, where it sells the whole system to a rival telegraph company and leaves the company so organized without assets.<sup>3</sup>

<sup>1</sup> Downing v. Mount Washington &c. Co., 40 N. H. 230.

<sup>2</sup> Hall v. Tanner &c. Engine Co.,  
91 Ala. 363.

<sup>3</sup> Interstate Tel. Co. v. Baltimore  
&c. Tel. Co., 51 Fed. Rep. 49.

## CHAPTER CXXIX.

### POWERS ASCRIBED AND DENIED TO PARTICULAR CORPORATIONS.

#### ART. I. INSURANCE CORPORATIONS.

##### II. RAILROAD COMPANIES.

##### III. TURNPIKE CORPORATIONS.

##### IV. MISCELLANEOUS CORPORATIONS.

#### ARTICLE I. INSURANCE CORPORATIONS.

##### SECTION

5849. Insurance companies may make and negotiate promissory notes.

5850. Insurance companies cannot engage in banking.

5851. Whether establish a guaranty fund.

5852. Cannot pension their retiring officers.

5853. Whether divide business into classes.

5854. Cannot purchase obligation of policy holder to be used as an offset.

5855. Cannot change the beneficiary prescribed in its charter.

##### SECTION

5856. Cannot transfer its assets to re-insuring company.

5857. Mutual company may insure on the all cash plan.

5858. But cannot turn itself into a stock company without legislative sanction.

5859. Mutual company authorized to insure for cash may take note for policy.

5860. What policies may and may not be issued.

5861. Validity of policies issued by foreign insurance companies.

§ 5849. **Insurance Companies May Make and Negotiate Promissory Notes.**—The power of making negotiable paper in settlement of their indebtedness, has been conceded to *insurance companies*; and a promissory note made by such a company is presumptively valid until the contrary is made to appear.<sup>1</sup>

<sup>1</sup> Barker v. Mechanics' Fire Ins. Co., 3 Wend. (N. Y.) 94; s. c. 20 Am. Dec. 664. Compare New York &c. Ins. Co. v. Sturges, 2 Cow. (N. Y.) 664;

New York &c. Ins. Co. v. Ely, 2 Cow. (N. Y.) 678; New York &c. Ins. Co. v. Bennett, 5 Conn. 574; s. c. 13 Am. Dec. 109.

§ 5850. **Insurance Companies cannot Engage in Banking.** If a corporation is organized merely to make insurances upon property, it cannot engage in the business of *banking*.<sup>1</sup> It cannot, directly or indirectly, absorb a banking corporation so as to draw to itself the rights, franchises, and exemptions contained in its charter; but there is no legal objection to its shareholders purchasing the shares of a banking company.<sup>2</sup> It is not within a prohibition against engaging in the banking business for an insurance company to invest its surplus or profits in loans secured by mortgages, for that is not banking.<sup>3</sup>

§ 5851. **Whether Establish a Guaranty Fund.**—It has been held that a contract between a mutual fire insurance company and its policy-holders, whereby the latter establish a fund for the purpose of guarantying the existing and future indebtedness of the company, is *ultra vires* and void, where the power to make such a contract is not expressly conferred upon the company by its charter, and is not within its general powers for raising a fund to meet its losses and expenses. The doubtful reasoning is, that such an arrangement destroys the essential character of the corporation as a mutual insurance company.<sup>4</sup> In like manner, another court has held that such a company could not raise a guaranty fund which should be put up in money bonds payable on demand, secured by a mortgage or by stocks as collateral security which should be liable to assessment *pro rata* for the payment of losses after all other available means should be exhausted,—the contributors to such capital to receive six per cent per annum on the amount of their bonds out of the net earnings of the company. Such an arrangement, not being authorized by any statute, was void both at law and in equity.<sup>5</sup> These holdings seem to be weak, inconclusive, and unjust. They do not

<sup>1</sup> Blair v. Perpetual Ins. Co., 10 Mo. 559, 565; s. c. 47 Am. Dec. 129; New York Firemen Ins. Co. v. Ely, 5 Conn. 560; s. c. 13 Am. Dec. 101.

<sup>2</sup> Life Asso. of America v. Levy, 33 La. An. 1203.

<sup>3</sup> Kennan v. Rundle, 81 Wis. 212.

<sup>4</sup> Trenton Mut. &c. Ins. Co. v. McKelway, 12 N. J. Eq. 133.

<sup>5</sup> State v. Butler, 86 Tenn. 614; s. c. 8 S. W. Rep. 586.

involve the question of the power of the corporation so much as the power of individuals; and there is no question of the power of an individual to guarantee the debts, obligations, or contingent liabilities of any individual or corporation, if he sees fit to do so; and what any one individual may do, any number of individuals may unite in doing; and the mere fact that they are stockholders in a corporation does not preclude them from so uniting. In so far as the corporation, on its part, obligates itself to do something in return for the creation, by them, of such a guaranty fund,—as to pay interest to the persons who have created it,—it may be *ultra vires*, and its action could be enjoined at the instance of any dissenting stockholder, or the State might make it a ground of a proceeding to forfeit its charter. But after the fund has been created, and after the corporation has paid out the interest to the creator of the fund and has become insolvent, then there is neither sense nor justice in allowing them to escape the obligation of the contract, on their part, on the ground that the corporation,—not they themselves,—had not the power to enter into it.<sup>1</sup> Such a contract is founded upon a good consideration which is the inducement held out by the public to insure by reason of the security afforded by such a guaranty; and this furnishes a ground of estoppel against the guarantor.<sup>2</sup> The better opinion is, that a mutual insurance company has the incidental or implied power, in the absence of a positive restriction, to receive a note or bond from one of its members as a part of a guaranty fund for the better security of its policy-holders; and that such note or bond is a valid security in the hands of the company, and upon the happening of its insolvency, in the hands of its receiver for the benefit of its creditors.

<sup>1</sup> Circumstances and statutory provisions under which the shareholders of the guaranty capital of an insurance company were entitled to the surplus belonging to the public department: *Traders' &c. Ins. Co. v.*

*Brown*, 142 Mass. 403. Doctrine that a guaranty capital is a liability and not assets: *Com. v. Berkshire &c. Ins. Co.*, 98 Mass. 25.

<sup>2</sup> *Hope Mut. Ins. Co. v. Perkins*, 2 Abb. App. Dec. (N. Y.) 383.

§ 5852. **Cannot Pension their Retiring Officers.**—A contract by an insurance corporation to pay its retiring president an annual salary for life, made at a meeting of the board of trustees at which he presided, has been held *ultra vires* and void, although he did not vote thereon.<sup>1</sup>

§ 5853. **Whether Divide Business into Classes.**—It has been held that an insurance company has no right, unless so empowered by statute, to divide its risks and capital into classes, and restrict the liability upon stock notes to the class in which they are placed.<sup>2</sup> On the contrary, the Court of Appeals of New York have twice held that it is competent for a mutual insurance company, when not prohibited by statute, to divide its business into departments or classes, pledging the premiums received from assessments from premium notes in each department, as a primary fund for the payment of all losses in that department,—the same remaining, it seems, a secondary fund for the payment of losses in other departments.<sup>3</sup>

§ 5854. **Cannot Purchase Obligation of Policy-holder to be Used as an Offset.**—A statutory power to “invest their capital and funds, accumulated in the course of business, in bonds and mortgages,” does not extend so far as to enable an insurance company to purchase upon credit an obligation secured by the mortgage of one of its policy-holders, who is entitled to indemnity for a loss, for the purpose of *setting off* such mortgage against the policy. Such a purchase, it has been said, is not only outside the limits of its charter, but is directly opposed to its leading objects.<sup>4</sup> Neither has an insurance company such a power, under a statutory authority “to invest all or any part of its capital stock, money, funds, or other property, in such a way as the directors may deem

<sup>1</sup> Beers v. New York Life Ins. Co., 66 Hun (N. Y.), 75; s. c. 49 N. Y. St. Rep. 182; 20 N. Y. Supp. 788.

<sup>2</sup> Fitzpatrick v. Troy Ins. Co., 5 Biss. (U. S.) 48.

<sup>3</sup> Sands v. Boutwell, 26 N. Y. 233; following White v. Ross, 4 Abb. App. Dec. (N. Y.) 589.

<sup>4</sup> Kansas Ins. Co. v. Craft, 18 Kan. 283.

best, for the safety of the capital and interest of the stockholders.”<sup>1</sup>

§ 5855. **Cannot Change the Beneficiary Prescribed in its Charter.**—There is judicial authority to the effect that where a *mutual benefit society* is chartered with authority to grant insurance for the benefit of a stated class of beneficiaries,—as, for instance, the widow or the children of a member,—the company can neither in the first instance grant an insurance for a different beneficiary,<sup>2</sup> nor consent to an *assignment of the policy* after it has been issued to a statutory beneficiary, to one who does not belong to the class of beneficiaries named in the statute,<sup>3</sup>—in either of which cases a court will, in conformity with the governing statute and contrary to the contract, direct the indemnity to be paid to the beneficiary named in the statute. When, therefore, the governing statute designated “the widow and children of the deceased member” as the persons to whom an insurance should be made, and nevertheless the company issued a benefit certificate to a member, payable to his heirs or as he might direct in his will,—it was held that, upon his death, his widow, there being no children, and not his administrator, was entitled to the benefit.<sup>4</sup> So, where a similar association was organized under a charter limiting its purposes “to afford relief to the widow and children of deceased members,” and a member took out a policy, in case of death, payable to his wife, or if she be dead, to his children, and afterwards assigned it to the association as security for a loan,—it was held that the assignment was void, and that the infant heirs of the deceased member could recover the benefit.<sup>5</sup>

<sup>1</sup> *Straus v. Eagle Ins. Co.*, 5 Ohio St. 60, 65.

<sup>2</sup> *Kentucky Masonic &c. Life Ins. Co. v. Miller*, 13 Bush (Ky.), 489.

<sup>3</sup> *Dietrich v. Madison Relief Asso.*, 45 Wis. 79.

<sup>4</sup> *Kentucky Masonic &c. Life Ins. Co. v. Miller*, *supra*.

<sup>5</sup> *Dietrich v. Madison Relief Asso.*, *supra*. That the heirs of one whose

life is insured cannot, after his death, exercise the right to change the insurance from one of two modes adopted by the company, which the assured selected, to the other,—see *Mound City &c. Life Ins. Co. v. Twining*, 19 Kan. 349. As to *changes of beneficiaries* in mutual benefit societies, see *post*, ch. 221.



§ 5856. **Cannot Transfer its Assets to Re-insuring Company.**—An agreement, by which one life insurance company transfers to another all of its assets, of whatsoever name and nature, in consideration of the latter company undertaking to re-insure all the risks, and to assume and pay all the debts and liabilities of the former company, is *ultra vires* and void, although the vendor company may be authorized by its charter to re-insure its risks.<sup>1</sup>

§ 5857. **Mutual Company may Insure on the All-cash Plan.** One court has discovered no valid reason why a mutual insurance company cannot issue policies on the *all-cash premium plan*, whereby the members are free from liability for assessment.<sup>2</sup> The same court has held that where a company is authorized, by statute, to issue policies on the cash principle to others than its members, all persons insured on that principle are entitled to look to the premium notes of the members as representing the capital stock of the company.<sup>3</sup>

§ 5858. **But cannot Turn Itself into a Stock Company without Legislative Sanction.**—But a mutual insurance company, created without any capital stock, cannot create a capital stock by virtue of a *by-law* passed for that purpose, and thereby withdraw from the class of mutual corporations, without capital stock, to which it belongs.<sup>4</sup>

<sup>1</sup> Smith v. St. Louis Mut. Life Ins. Co., 2 Tenn. Ch. 727; Price v. St. Louis &c. Life Ins. Co., 3 Mo. App. 263; Barden v. St. Louis &c. Life Ins. Co., 3 Mo. App. 248.

<sup>2</sup> Schimpf v. Lehigh Valley Mut. Ins. Co., 86 Pa. St. 373; affirming s. c. 13 Phila. (Pa.) 515. That a mutual insurance company might be incorporated under the New York Act of 1849, chapter 308, with power to issue policies on *cash payment*, see Mygatt v. New York Protection Ins. Co., 21 N. Y. 53. Compare Union

Ins. Co. v. Hoge, 21 How. (U. S.) 35, 64; White v. Havens, 20 How. Pr. (N. Y.) 177.

<sup>3</sup> Hays v. Lycoming Fire Ins. Co., 98 Pa. St. 184.

<sup>4</sup> State v. Utter, 34 N. J. L. 439. If it does, without legislative sanction, and by a mere *by-law*, create a joint stock, it is not to be *taxed* in respect of it, according to this holding, under a statute providing for the taxation of a corporation without a capital stock; but it would seem that by its wrongful act of creating a capital

§ 5859. **Mutual Company Authorized to Insure for Cash may Take Note for Policy.** — Where an amendment to the charter of a mutual insurance company authorized them to make insurance “for a specific rate of premium to be paid in cash in the same manner as insurance companies other than mutual insurance companies are accustomed to do,” it was held that they might accept a note for the premium, and recover upon it.<sup>1</sup>

§ 5860. **What Policies may and may not be Issued.** — A mutual fire insurance company, organized under the Kansas statute,<sup>2</sup> and which has no guaranty fund for the protection of its policy-holders, cannot legally issue policies of insurance on *property situated outside the State*.<sup>3</sup> Where the charter of an insurance company confers upon it the power “generally to do and perform all things relative to the objects of the association,” and provides, in a subsequent section, that “all policies or contracts of insurance” shall be subscribed by the president or some other officer designated by the board of directors for that purpose, the latter provision does not disable the company from binding itself by *contracts for policies* and for immediate insurance, executed in other modes and by other agents, — it being merely intended to prescribe the manner in which the final contract or policy shall be executed.<sup>4</sup> A corporation authorized by its charter to insure against *fire*, whether caused “by accident, lightning, or by other means,” cannot insure against damage by *lightning* not resulting in fire, although its by-laws provide for its doing so; and there can be no recovery, under such a charter, where the policy is a contract to pay the amount insured “within three months next after the said property shall be destroyed or demolished by fire.”<sup>5</sup> It has been held that neither a policy of insurance,

stock, without legislative sanction, it is enabled to withdraw a large mass of property from taxation.

<sup>1</sup> *Carey v. Nagle*, 2 Biss. (U. S.) 244. See also *s. c.* 2 Abb. (U. S.) 156.

<sup>2</sup> Kan. Laws 1885, ch. 132.

<sup>3</sup> *Kansas Home Ins. Co. v. Wilder*, 43 Kan. 731; *s. c.* 23 Pac. Rep. 1061.

<sup>4</sup> *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345; *s. c.* 15 Am. Rep. 612.

<sup>5</sup> *Andrews v. Union Mut. Ins. Co.*, 37 Me. 256.

nor a premium note given to procure it, is void, because, by the terms of the policy, it is to *extend beyond the term limited by the charter of the company for its corporate existence*; but in such a case the policy is valid for the unexpired term of the charter.<sup>1</sup> The propriety of this conclusion would seem to appear from the consideration that, in case the legislature should renew the charter, or in case the incorporators should, under an enabling act, become reincorporated, the obligation would continue in the renewed corporation.<sup>2</sup>

**§ 5861. Validity of Policies Issued by Foreign Insurance Companies.** — There is a general consensus of opinion to the effect that if a foreign insurance company comes within the domestic State, and there does business in violation of its laws and even in the face of prohibitory statutes having penal sanctions, this does not deprive the citizens of the domestic States, to whom it issues policies, of the right to recover thereon.<sup>3</sup> Even where there is in the domestic State an entire prohibition, such as that “no policy of insurance shall be signed, issued, or delivered,” by any company not chartered under the laws of the domestic State, except by an agent first obtaining a license in the manner prescribed by the act, this will not avoid a policy issued by a foreign insurance company, at the solicitation of an agent of the foreign company within the domestic State, having no authority to make insurances; for in such a case the *situs of the contract* is the residence of the insurance company, and not the State within which its agent solicited the risk and procured the application; and the courts of the State which is the *situs* of the contract will enforce it when not invalid by the laws of that State.<sup>4</sup>

<sup>1</sup> Huntley v. Merrill, 32 Barb. (N. Y.) 626; Huntley v. Beecher, 30 Barb. (N. Y.) 580.

<sup>2</sup> Such was the reasoning of Marvin, J., in the case last decided.

<sup>3</sup> Post, Ch. 195; Pennypacker v. Capital Ins. Co., 80 Iowa, 56; s. c. 20 Am. St. Rep. 395; 8 L. R. A. 236; 45 N. W. Rep. 408.

<sup>4</sup> Hyde v. Godnow, 3 N. Y. 266.

## ARTICLE II. RAILROAD CORPORATIONS.

## SECTION

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§ 5865. Preliminary.—It is proposed in this article to consider in brief, and rather with the view of convenient search and reference, first, the question of what powers have been ascribed or conceded to railroad companies, and, second, the question of what powers have been denied to them.

§ 5866. Make and Negotiate Promissory Notes.—In common with all corporations,<sup>1</sup> an *implied power* is ascribed to

<sup>1</sup> *Ante*, § 5730.

railroad companies to make promissory notes through their authorized agents,<sup>1</sup> and to negotiate the same in the ordinary course of business.<sup>2</sup>

§ 5867. **Guarantee Bonds.**—A railroad company, having the power to issue bonds and to receive, in payment of subscriptions to its own stock, the *bonds of municipal corporations*, may *sell* the bonds so received, and, for the purpose of giving them a marketable quality, may *guarantee* their payment.<sup>3</sup> If a guarantee is made by such a company for the mere *accommodation* of another company, although it might not be good as between the original parties, it will, on principles already considered in relation to *accommodation indorsements* by corporations,<sup>4</sup> be good as soon as the instrument, being negotiable, passes into the hands of a *bona fide* holder for value, provided the circumstances are such that the guaranty appears on its face, and from a circular of the agent of the guarantor company appointed to sell the bonds, to be such a contract as the company has power to make.<sup>5</sup> So, a railroad corporation having power to make contracts and arrangements with other such corporations for the *lease of railroads*, and to issue notes or bonds for not less than one hundred dollars, may, upon taking the lease of a railroad for the construction of which it has issued its bonds, guarantee the payment of the interest coupons thereon, although each coupon is *less than one hundred dollars*.<sup>6</sup>

§ 5868. **Circumstances under Which This Power Upheld.** Authority given to a railroad company in general terms to aid a connecting road by subscription to its stock, or otherwise, has been held to include the power to guarantee its bonds;<sup>7</sup> and so of an authority to contract with it for the transportation of freight or passen-

<sup>1</sup> Hamilton v. Newcastle &c. R. Co., 9 Ind. 359.

<sup>2</sup> Frye v. Tucker, 24 Ill. 180.

<sup>6</sup> Eastern Townships Bank v. St.

<sup>3</sup> Railroad Co. v. Howard, 7 Wall. (U. S.) 392.

Johnsbury &c. R. Co., 40 Fed. Rep. 423.

<sup>4</sup> Ante, § 5737.

<sup>7</sup> Zabriskie v. Cleaveland &c. R.

<sup>5</sup> Madison &c. R. Co. v. Norwich &c. Soc., 24 Ind. 457.

Co., 23 How. (U. S.) 381.

gers or for the use of its road, as to the board of directors might seem proper.<sup>1</sup> Under a statute conferring on a railway company all the powers and privileges, for the purpose of carrying on its business, that private individuals and natural persons enjoy, it has been held that a railway company, using the road of another such company, has power, in the lieu of rent and as a part of the consideration of the lease, to guarantee the payment of the bonds of the lessor company, both the interest and also the principal at maturity. This is perfectly plain; since an individual would have that power, and since it would be competent for the railway company to bind itself to pay directly to the lessor, or to third persons at the request of the lessor, an amount, equal to the amount of the bonds, principal and interest.<sup>2</sup> And in general, a railroad corporation, having power to take and dispose of the securities of another corporation, may guarantee their payment, if it disposes of them to another party in payment of its own debt; and if it buys property subject to a mortgage securing bonds, it may guarantee the payment thereof, if such guaranty is taken as payment *pro tanto* of its debt.<sup>3</sup>

§ 5869. **Receive Municipal Subscriptions.**—A statute, authorizing a city to subscribe its bonds for a certain railroad stock, authorizes that railroad to receive the subscription; and hence the city cannot defeat an action on the bonds, on the ground that the charter of the company did not authorize it to receive them in payment of its shares.<sup>4</sup>

§ 5870. **Dedicate Land for Highway.**—In the absence of any prohibition in their charters, or governing statutes, an *implied power* has been ascribed to railroad companies, to unite with the owners of the fee in dedicating, for the purposes of a public highway, lands taken by them under their charters.<sup>5</sup>

<sup>1</sup> Smead *v.* Indianapolis &c. R. Co., 11 Ind. 104.

<sup>2</sup> Low *v.* Central Pac. R. Co., 52 Cal. 53; *s. c.* 28 Am. Rep. 629.

<sup>3</sup> Ellerman *v.* Chicago Junction R. &c. Co., 49 N. J. Eq. 217; *s. c.* 11 Rail. & Corp. L. J. 97; 35 Am. & Eng. Corp. Cas. 388; 23 Atl. Rep. 287. See

also Stark Bank *v.* United States Pottery Co., 34 Vt. 144; Rahn *v.* King Wrought-Iron Bridge Manufactory, 16 Kan. 277.

<sup>4</sup> Clark *v.* Janesville, 10 Wis. 136; Bushnell *v.* Beloit, 10 Wis. 195. See *ante*, § 1115, *et seq.*

<sup>5</sup> Green *v.* Canaan, 29 Conn. 157.

§ 5871. **Contract to Carry Beyond their Own Lines.**— Although there was formerly some doubt upon the question, an *implied power* is now universally ascribed to railroad companies to contract to carry either passengers or goods beyond the terminus of their own lines,<sup>1</sup> even where the extra transit must be made in whole or in part by water.<sup>2</sup> On the contrary, a railroad company is *not bound* to enter into such a contract; and consequently it is competent for it to make a contract with a shipper limiting its liability to its own line, and constituting itself a mere forwarding agent for the purpose of completing the transit by means of other lines.

§ 5872. **Make Contract with Connecting Carriers.**— From the doctrine of the preceding section, it must be inferred that an *implied power* will also be ascribed to railroad companies to make needful and proper contracts with *connecting carriers* on land or water, with the view of securing, for freight and passengers, a continuous line of transportation, commonly called a *through line*. Such contracts, preventing as they do, the delay and expense of transshipment at particular points on the route of carriage, tend greatly to the public convenience; and, therefore, the courts discover no reason why the power to make them should not be implied, and why its exercise should not be favored.<sup>3</sup> This is especially so where the charter of a particular railroad corporation, or the general laws applicable to it, manifest an intention on the part of the legislature that it is to form a part of a continuous line of

<sup>1</sup> *Railway Co. v. McCarthy*, 96 U. S. 258; *Burtis v. Buffalo & C. R. Co.*, 24 N. Y. 269; *Perkins v. Portland & C. R. Co.*, 47 Me. 573; *s. c.* 74 Am. Dec. 507.

<sup>2</sup> *Wheeler v. San Francisco & C. R. Co.*, 31 Cal. 46; *s. c.* 89 Am. Dec. 147. That the acquiescence of the shareholders will prevent the corporation from successfully pleading *ultra vires* in such a case, see *Bissell v. Michigan*

& C. R. Co., 22 N. Y. 258; *Buffett v. Troy & C. R. Co.*, 40 N. Y. 168.

<sup>3</sup> *Chicago & C. R. Co. v. Ayres*, 140 Ill. 644; *s. c.* 30 N. E. Rep. 687; *Green Bay & C. R. Co. v. Union Steamboat Co.*, 107 U. S. 98. Such contracts will be *specifically enforced inequity*, though not after they have been *discontinued* by the action of the parties to them. *Androscoggin & C. R. Co. v. Androscoggin R. Co.*, 52 Me. 417.

transportation.<sup>1</sup> For the purposes of this doctrine, a *bridge over a river*, the principal purpose and use of which is to form a viaduct for the passage of railroad trains, is regarded as a *railroad*, and its proprietors as a railroad company, within the meaning of statutes authorizing railroad companies to make contracts with other companies for the purpose of securing a continuous line of transportation.<sup>2</sup> A railroad company, engaged largely in the shipment of cotton, has, in like manner, an implied power to enter into a contract with a steamship company for a specified amount of space on its ships for the *shipment of cotton across the ocean*, to be delivered at specified times at the point of shipment.<sup>3</sup>

§ 5873. **To What Extent Contract Joint Obligations.**—A limitation of the foregoing doctrine is found in the principle that corporations have no power to enter into *general partnerships* with each other;<sup>4</sup> and consequently the rule does not extend so far as to allow one railroad company to enter into a general partnership with another transportation company for the operation of both their railroads as *joint principals*.<sup>5</sup> But, call it a partnership or not, it has been said that, “without attempting to determine whether, as a general proposition, corporations may *contract joint obligations*, there can be no doubt . . . of the power of two or more railway companies, whose railways form a continuous line, to enter into a *joint arrangement for operating their railways as one line*, and to become jointly liable for money borrowed to be used in furtherance of the business of such line.”<sup>6</sup>

§ 5874. **Own Steamboats.**—The Supreme Court of the United States has held that railroad companies cannot, without authority of statute, assume to purchase steamboats to be

<sup>1</sup> Pittsburgh &c. R. Co. v. Keokuk Compress Co., 83 Va. 272; s. c. 2 S. E. &c. Co., 131 U. S. 371; Burke v. Concord R. Co., 61 N. H. 160. Rep. 139.

<sup>2</sup> Pittsburgh &c. R. Co. v. Keokuk &c. Co., 131 U. S. 371.

<sup>4</sup> Post, § 6403.

<sup>5</sup> Burke v. Concord R. Co., 61 N. H. 160.

<sup>3</sup> Norfolk &c. R. Co. v. Shippers'

<sup>6</sup> Chicago &c. R. Co. v. Ayres, 140 Ill. 644, 647; s. c. 30 N. E. Rep. 687.



run in connection with their railroads, and that notes given for such a purpose are void, and that the holder cannot recover on such notes against the corporation.<sup>1</sup> This untenable decision, which allowed the corporation to keep the consideration and repudiate the contract, was rendered when the doctrine of *ultra vires* was in its infancy, and when the Supreme Court of the United States did not deserve the standing as a judicial tribunal which it has since acquired. It would not be followed at this time by any enlightened court. Railroad companies can, and in many cases are bound to, own and control steamboats and ferries to convey passengers and freight across bodies of water lying on the line of their roads.<sup>2</sup>

§ 5875. **Contract to Promote Business of Another Road.** In like manner, it has been held not beyond the power of two railroad corporations to enter into a contract with each other, by which each obligates itself to promote the business of the other; since such a contract may be regarded as a contract by either corporation in furtherance of its own business, and hence within its implied power; and in each event, if one of the parties has availed himself of the benefit of the contract, it will be estopped to raise the objection that it was *ultra vires*.<sup>3</sup>

§ 5876. **Contract to Allow Municipal Corporations to Prescribe Motive Power.**—Where the charter of a railroad company provided that it should obtain the consent of the authorities of the City of New York, to construct its road

<sup>1</sup> Pearce v. Madison &c. R. Co., 21 How. (U. S.) 441.

<sup>2</sup> Wheeler v. San Francisco &c. R. Co., 31 Cal. 46; s. c. 89 Am. Dec. 147. Another court has held that if a railroad company is authorized, by the act under which they organize, "to contract for the transportation and delivery of, and to transport and deliver, persons and property conveyed over their road, beyond its *termini*," the purchase by the company of a

steamboat, designed by them in good faith for the transportation of freight and passengers from the terminus of their road to the line of another, is not *ultra vires*, and that a note given by the company, in consideration of such a purchase, will be binding upon them. Shawmut Bank v. Plattsburgh &c. R. Co., 31 Vt. 491.

<sup>3</sup> Tonawanda Valley &c. R. Co. v. New York &c. R. Co., 42 Hun (N. Y.), 495.

within that city, and authorized those authorities "to regulate the time and manner of using the same," and, in pursuance of this power, the company obtained the consent of the city to build its road within the city, upon condition of the city retaining the right of regulating the description of power to be used, which right, the common council of the city afterwards exercised, by prohibiting the use of steam as a motive power, upon the track of the company, within certain portions of the city,—it was held that the imposition of the restriction was authorized by the charter of the company, and that the city might limit it to the use of any one of the descriptions or modes of power enumerated in its charter.<sup>1</sup>

**§ 5877. Contract to Make Stock Gaps and Road Crossings.**—A railroad company may, for the purpose of settling a pending litigation, enter into a contract, by which it undertakes, jointly with individuals, to construct and maintain certain stock gaps and road crossings across its track upon the premises involved in the litigation.<sup>2</sup>

**§ 5878. License Erection of Buildings on its Right of Way.**—A railroad company has the exclusive control of all the land within what is usually termed its right of way, for the purpose of using it in the exercise of its granted franchises, and of excluding the others from it. And while it cannot divert it entirely from the uses for which it was allowed to condemn it, yet it is allowed a large discretion in determining to what uses it may be put. Undoubtedly, it may erect thereon any buildings necessary or convenient for the transaction of its business, and, by parity of reasoning, it may license third persons to erect and occupy such buildings;<sup>3</sup> and it is a reasonable conclusion that it may lease any portion of its right of way to third persons for the erection of such a building, as, for instance, a grain elevator<sup>4</sup>; though it may be

<sup>1</sup> New York &c. R. Co. v. New York, 4 Blatchf. (U. S.) 193.

<sup>2</sup> Chattanooga &c. R. Co. v. Davis, 89 Ga. 708; s. c. 15 S. E. Rep. 626.

<sup>3</sup> Grand Trunk R. Co. v. Richardson, 91 U. S. 454.

<sup>4</sup> Gilliland v. Chicago &c. R. Co., 19 Mo. App. 411.

doubted whether, by granting such a license, or making such a lease, it can cast off its public duty of policing its right of way so that there shall not be maintained thereon *attractive nuisances*, that is to say, substances like *scattered salt*, tending to attract *domestic animals* upon the track where they are liable to be run over and killed.<sup>1</sup>

§ 5879. **Purchase Railroad Already Built.**—A railroad company having power to *construct* a particular line of railroad, with general power to purchase property of whatever nature or kind, may *purchase* from another company a railroad already built upon that line, provided the latter company has power to sell.<sup>2</sup> But where a railroad company is chartered with power to build a line of railroad, but the exercise of the power is limited to a definite period of time, the company, having failed to exercise the power within that time, cannot thereafter exercise the substituted power of purchasing or leasing the same line.<sup>3</sup>

§ 5880. **Railway Leases Void unless Authorized by Express Law.**—As elsewhere stated in other relations,<sup>4</sup> when charters of railway companies are granted by the State, in consideration of a duty and obligation assumed by them to perform certain public services, it is regarded as contrary to public policy to allow them to cast off this duty and obligation, by any form of alienation or contract, without the express sanction of the legislature. It follows that a contract by which one railroad corporation *leases its properties and the right to exercise its franchises* to another corporation or individual, is void, in the absence of an express authorization or sanction of the legislature. No *implication* in favor of the power to make such a contract arises from the ordinary lan-

<sup>1</sup> On this point see *Burger v. St. Louis &c. R. Co.*, 52 Mo. App. 119; and note the dissenting opinion of Rombaur, P. J., at page 128.

<sup>2</sup> *Branch v. Jesup*, 106 U. S. 468;

*Camden &c. R. Co. v. May's Landing &c. R. Co.*, 48 N. J. L. 530, 560.

<sup>3</sup> *Camden &c. R. Co. v. May's Landing &c. R. Co.*, *supra*.

<sup>4</sup> *Ante*, § 5355, *et seq.*; *post*, § 6137.

guage of charters conferring the *power to contract*, but the power must expressly and affirmatively appear.<sup>1</sup> The doctrine goes to the extent that, a lease of its property and the right to exercise its franchises by one railroad corporation to another, *either* of which is not expressly authorized to enter into such a contract, is *ultra vires* and void.<sup>2</sup> Such being the nature of such a contract, it follows that a court of equity will not interfere to assist either of the parties to obtain a *collateral benefit*, which the agreement would give, or to aid them in any manner which would promote the object of the agreement.<sup>3</sup> But, on the contrary, it will grant an *injunction*, to restrain the execution of such an agreement at the suit of a *shareholder*, in one of the corporations, filing the bill in behalf of himself and the other shareholders of his corporation, against his own and the other corporation.<sup>4</sup>

<sup>1</sup> *Thomas v. Railroad Company*, 101 U. S. 71; *Pittsburg &c. R. Co. v. Keokuk &c. Co.*, 131 U. S. 371; *Oregon R. & Nav. Co. v. Oregonian R. Co.*, 130 U. S. 1; *Pennsylvania R. Co. v. St. Louis &c. R. Co.*, 118 U. S. 290, 630; *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 24; *Abbott v. Johnstown &c. Horse R. Co.*, 80 N. Y. 27; *s. c.* 36 Am. Rep. 572; *Beman v. Rufford*, 15 Jur. 914; *s. c.* 6 Eng. L. & Eq. 106; *Great Northern R. Co. v. Eastern Counties R. Co.*, 9 Hare, 306; *s. c.* 12 Eng. L. & Eq. 224; *Winch v. Birkenhead &c. R. Co.*, 5 De Gex & Sm. 562; *s. c.* 16 Jur. 1035; 13 Eng. L. & Eq. 506; *Nelson v. Vermont &c. R. Co.*, 26 Vt. 717; *s. c.* 62 Am. Dec. 614; *Macon &c. R. Co. v. Mayes*, 49 Ga. 355; *s. c.* 15 Am. Rep. 678; *Mahoney v. Atlantic &c. R. Co.*, 63 Me. 68; *Kersey Oil Co. v. Oil Creek &c. R. Co.*, 12 Phila. (Pa.) 374; *Stockton v. Central R. Co.*, 50 N. J. Eq. 52; *s. c.* 17 L. R. A. 97; 12 Rail. & Corp. L. J. 194; 51 Am. & Eng. Rail. Cas. 1; 24

Atl. Rep. 964; *Troy &c. R. Co. v. Kerr*, 17 Barb. (N. Y.) 581; *Woodruff v. Erie R. Co.*, 25 Hun (N. Y.), 248; *s. c.* reversed, 93 N. Y. 609; *Lawrence v. Smith*, 57 Iowa, 701; *International &c. R. Co. v. Underwood*, 67 Tex. 589; *Central &c. R. Co. v. Morris*, 68 Tex. 49; *Braslin v. Somerville Horse R. Co.*, 145 Mass. 64, 67; *Com. v. Smith*, 10 Allen (Mass.), 448; *s. c.* 87 Am. Dec. 672; *Richardson v. Sibley*, 11 Allen (Mass.), 65; *s. c.* 87 Am. Dec. 700; *Middlesex R. Co. v. Boston &c. R. Co.*, 115 Mass. 347; *Davis v. Old Colony R. Co.*, 131 Mass. 258, 271; *s. c.* 41 Am. Rep. 221; *Railroad Co. v. Brown*, 17 Wall. (U. S.) 445, 450; *Bower v. Burlington &c. R. Co.*, 42 Iowa, 546.

<sup>2</sup> *Pittsburgh &c. R. Co. v. Keokuk &c. Bridge Co.*, 131 U. S. 371.

<sup>3</sup> *Great Northern R. Co. v. Eastern Counties R. Co.*, 9 Hare, 306; *s. c.* 12 Eng. L. & Eq. 224.

<sup>4</sup> *Winch v. Birkenhead &c. R. Co.*, 5 De Gex & Sm. 562; *s. c.* 16 Jur. 1035; 13 Eng. L. & Eq. 506.

§ 5881. **Illustrations of the Rule.**—As this power must be conferred by the legislature of the State granting the franchise to build and operate the railway within its limits, and delegating to that end its sovereign right of eminent domain, it follows that such a power cannot be acquired by the mere act of organizing a railroad corporation in a foreign country, and assuming such a power in the articles of incorporation or other constating instrument. A number of co-adventurers or partners cannot create such a power for themselves in this way. This is illustrated by an important case where a railway company organized in Scotland, under a British Companies Act, took to itself the power to transact business in Oregon, as a corporation of that State might do, and, having built a railroad in Oregon, attempted to lease it to a railway corporation organized under the laws of that State, for the term of ninety-six years. Its memorandum of association contained a declaration in favor of its power to buy, sell, or lease railroads, and the articles of association of the Oregon corporation contained a similar declaration. After the lease had been in operation three years, the Oregon corporation elected to rescind the contract and refused to pay further rent. In an action by the Scottish corporation for future rents, it was held that the contract was *ultra vires*, because not authorized by the laws of Oregon; that it was an unlawful contract in the sense of being opposed to the public policy of the State; that either party had a right of rescission and was under a continuing duty to withdraw from it; that, upon the contract being rescinded by either party, no right of action arose in behalf of the other party for anything promised to be done or rendered by the contract subsequently to the rescission; and, consequently, that the Scottish corporation could not maintain an action for rents subsequently accruing.<sup>1</sup> A

<sup>1</sup> Oregon R. &c. Co. v. Oregonian R. Co., 130 U. S. 1; reversing s. c. 22 Fed. Rep. 245; and 23 Fed. Rep. 232. In an article in the *Juridical Review*, published at Edinburgh, by Mr. Edmund Robertson, a Scottish advocate, who was permitted to appear in the Supreme Court of the United States, in the argument of this case (see 130 U. S. 14), the decision is severely criticised, and it is stated that the best legal opinion in both countries was consulted before the lease was

concluded, including the late Judah P. Benjamin, Q. C., who certified its validity, "as did also the principal solicitor on the other side, who was one of the gentlemen who afterwards succeeded in defeating it in the Supreme Court. The lessee entered into possession, and for about three years paid the rent. In May, 1884, it suddenly repudiated the lease as invalid, and offered to hand over the railroad, large sections of which, by that time, had become wholly dilapi-

more conspicuous illustration of the rule is found in a decision, where a Pennsylvania corporation, engaged in building and operating sleeping-cars, entered into a lease for ninety-nine years, whereby it turned over its properties to the Pullman Palace Car Company, of Illinois, under which the latter company held on to the properties for about sixteen years, and then repudiated the lease, presumably after it had destroyed its rival, worn out its properties, and procured for itself contracts with railroad companies in place of its contracts, which had expired; and it was held that an action could not be maintained by the lessor upon a covenant of the lease for further rent.<sup>1</sup> On the contrary, it was a sound conclusion of the New York Court of Appeals, that where the lessee corporation *held on to the leased property* and continued to operate it, it became *estopped* from repudiating its obligation to pay rent and from setting up the defense of *ultra vires* in an action to recover the same;<sup>2</sup> though the reasoning of the court that such a lease is neither *malum in se* nor *malum prohibitum*, nor void as contrary to public policy, is not in line with the prevailing theory. It is not, indeed, *malum prohibitum*, in the sense of being prohibited by *statute*, but it is *malum prohibitum*, in the sense of being prohibited by the principles of the common law; and nearly all judicial authority concurs to the effect that it is against public policy.<sup>3</sup>

§ 5882. **Right and Duty of Rescission.** — The decisions of the Supreme Court of the United States assert and emphasize

dated, to its owners." The author has ventured to inquire, in another publication, in what possible manner the public policy of the State of Oregon could be wounded by an *alien corporation* turning over a railway property within the State to a *citizen corporation* competent to possess and operate such property: 28 Am. Law Rev. 402.

<sup>1</sup> Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S. 24. The author has ventured to observe unfavorably upon this case in 28 Am. Law Rev. 403.

<sup>2</sup> Woodruff v. Erie R. Co., 93 N. Y. 609; reversing s. c. 25 Hun (N. Y.), 246.

<sup>3</sup> There is a Federal Circuit Court decision to the effect that, there being *no statute* in Indiana which in terms forbids or prohibits railroad corporations of that State from executing *leases* of their property, a lease made by such a corporation is *valid*, — especially where such a lease is entered into with a railroad corporation, formed in an adjoining State, for the purpose of creating a connecting line of travel and traffic. Pittsburgh &c. R. Co. v. Columbus &c. R. Co., 8 Biss. (U. S.) 456. But this decision must be regarded as *overruled* by the decisions of the Supreme Court of the United States, above referred to.

a continuing duty of rescission upon the part of either of the corporations entering into the unlawful contract, and they hold that the fact that it has been *executed in part* does not prevent a rescission in so far as it remains unexecuted,—otherwise the part execution of a void contract would make it valid in all its parts.<sup>1</sup> But, no doubt, this right of rescission is based upon the obligation of doing justice to the other corporation, by putting it, so far as possible, *in statu quo*;<sup>2</sup> and the courts will even interfere to prevent a rescission until this has been done.<sup>3</sup>

§ 5883. **Railway Company cannot Lease its Telegraph Line unless so Authorized.** — The franchise of building and operating a line of telegraph rests upon the same principle as the franchise of building and operating a railway: it is coupled with the obligation of operating the telegraph line, for the benefit of the public, under reasonable conditions and at reasonable charges; and, therefore, the principle under consideration has been justly extended so far as to hold that, where a railroad company had been chartered by act of Congress, and empowered to construct, maintain, and operate a railroad *and telegraph* line, it could not lease its right to construct, maintain, and operate a telegraph line, without the consent of Congress, although it was stipulated in the lease that the lessee should perform all the duties imposed, in respect of the telegraph line, upon the lessor by its charter.<sup>4</sup> Either party being under a continuing duty to withdraw from such an *ultra vires* contract,<sup>5</sup> the railroad company was sustained in seizing the line of telegraph from the telegraph com-

<sup>1</sup> Thomas v. Railroad Co., 101 U. S. 71, 86; Oregon Rail. & Nav. Co. v. Oregonian Nav. Co., 130 U. S. 1.

<sup>2</sup> Woodruff v. Erie R. Co., 93 N. Y. 609.

<sup>3</sup> Post, § 6003. Compare Pullman's Palace Car Co. v. Central Transportation Co., 139 U. S. 62. That such a lease is *voidable* merely, and that, in the absence of fraud, both parties are

bound, until one of them, or a stockholder of one of them, claims an avoidance, see Beveridge v. New York Elev. R. Co., 42 Hun (N. Y.), 656, *mem.*; s. c. 5 N. Y. St. Rep. 59.

<sup>4</sup> Atlantic &c. Tel. Co. v. Union Pac. R. Co., 1 McCrary (U. S.), 541.

<sup>5</sup> Ante, § 5882; Thomas v. Railroad Co., 101 U. S. 71.

pany to which it had leased it, and in resuming control and operation of it; but it was *enjoined* from taking this course until an *accounting* between it and the telegraph company, for the purpose of settling the equities between them, had been made.<sup>1</sup>

§ 5884. **Responsibility of the Lessor for the Torts of the Lessee.**—If the lease is *ultra vires* and void, within the meaning of the preceding sections, the lessor company remains liable for any failure of the lessee company to discharge the *public obligations* which the lessor company has thus endeavored to devolve upon the lessee company. It will be answerable, in damages, for its *negligence* and the negligence of its servants.<sup>2</sup> On the other hand, if the lease has been made

<sup>1</sup> *Ante*, § 5357.

<sup>2</sup> *Ante*, § 5355; *post*, § 6241; *Abbott v. Johnstown &c. Horse R. Co.*, 80 N. Y. 27; *s. c.* 36 Am. Rep. 572, Folger, J., dissenting, on the view of a want of privity; *Balsley v. St. Louis &c. R. Co.*, 119 Ill. 68; *s. c.* 59 Am. Rep. 784; 8 N. E. Rep. 859; 1 Rail. & Corp. L. J. 63; *National Bank v. Atlanta &c. R. Co.*, 25 S. C. 216 (lessor liable for failure of lessee to deliver goods as carrier); *Langley v. Boston &c. R. Co.*, 10 Gray (Mass.), 103; *Nelson v. Vermont &c. R. Co.*, 26 Vt. 717, 721; *s. c.* 62 Am. Dec. 614; *Macon &c. R. Co. v. Mayes*, 49 Ga. 355; *s. c.* 15 Am. Rep. 678; *Railroad Co. v. Brown*, 17 Wall. (U. S.) 445, 450; *Singleton v. Southwestern R. Co.*, 70 Ga. 464; *s. c.* 48 Am. Rep. 574; distinguishing *Jones v. Georgia &c. Co.*, 66 Ga. 558. Some of the courts state the doctrine loosely, without any apparent regard to the question whether the lease was lawful or unlawful: *East Line &c. R. Co. v. Lee*, 71 Tex. 538; *s. c.* 9 S. W. Rep. 604; *Peoria &c. R. Co. v. Lane*, 83 Ill. 448; *International &c. R. Co. v. Kuehn*, 70 Tex. 582. But by running

back through the decisions of these courts on the subject, it will generally be found that in the first case stating the doctrine, stress was laid on the fact that the legislature had not authorized the railroad company to assign its franchises or devolve its public duties upon another person or corporation: *Ohio &c. R. Co. v. Dunbar*, 20 Ill. 623; *Central &c. R. Co. v. Morris*, 68 Tex. 49, 59. And doubtless in a case where it should be made to appear that the legislature had expressly authorized the making of the lease, the court would hold that the sole liability rests upon the lessee,—that is to say, upon the party actually guilty of the actionable wrong. In such a case there would be no more propriety in holding the lessor liable than there would be in holding a private landlord liable for the acts of his tenant in possession of the demised premises. The rule of the text has been applied to railway *contractors* running what are called *construction trains*, so as to make the railway company liable for the killing of stock by such trains: *Illinois Central R. Co. v. Whipple*, 22 Ill. 105. On the other



under authority of law, then, on principle and the better opinion, the lessor company is not liable for damages done by the lessee company, or its servants, in operating the road, unless there is a statutory reservation of such liability.<sup>1</sup> The theory is that, where the lease is authorized by law, the lessor company becomes, *pro hac vice*, the owner of the road, and subject to the police regulations affecting its operation, and to the liabilities growing out of its operation, under the principles of the common law. A further theory is that there is *no privity of contract* between the lessor and a passenger, or a shipper of goods, while the road is in the hands of the lessee. But this theory proves too much, for it would operate to exonerate the lessee where the lease had not been authorized by law. On the other hand, decisions are found which go to the length of holding that, although the lease has been authorized by statute, the lessor railway company remains liable for the negligences of the lessee, even where the failure of duty arises under a contract with the plaintiff, as in case of a passenger injured by the operation of its train.<sup>2</sup>

§ 5885. *Illustrations.*—Where, by the terms of its charter, a street railroad company was *declared liable* for any loss or injury that any person might sustain by reason of any carelessness, neglect, or misconduct of its agents and servants in the management, con-

hand, where a railroad company allowed another company, under a contract, to run its trains over the road of the former company, the latter company was held liable for stock killed in so running its trains through the fact of the road not being fenced, as though it had been the actual owner: *Illinois Central R. Co. v. Kanouse*, 39 Ill. 272. In such a case it has been held that the owner of the railroad is liable for stock killed through its failure to fence its track (*Toledo &c. R. Co. v. Rumbold*, 40 Ill. 143), and *said*, in conformity with the case last previously cited, that the lessee is also liable. *Ibid.*

<sup>1</sup> *Virginia &c. R. Co. v. Washington*, 86 Va. 629; *s. c.* 10 S. E. Rep. 927; 7 L. R. A. 344; 7 Rail. & Corp. L. J. 353; *Mahoney v. Atlantic &c. R. Co.*, 63 Me. 68; *Ditchett v. Spuyten Duyvil &c. R. Co.*, 67 N. Y. 425 (reversing *s. c.* 5 Hun (N. Y.), 165); *Norton v. Wiswall*, 26 Barb. (N. Y.) 618; *Murch v. Concord R. Co.*, 29 N. H. 9; *s. c.* 61 Am. Dec. 631; *Pierce v. Concord Railroad*, 51 N. H. 590, 593.

<sup>2</sup> *Central R. Co. v. Brinson*, 64 Ga. 475. Compare *Peoria &c. R. Co. v. Lane*, 83 Ill. 448, and cases there cited.

struction, or use of its tracks; and it leased a portion of its road to another such company for the period of its charter, and the lessee company signed the lease to still another company, and the legislature ratified and confirmed the lease and assignment,—it was nevertheless held that the lessor company remained liable for any injury to a passenger by the negligence of a servant of the assignee of the lease, notwithstanding that, by the terms of the lease, the assignee and not the assignor would have been liable.<sup>1</sup> So, where a steam railroad corporation stood under a similar liability, by the terms of its charter, and leased its railroad to another such corporation, under the authority of an act of the legislature, which contained the provision “that nothing in this act, or in any law or contract that may be entered into under the authority of the same, shall exonerate the said company, or the stockholders thereof, from any duties or liabilities now imposed upon them by the charter of said company, or by the general laws of the State,” etc.,—it was held that this operated to leave the lessor company burdened with liability for the *torts* of the lessee company in operating the road,<sup>2</sup> and for a failure to perform its *public duties* not resting in contract.<sup>3</sup> Yet it was not liable, where the duty consisted of a *breach of a contract*, as for assaulting and expelling a passenger, who had purchased a ticket and acquired the right to travel on one of the trains of its lessee, for the reason that there was no *privity of contract* between the lessor and the passenger.<sup>4</sup> Where the act done by the lessee is required to be done by the terms of the lease, and where it results in an actionable injury to a third person, then, of course, he may maintain an action, either against the lessor or against the lessee, because they are *joint tort-feasors*. The lessor, having required the lessee to do the act, and the action not having been predicated upon

<sup>1</sup> *Braslin v. Somerville Horse R. Co.*, 145 Mass. 64.

<sup>2</sup> As in *Stearns v. Atlantic & C. R. Co.*, 46 Me. 95, 117 (where it was held that the lessor remained, under its statute, liable for damages caused by fire).

<sup>3</sup> As in *Whitney v. Atlantic & C. R. Co.*, 44 Me. 362, 367; s. c. 69 Am. Dec. 102 (where it was held that the lessor company remained liable under its charter obligation to maintain sufficient fences).

<sup>4</sup> *Mahoney v. Atlantic & C. R. Co.*, 63 Me. 68. This decision is not worthy of any respect. An action against a common carrier for failure to perform its public duties, although assumed by contract, may be brought, either in the form of an action *ex contractu* or *ex delicto*; and in the particular case the action was *trespass* for a *tort*. The case was clearly within the reservation of the statute, and three of the eight judges dissented.

the negligent manner of doing it, cannot escape liability for the consequences of it, — as where the lessee has built an embankment, as required to do by the lease, which results in an actionable injury to a land-owner.<sup>1</sup> Where there was a statute reciting that, “where a corporation in this State, leasing its road to a corporation of another State, shall remain liable as if it operated the road itself,” etc., a corporation *chartered under an act of Congress* was a corporation of another State, within the meaning of this statute; and where a domestic corporation leased its railroad to such Federal corporation, the lessor remained liable for negligent injuries to the servants of the latter.<sup>2</sup>

**§ 5886. Responsibility of the Lessee for Negligence in Operating the Road.** — Although the lessor company may remain liable, under the foregoing doctrine, for the negligence and other torts of the lessee in operating the road, yet it does not follow from this that the lessee will not also be liable. One theory is that, although the public are not bound to look beyond the lessor, yet they may, if they see fit, look to the lessee.<sup>3</sup> And where the rule of the jurisdiction is that the lessor is not liable, then, for that reason alone, the lessee is.<sup>4</sup>

**§ 5887. What Grants of Power Authorize Such Leases.** — It has been held that the power conferred by a statute upon a railroad corporation, to contract with another such corporation for the use of their respective roads, in such manner as the contract may prescribe, not inconsistent with the provisions of the charter of the corporation whose railroad is to be used under such contract,<sup>5</sup> involves the power to make a lease for a term of years.<sup>6</sup> The court also hold that the power

<sup>1</sup> *Miller v. New York &c. R. Co.*, 20 N. Y. St. Rep. 157; *s. c.* 3 N. Y. Supp. 245.

<sup>2</sup> *Smith v. Pacific Railroad*, 61 Mo. 17.

<sup>3</sup> *Nelson v. Vermont &c. R. Co.*, 26 Vt. 717, 721; *s. c.* 62 Am. Dec. 614, *per* Redfield, C. J.

<sup>4</sup> *Mahoney v. Atlantic &c. R. Co.*, 63 Me. 68. That the lessee will not be liable to indictment for the negli-

gence of the lessor in making its road too narrow for safety, — see *Com. v. Pennsylvania R. Co.*, 2 Pa. County Ct. 391.

<sup>5</sup> N. Y. Laws 1839, ch. 218.

<sup>6</sup> *Beveridge v. New York &c. R. Co.*, 112 N. Y. 1, 21; *s. c.* 19 N. E. Rep. 489; 20 N. Y. St. Rep. 962; 2 L. R. A. 648. And see, as tending to the same conclusion, *Woodruff v. Erie R. Co.*, 93 N. Y. 609, 616.

to make such a contract rests in the board of directors, without the consent or ratification of the stockholders, and that, in the absence of fraud or collusion, such a contract, although made by the directors, without special authorization of the stockholders, binds the corporation.<sup>1</sup> It has also been held, under the same statute, that a New York railroad corporation, thus empowered to contract with another railroad corporation, may enter into a contract with such a corporation, owning and operating a railroad in another State, whereby its railroad is leased to the New York corporation, where the legislature of the State of such other corporation has conferred upon it the power to lease its property.<sup>2</sup> Notwithstanding the foregoing decisions, it may be doubted whether, on sound principle, a power conferred upon a railroad company to enter into contracts with other such companies, intended no doubt to confer the mere power of making traffic arrangements, confers upon one railroad company the power to embark its capital in the operation of railroads chartered in other States, and subject to the laws of such States.

§ 5888. **Recovering Rent under an Ultra Vires Lease.** — Although a railway lease may be *ultra vires* and voidable for want of the consent of the legislature,<sup>3</sup> or the consent of the stockholders,<sup>4</sup> yet the lessee cannot on this ground defend an action brought by the lessor to recover *rents already earned*, but the principle of estoppel, elsewhere considered, operates to cut off this defense.<sup>5</sup> This estoppel extends, of course, to one claiming under the lessee.<sup>6</sup> But where the lease is *ultra vires* for want of the consent of the legislature, it does not extend so far as to prevent either party from withdrawing from the contract, and, having settled previous accounts and equities, from defending against any covenant contained in the lease

<sup>1</sup> Beveridge v. New York &c. R. Co., Joseph &c. R. Co., 1 McCrary (U. S.), *supra*. 247.

<sup>2</sup> Day v. Ogdensburgh &c. R. Co., 107 N. Y. 129. <sup>5</sup> *Ibid.*; Woodruff v. Erie R. Co., 93 N. Y. 609; Camden &c. R. Co. v.

<sup>3</sup> *Ante*, § 5880. May's Landing &c. R. Co., 48 N. J. L.

<sup>4</sup> Farmers' Loan &c. Co. v. St. 530.

<sup>6</sup> Woodruff v. Erie R. Co., 93 N. Y. 609.

relating to future occupation or the payment of future rent.<sup>1</sup> There is, however, judicial authority to the effect that where the lease has been *fully executed* on the part of the lessor by delivery of possession, future rents are recoverable so long as the State does not interpose to put an end to the contract;<sup>2</sup> and this is the only conclusion consistent with sound principle.<sup>3</sup>

§ 5889. **Statutes Conferring the Power to Lease.**—It has been held that the general provision of a statute conferring the power upon railroad corporations to contract with other such corporations for the use of their respective roads in such a manner as the contract may prescribe, carries with it the power to make a lease for a term of years.<sup>4</sup>

§ 5890. **Statutory Expressions not Conferring This Power.** It has been held that the power to lease its properties is not conferred upon a railroad company by the grant of certain rights upon a *condition* binding upon itself, its successors, and assigns;<sup>5</sup> nor by a statute authorizing any railroad company, incorporated under the laws of the State and having a terminus in New York harbor, to purchase or lease steamboats and to operate a ferry over New York harbor to any point distant not more than ten miles from the terminus,—so as to authorize a railroad company, so existing, to lease a ferry route having no connection with its terminus;<sup>6</sup> nor by a statute authorizing any railroad company to lease, consolidate, or merge with any other, so as to empower the directors to lease against the

<sup>1</sup> *Ante*, § 5882.

<sup>2</sup> *Camden &c. Co. v. May's Landing &c. R. Co.*, 48 N. J. L. 530. That the acceptance of rent under an *ultra vires* railway lease does not make the same valid,—see *Ogdensburgh &c. R. Co. v. Vermont &c. R. Co.*, 6 Thomp. & C. (N. Y.) 488; *s. c.* 4 Hun (N. Y.), 268.

<sup>3</sup> See *post*, § 6033; 24 Am. Law Rev. 399, *et seq.* Circumstances under which a lessee railroad company acquiring certain rolling-stock held by the lessor under a “*car trust*” was estopped in an action by the car trust

to set up that the lease was *ultra vires*: *Humphrey v. St. Louis &c. R. Co.*, 37 Fed. Rep. 307; *s. c.* 5 Rail. & Corp. L. J. 149.

<sup>4</sup> *Beveridge v. New York Elev. R. Co.*, 112 N. Y. 121; *s. c.* 20 N. Y. St. Rep. 962; 19 N. E. Rep. 489; 2 L. R. A. 648; *Woodruff v. Erie R. Co.*, 93 N. Y. 609, 616.

<sup>5</sup> *Briscoe v. Southern Kansas R. Co.*, 40 Fed. Rep. 273; *s. c.* 7 Rail. & Corp. L. J. 36; 40 Am. & Eng. Rail. Cas. 599.

<sup>6</sup> *Starin v. New York*, 42 Hun (N. Y.), 549.

wishes of a minority of the stockholders;<sup>1</sup> nor by a statute authorizing the merging, consolidating, and leasing, so to authorize the lease without such consent;<sup>2</sup> nor by a charter permitting a railroad company to lease another railroad connected with its own, so as to permit it to lease its own road to another road;<sup>3</sup> nor by a statute authorizing a *sleeping-car company* to contract with other corporations for the leasing and transferring to them of its railway cars and other property, so as to authorize it to transfer all its property, moneys, credits, contracts, and rights of action to another such company, and to deprive itself by covenant of the right to exercise its own franchises.<sup>4</sup>

§ 5891. **Prohibition in Case of Competing Lines.** — Statutes exist in some of the States *prohibiting the leasing or consolidation of parallel or competing lines of railway*. A statute containing the reservation that it shall not be construed to authorize "any railway company to lease its rights or franchises to any other company owning or operating a parallel road thereto,"<sup>5</sup> merely prohibits the leasing of one parallel road to a company owning the other, and was intended to preclude the companies owning parallel roads from making traffic contracts for the partial use of their respective routes between the line of parallelism.<sup>6</sup> Two railroads which do not touch any two common points between which for more than forty miles a third railroad extends, and one of which is in reality a suburban road whose traffic would not be deflected

<sup>1</sup> Mills v. Central R. Co., 41 N. J. Eq. 1.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid. And in a suit by the dissenting minority of stockholders, the court will annul a lease thus illegally made. Ibid.

<sup>4</sup> Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S. 24. That the Nebraska statute (Comp. Stat. Neb., ch. 16, § 94) authorizes the leasing of a railroad constructed by another company only in cases where the road of the lessee and that of the lessor will form a continuous line, — see State v. Atchison &c. R. Co., 24

Neb. 143; s. c. 8 Am. St. Rep. 164; 38 N. W. Rep. 43. That the charter of a corporation other than a railroad company which merely empowers it to sell the real estate necessary for the transaction of its business, when not required for its use, does not extend to giving a power to lease, — see Metropolitan Concert Co. v. Abby, 52 N. Y. Super. 97.

<sup>5</sup> N. Y. Railroad Act of 1884, § 15.

<sup>6</sup> People v. O'Brien, 111 N. Y. 1; s. c. 7 Am. St. Rep. 684; 19 N. Y. St. Rep. 173; 18 N. E. Rep. 692; 2 L. R. A. 25; reversing s. c. 45 Hun (N. Y.), 519.

over the other road to any considerable extent in the event of any leasing or consolidation, are not competing lines, within the meaning of a statute prohibiting the consolidation of competing lines, or the purchase, lease, or control of one such line by another.<sup>1</sup> A statute prohibiting railroad corporations "whose railroads run on parallel or competing lines" from *merging* or *consolidating*,<sup>2</sup> does not prohibit one such corporation from *leasing* its road to another.<sup>3</sup>

§ 5892. **Consent of the Stockholders.**—Statutes exist authorizing railway companies to lease their roads and properties to other such companies, but upon the condition of obtaining the consent of a prescribed number of stockholders, generally two-thirds, by a meeting called in a mode prescribed.<sup>4</sup> Such statutes are certainly mandatory in such a sense that an agreement so to lease which has not received the requisite assent of the stockholders cannot be *specifically enforced*.<sup>5</sup> On principles already alluded to,<sup>6</sup> it cannot be doubted, on the one hand, that such a lease may be set aside at the suit of the stockholders if they proceed seasonably; and on the other hand, that it may be validated by their laches or acquiescence, on the principle of *ratification* or *estoppel*.<sup>7</sup> Where a lease had received

<sup>1</sup> Kimball v. Atchison &c. R. Co., 46 Fed. Rep. 888.

<sup>2</sup> N. Y. Laws 1869, ch. 917, § 9.

<sup>3</sup> Gere v. New York Cent. &c. R. Co., 19 Abb. N. Cas. (N. Y.) 193. That the provision of the Pennsylvania constitution against the leasing or operating by one parallel or competing railroad of another, does not apply to *street railways*,—see Shipley v. Continental R. Co., 13 Phila. (Pa.) 128. A "voting trust" between railroad companies construed as contrary to the Georgia constitution prohibiting agreements between corporations to defeat or lessen competition: Clarke v. Central R. &c. Co., 50 Fed. Rep. 338; s. c. 15 L. R. A. 683.

<sup>4</sup> See, for example, Gen. Stat. Colo. 1883, ch. 19, §§ 124, 125, and Gen.

Stats. Neb., ch. 94, § 2. Under the construction of the *New York Act of 1839*, such a lease might be made by the board of directors without the concurrence of the stockholders: Beveridge v. New York Elev. R. Co., 112 N. Y. 1; s. c. 20 N. Y. St. Rep. 962; 19 N. E. Rep. 489; 2 L. R. A. 648.

<sup>5</sup> Peters v. Lincoln &c. R. Co., 2 McCrary (U. S.), 275; s. c. 12 Fed. Rep. 513; Peters v. Lincoln &c. R. Co., 14 Fed. Rep. 319.

<sup>6</sup> Ante, § 4480, et seq.

<sup>7</sup> Ante, §§ 5271, 5314. What agreement to work a mine is a *contract for labor*, and not a *lease* within the meaning of a statute requiring a ratification by the stockholders,—see Hudepohl v. Liberty Hill Con. Min. &c. Co., 80 Cal. 553; s. c. 22 Pac. Rep. 339.

the assent of three-fourths of the stockholders of the lessor company as required by its charter, the court refused to set it aside, in the absence of any fraudulent conduct or intent, on the ground that, by its provisions, all the rents were to be appropriated for the benefit of the holders of the preferred stock of the lessor.<sup>1</sup>

§ 5893. **Lessee Takes Subject to What Burdens.**—If the charter of the lessor company imposes upon it a liability to pay, as a franchise tax, a percentage of its gross earnings, the lessee company will, in the absence of a release by the legislature, take the property burdened with the obligation to pay this tax, although it has not covenanted to do so in the lease.<sup>2</sup> Where the lease provides that the lessee company is to incur no liability for “debts, dues, claims, and liabilities,” of the lessor company, it will not become liable to perform a parol agreement of the lessor company to furnish an *annual pass* to a land-owner who surrendered a right of way over his land in consideration of such promise.<sup>3</sup>

§ 5894. **Formalities in the Execution of Such Leases.**—On the one hand, a mere *corpora e vole* that the railroad of the corporation be leased to another such corporation at a stated rental, is *not of itself a lease*, within the meaning of a prohibitory statute, or otherwise.<sup>4</sup> On the other hand, where a formal lease has been executed, it is not necessary to its validity, in the absence of a statute otherwise providing, that corporate action authorizing or ratifying it should be taken *within the limits of the State* by which the lessor corporation was created.<sup>5</sup>

<sup>1</sup> *Middletown v. Boston & C. Air Line R. Co.*, 53 Conn. 351, 359.

<sup>2</sup> *New York v. Twenty-third Street R. Co.*, 113 N. Y. 311; *s. c.* 22 N. Y. St. Rep. 598; 21 N. E. Rep. 60; affirming *s. c.* 48 Hun (N. Y.), 552; and 16 N. Y. St. Rep. 137.

<sup>3</sup> *Pennsylvania Co. v. Erie & C. R. Co.*, 108 Pa. St. 621. Construction of a contract held to be an assignment of such a lease by the lessee, making the

assignee liable to perform the covenants of the original lease and to pay all valid claims of his assignor assumed thereby: *Frank v. New York & C. R. Co.*, 44 Hun (N. Y.), 624, *mem.*; *s. c.* 7 N. Y. St. Rep. 814.

<sup>4</sup> *Peters v. Boston & C. R. Co.*, 114 Mass. 127.

<sup>5</sup> *Pittsburgh & C. R. Co. v. Columbus & C. R. Co.*, 8 Bi s. (U. S.) 456. Liability on a *replevin bond* given to



§ 5895. **Right of Eminent Domain does not Pass.**—Where a railroad corporation has been created by the legislature and clothed with the power to condemn land for its uses, and thereafter leases its railroad for a hundred years to another such corporation, this delegated power of eminent domain does not pass under the lease, but remains with the lessor, and the legislature may deal with the lessor exclusively in exercising a reserved power to amend its charter.<sup>1</sup>

§ 5896. **Validity of Leases Extending Beyond Term of Corporate Existence.**—Down to the present time, there seems to be no judicial authority opposed to the conclusion that a lease by one railroad corporation of its property to another corporation, may be valid, although made for a longer term than the period of the corporate existence of the lessor. Such a lease will, if not otherwise invalid, be good for that term;<sup>2</sup> and it may be assumed that it will be prolonged without the execution of a new contract, if the period of the corporate existence of the lessor is renewed by a reincorporation in some way provided by law.<sup>3</sup>

§ 5897. **Actions by Third Parties on the Covenants of Such Leases.**—The right of the third party to maintain an action on the covenants of such a lease, where the covenant requires, we will say, the lessee to do something in his favor, as to pay a debt owing by the lessor to him, depends upon principles of procedure which are not uniform. By the principles of the

recover certain *attached property* of the lessor company, with reference to the defense that its execution had not been authorized by the board of directors: *Bank of Middlebury v. Rutland &c. R. Co.*, 30 Vt. 159. When *appointment of receivers* of the property of the lessor corporation *not an eviction*: *Pittsburgh &c. R. Co. v. Columbus &c. R. Co.*, 8 Biss. (U. S.) 456; *Frank v. New York &c. R. Co.*, 44 Hun (N. Y.), 624, *mem.*; *s. c.* 7 N. Y. St. Rep. 814; and see *post*, §§ 6998, 6999.

<sup>1</sup> *Worcester v. Norwich &c. R. Co.*, 109 Mass. 103.

<sup>2</sup> *Gere v. New York Central &c. R. Co.*, 19 Abb. N. Cas. (N. Y.) 193.

<sup>3</sup> That a lease by a railroad company of the privilege of laying tracks over parts of its route will not avail to retain the corporate existence of the lessor company, under a statute requiring it to make a certain expenditure within a given time,—see *Re Brooklyn &c. R. Co.*, 81 N. Y. 69.

common law such an action was not maintainable, but the rule is understood to have been otherwise in equity. Under many of the modern codes of procedure an action is maintainable by third parties upon a contract made between two other parties for his benefit, and where that principle obtains, a third party may maintain an action under the circumstances above stated. But the promise must be a promise to render something to the person suing. For instance, where the promise is to pay an annual dividend to the *lessor corporation* upon its capital stock, this has been held to give no right of action to recover such a dividend, to a *stockholder* of the *lessor corporation*.<sup>1</sup> Outside of these principles, a corporation has no power to *transfer its entire property* by lease so as to prevent the application of it at its full value to the satisfaction of its existing debts; but a court of equity will in a proper case of this kind decree the lessee corporation to pay a judgment recovered against the lessor.<sup>2</sup>

**§ 5898. Covenants to Repair.** — A corporation having the power to acquire, by lease, a building for its use, has the implied power to enter into the usual covenant to repair, and, at the determination of the lease, to surrender in good condition; and if, having so covenanted, the property is destroyed by fire, it will be bound to rebuild.<sup>3</sup>

<sup>1</sup> *Beveridge v. New York Elev. R. Co.*, 42 Hun (N. Y.) 656, *mem.*; *s. c.* 5 N. Y. St. Rep. 59. Compare *ante*, § 2293.

<sup>2</sup> *Chicago &c. R. Co. v. Third Nat. Bank*, 134 U. S. 276.

<sup>3</sup> *Abby v. Billups*, 35 Miss. 618; *s. c.* 72 Am. Dec. 143. *Construction of particular railway leases*: — With reference to change of location after road located and built: *Minneapolis &c. R. Co. v. St. Paul &c. R. Co.*, 35 Minn. 265; *s. c.* 28 N. W. Rep. 705. With reference to payment of rent on the basis of part of the gross earnings and receipts: *Railroad Co. v. Railroad Co.*, 44 Ohio St. 287; *s. c.* 7 N.

E. Rep. 139. With reference to the effect upon the lease of the appointment of receivers, and a proceeding to forfeit the franchises of the company, and the pendency of proceedings in a court of the United States: *New York Elev. R. Co. v. Manhattan R. Co.*, 63 How. Pr. (N. Y.) 14. With reference to a demand of rescission on the ground that the lessor had failed to comply with a covenant to arrange, provide for, adjust, and classify its indebtedness: *Pittsburgh &c. R. Co. v. Columbus &c. R. Co.*, 8 Biss. (U. S.) 456. With reference to the right of a judgment creditor of the lessor to a decree requiring the

§ 5899. **Offer Reward for Criminals.**—An *implied power* has been ascribed to railroad companies, having in view the protection of their property, to issue a printed circular, authorizing a general and standing reward, for the arrest with proof to convict, of any person or persons maliciously obstructing its tracks.<sup>1</sup>

§ 5900. **Make Freight Contracts Before Completion of Line.**—A contract of a railroad company, before the completion of its line, for the carriage of freight, cannot be regarded as *ultra vires*, nor can the corporation avail itself of this defense where the contract has been fully *executed* by the other contracting party.<sup>2</sup>

§ 5901. **Contract to Transport Freight at Specified Rates for Ten Years.**—A railway corporation, authorized by its charter “to do all acts needful to carry into effect the objects for which it was created,” including the right to exact a compensation not exceeding a specified rate for the transportation of persons and property, may contract to transport the freight of another corporation at specified rates for the period of ten

lessee to pay the amount of his judgment: *Chicago & C. R. Co. v. Third Nat. Bank*, 134 U. S. 276; affirming *s. c.* 26 Fed. Rep. 820. With reference to a covenant by the lessee to organize a new company and to issue the lessor stock therein: *Catlin v. Green*, 5 N. Y. St. Rep. 866. Statute of North Carolina authorizing a lease of iron rails: N. C. Laws 1887, ch. 341. Construction of a lease held not to carry the right which the lessor had, under a contract, of *running its cars over certain tracks of another company*: *Brooklyn Crosstown R. Co. v. Brooklyn City R. Co.*, 51 Hun (N. Y.), 600; *s. c.* 22 N. Y. St. Rep. 56; 3 N. Y. Supp. 901. Compare *Norwich & C. R. Co. v. Worcester*, 147 Mass. 518; *s. c.* 18 N. E. Rep. 409.

<sup>1</sup> *Central R. & C. Co. v. Cheatham*,

85 Ala. 292; *s. c.* 7 Am. St. Rep. 48; 4 South. Rep. 828. As to the nature of the contract created by the *advertisement of a reward* and a performance of such services, see *Ryer v. Stockwell*, 14 Cal. 134; *s. c.* 73 Am. Dec. 634, and note 638; *Fitch v. Snedaker*, 38 N. Y. 248; *s. c.* 97 Am. Dec. 791; *Besse v. Dyer*, 9 Allen (Mass.), 151; *s. c.* 85 Am. Dec. 747, and note 749; *Hayden v. Souger*, 56 Ind. 42; *s. c.* 26 Am. Rep. 1, and note 5. As to whom may claim the reward, see *Re Russell*, 51 Conn. 577; *s. c.* 50 Am. Rep. 55; *Hayden v. Souger*, 56 Ind. 42; *s. c.* 26 Am. Rep. 1; *Auditor v. Ballard*, 9 Bush (Ky.), 572; *s. c.* 15 Am. Rep. 728.

<sup>2</sup> *Louisville & C. R. Co. v. Flanagan*, 113 Ind. 488; *s. c.* 3 Am. St. Rep. 674, 680.

years, and for a breach of such contract the other party will have an action for damages. Such a contract, it is reasoned, is not necessarily void as being an unjust discrimination between shippers. Nor is it void for want of a sufficient consideration, nor for want of mutuality. Nor is the question one of abuse, by the board of directors, of the judgment and discrimination vested in them by law, where the action is brought by the other contracting party, and neither the stockholders nor the public authorities are complaining. Neither does the length of time the contract has to run affect the question of the power to make it.<sup>1</sup>

### ARTICLE III. TURNPIKE CORPORATIONS.

SECTION	SECTION
5904. Powers in respect of establishing route.	5918. Power to detain travelers for non-payment of tolls.
5905. Changing the route and <i>termini</i> .	5919. Fraudulent evasion of the payment of tolls.
5906. Power to build its road upon the public highway.	5920. Exemptions from payment of tolls.
5907. Protecting right of way from encroachment.	5921. Construction of statutes creating such exemptions.
5908. Manner of constructing the road.	5922. Further of such statutes.
5909. Liability for damages in building the road.	5923. Continued.
5910. Right to erect toll-gates at particular places.	5924. Construction of contracts creating such exemptions.
5911. Further of this subject.	5925. No right to charge unreasonable tolls.
5912. Right to erect toll-houses, dig wells, etc., upon right of way.	5926. Forfeiture of franchise for exacting illegal tolls.
5913. Whether the turnpike company can change its gates after having erected them.	5927. Right to exact tolls within cities and towns.
5914. When the right to demand toll arises.	5928. Vehicles how rated for the purpose of tolls.
5915. Right to demand tolls for the whole distance from gate to gate.	5929. Penalties against toll-gatherers.
5916. Whether toll demandable for traveling between two gates.	5930. Actions to recover tolls.
5917. Right to demand pre-payment of tolls.	5931. Defenses to such actions.
	5932. Whether a defense that the road is not properly constructed or repaired.
	5933. Actions to recover back tolls illegally exacted.
	5933 a. Penalties for forcibly passing toll-gates without paying toll.

<sup>1</sup> Railroad Co. v. Furnace Co., 37 Ohio St. 321; s. c. 41 Am. Rep. 509.

SECTION

- 5934. Breaking the toll-gate and passing.
- 5935. Further of this subject.
- 5936. Penal liability of officers.
- 5937. Liability for failure to perform its public duties.
- 5938. Effect of an abandonment by the turnpike company.

SECTION

- 5939. What will be evidence of an abandonment.
- 5940. Public proceedings to vacate such roads and to open them as common highways.
- 5941. Acts which turnpike companies may and may not do.
- 5942. Powers as depending upon a valid organization.

§ 5904. Powers in Respect of Establishing Route. — It has been held that where the incorporating act directs the commissioners to select the shortest and best route between two specified towns, the intent of the legislature is that the road shall run from the *corporate limits* of one town to the corporate limits of the other;<sup>1</sup> that a statute, enacting that any road, made by a turnpike company organized thereunder, shall not be less than five miles in length, is not satisfied by the building of a road four miles in length, and the *buying* of the right to use an additional mile of the road of another company;<sup>2</sup> that a description in the articles of association of a turnpike company of its proposed road, as beginning at a point where two designated roads touch each other, at a described corner of a described section, and tracing the route to a described point in another described section and range where it terminates, is sufficient, notwithstanding it fails to state the *range* of the section at the point of beginning;<sup>3</sup> that the exact location of the turnpike of such a company need not be shown in its articles of association, but that the directors may fix the exact route within the limits of a general description given in such articles;<sup>4</sup> that an incorporating act which prescribes the point of commencement of the road as a point *near* another designated point, demands only a reasonable conformity, and is complied with where the distance between the two points is as great as a mile and a half;<sup>5</sup> and that,

<sup>1</sup> Franklin &c. Turnp. Co. v. Campbell, 2 Humph. (Tenn.) 467.

<sup>2</sup> Green v. Beeson, 31 Ind. 7. Compare *ante*, § 5879.

<sup>5</sup> Hadley v. Harpeth Turnp. Co., 2 Humph. (Tenn.) 555.

<sup>3</sup> Estell v. Knightstown &c. Turnp. Co., 41 Ind. 174.

<sup>4</sup> Barnhill v. Mill Spring &c. Gravel Road Co., 51 Ind. 354.

where a charter requires the chief engineer of the State to survey and mark the most direct and practicable route, and makes it the duty of the company to follow that route, a general description of the route to be traversed, made by the chief engineer, such as will "serve to guide the directory [of the company] in its actual location," is not a compliance with the statute, and the directory are not bound by such designation.<sup>1</sup>

§ 5905. **Changing the Route and Termini.**—It has been held that a company, having once located its road, *cannot change the location at will*, but must keep it in repair, unless prevented by some *vis major*, or the lawful appropriation of it by the public;<sup>2</sup> but that it has a discretion to change its route so as to *avoid obstacles* and to obtain the best route, except that it cannot change or abandon its original *termini*;<sup>3</sup> but on the other hand, that a municipal corporation cannot enjoin a turnpike company from exercising a power conferred in its charter to construct its road within the borough limits, on the ground that it originally located it upon another route without such limits, and thereby *exhausted its power*, where it delayed bringing its action for eleven years, and failed to make clear proof that the former location had ever been completed.<sup>4</sup>

§ 5906. **Power to Build its Road upon the Public Highway.**—It is competent for the legislature of a State to em-

<sup>1</sup> Hadley v. Harpeth Turnp. Co., 2 Humph. (Tenn.) 555.

<sup>2</sup> Kenton County Court v. Bank Lick Turnp. Co., 10 Bush (Ky.), 529.

<sup>3</sup> Beckner v. Riverside &c. Turnp. Co., 65 Ind. 468.

<sup>4</sup> Dunmore's Appeal, 1 Pa. Supr. Ct. Cas. 567; s. c. 17 Atl. Rep. 34. But if the right of way of an old highway, established by long and uninterrupted user, is granted by the County Court to an incorporated company, for the purpose of constructing thereupon a plank road, it is not

within the power of the company receiving such grant to depart from the line of the old road at such points as they may choose, and thus confer upon the owners of the soil, over which the old road passes, the right to obstruct the remaining portions not appropriated by the company for the uses intended,—especially, if such obstruction result in inconvenience to the public, arising out of the fact that another highway intersecting the road granted to the company is thereby obstructed. Topp v. Garrett, 1 Swan (Tenn.), 459.

power a private corporation to construct a turnpike upon a *public highway*, to establish toll-gates thereon, and to maintain the road by means of tolls collected from the public who use the highway;<sup>1</sup> but, upon the well-known principle that grants of franchises to corporations which are in derogation of the common or public right are strictly construed in favor of the public and against the grantee,<sup>2</sup> it has been held that a mere authority in the charter of such a company to construct a turnpike between two designated *termini*, does not carry with it, by implication, the right to appropriate a public highway already in existence, the appropriation not being a matter of necessity, but of economy merely.<sup>3</sup> But where the incorporating act authorized the appointment of a committee to locate the road, and they established it upon a pre-existing highway, it was held that their action was tantamount to an express legislative grant of a right to appropriate the highway.<sup>4</sup> Where the right has been granted to construct a turnpike upon an existing public road, the exercise of the right necessarily has the effect of abolishing the road as a common and unrestricted highway, and also (it has been held) of abolishing roads which run parallel and adjoining to it.<sup>5</sup> Under some statutory systems, the company is required to obtain the consent of the county authorities before it can take possession of a public highway; but it has been held that where it is in possession, and an action has been brought to enjoin it from continuing in possession, the *consent* of the county commissioners will be *presumed*.<sup>6</sup> On the other hand, where the County Court is empowered by the governing statute to prescribe the extent, terms, and conditions upon which the public road may be thus used, if one corporation is organized to

<sup>1</sup> Chagrin Falls &c. Plank Road Co. v. Cane, 2 Ohio St. 419; Pantan Turnp. Co. v. Bishop, 11 Vt. 198; Nolensville Turnp. Co. v. Baker, 4 Humph. (Tenn.) 315.

<sup>2</sup> *Ante*, §§ 5345, 5659.

<sup>3</sup> Groff's Appeal, 128 Pa. St. 621; s. c. 18 Atl. Rep. 431; 24 Week. Not. Cas. (Pa.) 425; 5 L. R. A. 661.

<sup>4</sup> Pantan Turnp. Co. v. Bishop, 11 Vt. 198.

<sup>5</sup> Nolensville Turnp. Co. v. Baker, 4 Humph. (Tenn.) 315. Compare *ante*, § 5404.

<sup>6</sup> Palmer v. Logansport &c. Gravel Road Co., 108 Ind. 137; s. c. 8 N. E. Rep. 905.

construct the improved road and another corporation is subsequently organized for the same purpose, and the subsequent company first obtains an agreement with the County Court, under the statute, its rights take precedence of those of the first company, and the franchise of the former is not in a legal sense impaired thereby.<sup>1</sup> The title thus acquired by the private corporation in the public highway is not an absolute title in fee, but an easement and franchise burdened with a public duty, which may be *lost by abandonment*, in which case the public rights re-attach without any judicial declaration to that effect, as hereafter explained.<sup>2</sup>

**§ 5907. Protecting Right of Way from Encroachment. —**

The company will be entitled to an *injunction* to prevent encroachments upon its right of way by the erection of buildings thereon, etc.;<sup>3</sup> but the extent to which the owner of the fee may occupy and use the right of way, provided he does not directly interfere with the easement of the corporation, has been a subject of more or less conflict of opinion. But the rights of the corporation, in respect of its right of way, do not attach until its road has been actually located: those rights do not relate back to the filing of its articles of association; and consequently settlers upon the land upon which such location is made, who become such after the filing of the articles of incorporation, but prior to the actual condemnation, do not take their lands subject to the right of way of the corporation.<sup>4</sup>

**§ 5908. Manner of Constructing the Road. —** If the charter requires the road to be laid out at a certain width, the corporation is bound to construct it and maintain it at that width, as a condition of continuing to exercise its

<sup>1</sup> Douglas County Road Co. v. Canyonville &c. Road Co., 8 Or. 102. Compare Douglas County Road Co. v. Douglas County, 6 Or. 299.

<sup>2</sup> Post, § 5938. That in an inquisition concerning a turnpike company, the fact that *jurors* have paid toll to the company is not a *disqualification*,

—see Re Germantown &c. Turnp. Co. (Pa.), 1 Leg. Gaz. Rep. 252.

<sup>3</sup> Shippen v. Paul, 34 N. J. Eq. 314.

<sup>4</sup> Riddell v. Animas Canon Toll R. Co., 5 Colo. 230. Construction of a statute authorizing the closing up of *lateral roads*: Shuck v. Lebanon &c. Turnp. Road Co., 9 Bush (Ky.), 168.



franchise; and the fact that it is laid out on an ancient highway furnishes no excuse for the failure to perform this condition.<sup>1</sup> The *certificate of commissioners or inspectors*, under a charter or governing statute, to the effect that the road *has been constructed* as thereby required, is not conclusive, *as against the State*, in an action to forfeit the franchises of the corporation by reason of its failure to perform its public duty in this respect;<sup>2</sup> but it is conclusive as against a private person.<sup>3</sup> If the governing statute requires the road to be *arched*, this means that the center of it is to be rounded up; and the statute is not satisfied by the mere construction of side ditches.<sup>4</sup> If the statute requires the road to be bedded with stone, gravel, or such other material as may be found on its line, so as to form a hard surface, this means durable material; and the statute is not satisfied with the making of a mere dirt road, if gravel and stone can be found within one or two miles of the line.<sup>5</sup>

**§ 5909. Liability for Damages in Building the Road.**—A grant of right to occupy and use a public highway for its gravel road confers upon the company a right to make such *excavations* thereon as may be necessary for the grading of the same.<sup>6</sup> But if the company, in the construction of its road, collects a quantity of *water* and casts it upon the land of an adjoining owner, it will be liable in damages therefor, the same as any other proprietor will under like circumstances; and the land-owner in turn has a right to protect himself from the invasion by obstructing any channel producing it, although the turnpike will thereby be injured. It was so held where a turnpike had been located upon an ancient highway from which the water was conducted by three drains into the

<sup>1</sup> *People v. Fishkill &c. Plank Road Co.*, 27 Barb. (N. Y.) 445.

<sup>2</sup> *People v. Kingston &c. Turnp. Co.*, 23 Wend. (N. Y.) 193; *s. c.* 35 Am. Dec. 551; *People v. Fishkill &c. Plank Road Co.*, 27 Barb. (N. Y.) 445.

<sup>3</sup> *Post*, §§ 5914, 5931.

<sup>4</sup> *People v. Waterford &c. Turnp. Co.*, 3 Abb. App. Dec. (N. Y.) 580.

<sup>5</sup> *People v. Waterford &c. Turnp. Co.*, 3 Abb. App. Dec. (N. Y.) 580. Minimum width eight and one-half feet under statute of Indiana: *Neff v. Mooresville &c. Gravel Road Co.*, 66 Ind. 279.

<sup>6</sup> *Carter v. Clark*, 89 Ind. 238.

adjoining land, two of which drains the company permitted to be closed so as to collect and turn all the water upon the land of a particular lot-owner.<sup>1</sup>

**§ 5910. Right to Erect Toll-gates at Particular Places.**

In determining whether a power exists to erect a toll-gate across a highway at a given place, there will not be much difficulty if certain considerations are kept in mind. These are: 1. That a road which has acquired the character of a public highway in any of the modes provided by law, is *prima facie* open to the free use of the whole public; from which it would follow that, where a right to obstruct it by means of a *toll-gate* and to demand the payment of tolls from members of the public passing thereon, is claimed by any person or corporation, the claimant must justify under an act of the legislature clearly conferring the right. If there is no such act of the legislature, then the toll-gate stands on the footing of any other *purpresture*; it is merely a *public nuisance*; the author of it is liable to be punished by *indictment*, and it may be removed by *injunction*, either at the suit of the State or at the suit of a private person specially injured thereby.<sup>2</sup> 2. But if it has been authorized by the legislature, it cannot, for that very reason, be a nuisance, either public or private, provided the statute be valid; and whether the statute be valid will generally depend upon the question whether or not it authorizes the taking or damaging of private property for public use without just compensation, within the meaning of constitutional inhibitions. 3. The franchise to construct a turnpike road, for the use of the public upon a given route, in consideration of the right to exact tolls from persons traveling thereon, implies the *right to erect toll-gates* at such places as may be reasonably necessary to secure the collection of tolls and to prevent the traveling public from making use of the road without the payment of tolls.<sup>3</sup>

<sup>1</sup> Limerick &c. Turnp. Co.'s Appeal, 80 Pa. St. 425.

<sup>2</sup> *Post*, Ch. 187; Maysville &c. Turnp. Co. v. Ratliff, 85 Ky. 244; s. c.

W. Rep. 148; Wales v. Stetson, 2 Mass. 143; s. c. 3 Am. Dec. 39. Compare Craig v. People, 47 Ill. 487.

<sup>3</sup> A turnpike company may, there-

§ 5911. Further of This Subject.—On the other hand, where the charter does not clearly designate the places along the route, or the distances at which the company is authorized to erect such gates, and its meaning in this respect is doubtful or ambiguous, then, under principles already adverted to,<sup>1</sup> it is to be construed *most strongly against the grantee* and in favor of public trade and convenience;<sup>2</sup> and so as not to authorize the doing of that which will amount to a *private nuisance*.<sup>3</sup> But on the other hand, this rule of construction does not exact that the judge should disregard the purpose of the legislature, and so construe the statute as to destroy or substantially impair the grant. It must be construed *reasonably*; and if it enacts that “no gate or turnpike shall be erected on any part of the highway which has heretofore been used as such,” this will not prevent the erection of a gate upon an ancient highway which has been vacated, and in respect of which the public right of travel has been terminated.<sup>4</sup> It is, of course, competent for the company to erect

fore, place its gates so as most effectually and certainly to collect tolls, in so far as it is not restricted by its charter or by statute; and to that end it may also *change any gate* after it is once established. Upon this principle, it has been held that it may, unless its charter otherwise provides, erect gates at a distance of five miles apart, proportioning the toll to the distance, where, without so erecting them, a space of nearly five miles each way of its turnpike road, from the entrance of a public race-track, will be subject to use by persons attending the meetings without the payment of tolls. *Maysville &c. Turnp. Co. v. Ratliff*, 85 Ky. 244; *s. c.* 3 S. W. Rep. 148.

<sup>1</sup> *Ante*, §§ 5345, 5659.

<sup>2</sup> *Stormfeltz v. Manor Turnp. Co.*, 13 Pa. St. 554.

<sup>3</sup> *Snell v. Buresh*, 123 Ill. 151.

<sup>4</sup> *State v. Passaic Turnp. Co.*, 27

N. J. L. 217. There is some difficulty in applying this principle, because what the legislature has authorized cannot, for that reason, be deemed a nuisance, and an unauthorized toll-gate is a nuisance *per se*. Therefore, to say that, while the legislature has authorized the turnpike company to erect toll-gates without restrictions as to place or distance, yet this power cannot be so exercised as to create a nuisance, is to reason in a circle,—especially in view of the fact that nothing is more indefinite, in many cases, than what is or is not a nuisance. It may readily be understood, however, that the power may be exercised *unreasonably* and *oppressively*. For instance, the lands of a proprietor may be situated at the outskirts of an incorporated town or village, in which case the erection of a toll-gate at such a place will deflect a large portion of the public travel to other roads by

toll-gates so as to intersect and stop an old highway, provided it is empowered so to do by the terms of its charter, which will operate to control the use of the road and to override the contrary provisions of any general statute on the subject, under the principle *generalia specialibus non derogant*.<sup>1</sup> It is clear that the erection of a toll-gate *laterally* with the turnpike road, so as to obstruct a free public highway crossing the turnpike, may or may not be a public nuisance, according to the use to which the gate is put. If it is so used as to prevent a traveler on the public highway from crossing the turnpike and pursuing his journey thereon, then it will be a mere *purpresture* of the highway, in the absence of any legislative authorization, and, as such, a *public nuisance*. But, if it is used for the mere purpose of preventing travelers, who use the turnpike road, from leaving the road and passing into the public highway before they have paid their tolls for the use of the road, or from entering upon the turnpike without paying toll, then it is not a public nuisance, and is not unlawful, and the erection of it where its use is thus restrained is within the general powers of a turnpike company whose charter does not prescribe the places at which its gates shall be erected.<sup>2</sup>

which the town or village may be entered, and thereby materially damage the land and reduce its rental value. Such, roughly stated, were the facts in *Snell v. Buresh*, 123 Ill. 151. The doctrine that permissive statutes are not to be construed as conferring a license to commit a nuisance where the thing authorized can be done, or the thing granted can be enjoyed, without committing a nuisance, is one familiar to the profession. See *Cogswell v. New York &c. R. Co.*, 103 N. Y. 10; *s. c.* 57 Am. Rep. 701; *Hill v. Metropolitan Asylum District*, 4 Q. B. Div. 433; *s. c.* 6 App. Cas. 193; *Truman v. London R. Co.*, 25 Ch. Div. 423; *Baltimore &c. R. Co. v. Fifth Baptist Church*, 108 U. S. 317; all cited in *Snell v. Buresh*, *supra*.

<sup>1</sup> See, in part confirmation of the text, *Farmers' Turnp. Road v. Coventry*, 10 Johns. (N. Y.) 390; *People v. Denslow*, 1 Caines (N. Y.), 177.

<sup>2</sup> *Ayres v. Turnpike Co.*, 9 N. J. L. 33. It has been held, in substance, where the charter of a turnpike corporation gave it authority to erect a toll-gate "at a place *near* the Massachusetts line, as the president and directors should direct,"—that the erection of a toll-gate *two miles and three-quarters* distant from the Massachusetts line was not authorized by the statute; and hence that an action lay against the toll-gatherer by one from whom he had demanded and received toll at such gate, to recover back the money so unlawfully demanded and received. *Griffen v. House*, 18 Johns. (N. Y.) 397. But,

§ 5912. **Right to Erect Toll-houses, Dig Wells, etc., upon Right of Way.**—Although, by the condemnation or purchase of its right of way, the turnpike company acquires only an *easement* for the purpose of exercising its franchises, yet it is not inconsistent with the rights of the owner of the *fee* that it should have the power to erect *toll-houses* at its toll-gates within the limits of its right of way, and *dig wells* at such toll-houses for the accommodation and use of its toll-gatherers.<sup>1</sup> But if the house is built for a purpose not connected with the operation of the road, or if, after having been built for such a purpose, it is rented out or otherwise put to a different use, this will be an invasion of the rights of the owner of the fee, for which he may maintain an action of *trespass* at common law.<sup>2</sup> This principle is not altered by the fact that, in condemning the land for the right of way, compensation was not made for the detriment which a toll-house might occasion to the owner of the fee.<sup>3</sup>

§ 5913. **Whether the Turnpike Company can Change its Gates after having Erected Them.**—On this subject there are two theories. One is that, where the legislature has clothed the directors of the turnpike company with the power to locate and erect toll-gates according to their discretion, or with the power to erect and locate them within certain pre-

where the incorporating act authorized the company to erect a toll-gate “near the dwelling-house of John Van Hosen,” and the company erected a gate *eight chains and fifteen lengths* from such dwelling-house, and at a place where it intercepted the travel upon a public road which crossed the turnpike road *laterally*,—it was held that it was authorized by the statute; since the statute did not require that it should be constructed *nearest* the dwelling-house, and since the court would not interfere with the discretion vested in the directors by the legislature. *People v. Denslow*, 1 Caines (N. Y.), 177. The

decision would seem to have been fundamentally erroneous. The grant ought not to have been so interpreted as to allow the company, in the exercise of a mere discretion, to obstruct a lateral road, which had been a public highway for forty years.

<sup>1</sup> *Ward v. Marietta &c. Turnp. Co.*, 6 Ohio St. 15; *Ridge Turnpike v. Stoevers*, 2 Watts & S. (Pa.) 548, and 6 Watts & S. (Pa.) 378.

<sup>2</sup> This doctrine was conceded in *Ridge Turnp. Co. v. Stoevers*, 6 Watts & S. (Pa.) 378.

<sup>3</sup> *Ward v. Marietta &c. Turnp. Co.*, 6 Ohio St. 15.

scribed limits, when they have once exercised the *power* it becomes *exhausted*, so that they cannot thereafter remove them to another location, or discontinue them and erect new ones elsewhere.<sup>1</sup> There is neither sense nor justice in this doctrine: no sense, because there is nothing in the language of such charters to indicate that the legislature intended to put such a restraint upon the company in the exercise of the franchises granted; no justice, because in many cases such a construction operates to destroy or substantially impair the granted franchises. It restrains the company from *correcting a mistake* that it may have made in selecting the site for a toll-gate, or from making changes in its toll-gates which may be required by the construction of lateral public roads, by the building of towns, by the establishment of race-courses, or by other changes which are constantly taking place in a growing country. The better opinion is that a turnpike company, having a general power, without restriction, to erect toll-gates and receive tolls, may from time to time alter the location of such gates, as its exigencies and the necessity of protecting its franchises require;<sup>2</sup> and that such a company, having power under its charter to erect as many toll-gates as may be necessary to collect its lawful tolls, may *increase the number* of gates originally established, and change their situation from time to time, so as to prevent the traveling public from evading the payment of tolls, provided they are not placed in a situation prohibited by the charter or governing statute.<sup>3</sup> But where the charter limits the number of gates and provides that they shall be erected at such places as a *committee*, appointed by the statute, shall direct, then it is a reasonable conclusion that, where the committee have acted and made the designation, the directors of the corporation have no power to remove the gates to some other place to suit their

<sup>1</sup> *Griffen v. House*, 18 Johns. (N. Y.) 397; *State v. Norwalk & Co. Turnp. Co.*, 10 Conn. 157; *Hartford & Co. Turnp. Soc. v. Hosmer*, 12 Conn. 361.

<sup>2</sup> *Fowler v. Pratt*, 11 Vt. 369. See *Maysville & Co. Turnp. Co. v. Ratliff*,

85 Ky. 244, which supports the text and presents a collection of facts strongly illustrating the propriety of the rule.

<sup>3</sup> *Cheshire Turnpike v. Stevens*, 10 N. H. 133.

convenience,—especially where there is a public law prescribing the manner in which such removals may be made, by petition to the public authorities.<sup>1</sup>

§ 5914. **When the Right to Demand Toll Arises.**—Statutes and charters, authorizing the organization of turnpike and other toll-road companies, generally prescribe the *conditions precedent* which must be performed before the right to demand toll arises.<sup>2</sup> In California, a turnpike company cannot demand tolls from the traveling public until the number and location of its toll-gates have been fixed by an *order of the board of supervisors* of the county, and this is so, although the supervisors have fixed its rates of toll; and an order of the supervisors authorizing the directors of such a corporation to establish toll-gates at such places as they may designate, does not confer upon it the franchise of collecting tolls. In other words, the supervisors have no authority to authorize tolls to be collected except at gates which they themselves have established in compliance with law; and where they have prescribed no such gates, but have attempted to delegate their functions to the directors of the turnpike company, the condition has not arisen which authorizes the company to collect tolls. If the condition precedent named in the statute upon which the right of the toll-road corporation to demand tolls from the traveling public has not accrued, any person using the highway and refusing to pay toll may defend an action brought against him to recover such tolls upon this ground; and such a defense is in no sense an attempt to litigate with the corporation the question of its rightful possession of a franchise, in a *collateral proceeding*.<sup>3</sup> But where the right to determine whether this condition precedent has taken place, and, upon making the determination, to confer upon the corporation the franchise or license of collecting tolls, is vested

<sup>1</sup> Hartford &c. Turnp. Corp. v. Baker, 17 Pick. (Mass.) 432.

<sup>2</sup> For the construction of such statutes, see Hinsdale Bridge v. Warren, 6 N. H. 154; Southport Plank

Road Co. v. Russell, 44 Hun (N. Y.), 626, *mem.*; s. c. 7 N. Y. St. Rep. 596.

<sup>3</sup> Waterloo Turnp. Road Co. v. Cole, 51 Cal. 381.

in a public board, such as the supervisors of a county, and they, in the exercise of the power, make the determination and confer the franchise or license, — then it will not be competent for one, sued for non-payment of tolls, to set up by way of defense that the conditions did not exist which authorized such public board to grant the franchise or license. That would be an attempt to re-litigate, in a collateral way, a question which they have decided, and to overturn, in an action between the company and a private party, their judgment, in a case where they had jurisdiction, on the mere ground that their jurisdiction was erroneously exercised.<sup>1</sup>

§ 5915. **Right to Demand Tolls for the Whole Distance from Gate to Gate.** — The governing principle upon this subject, founded in convenience and necessity, and laid down by various courts, under charters and statutes more or less similar, is this: That each toll-gate represents a certain *unit of distance*, whether it be placed at the end of the space which it represents or at some intermediate point thereon, and that every traveler *passing the gate* must pay the prescribed and lawful toll for that unit of distance, whether he has traveled or intends to travel entirely over it or not.<sup>2</sup> The rule is founded upon the utter impracticability of the toll-gatherer adjusting the equities between the turnpike company and each traveler who may use its road, and of the endless disputes with travelers which would follow such an attempt. He cannot, in many cases, know how far a traveler has traveled,

<sup>1</sup> *Truckee &c. Turnp. Co. v. Campbell*, 44 Cal. 89. The board of supervisors will not be allowed arbitrarily to refuse to fix the rate of toll of a turnpike road company, under this statute, thus practically confiscating its property and franchises, but they will be compelled to act by *mandamus*. *Stony Hill Turnp. Co. v. Placer County*, 88 Cal. 632; *s. c.* 26 Pac. Rep. 513; *Volcano Canyon Road Co. v. Placer County*, 88 Cal. 634; *s. c.* 26 Pac. Rep. 513. In such a proceeding

the ownership of the road cannot be inquired into; that can only be contested between the corporation and the State. *Weaverville &c. Wagon Road Co. v. Trinity County*, 64 Cal. 69.

<sup>2</sup> *Stuart v. Rich*, 1 Caines (N. Y.), 182; *People v. Kingston &c. Turnp. Co.*, 23 Wend. (N. Y.) 193; *s. c.* 35 Am. Dec. 551; *Mallory v. Austin*, 7 Barb. (N. Y.) 626; *Lincoln Ave. &c. Co. v. Daum*, 79 Ill. 299; *Baltimore &c. Turnp. Road v. Routzahn*, 65 Md. 113; *s. c.* 4 Atl. Rep. 275.



or intends to travel; and even where he may know the general distance, it would require, in many cases, a mathematical calculation on his part to determine the exact distance, the making of which would impose upon the traveler a vexatious delay.<sup>1</sup> "When," therefore, — to use the syllabus of a well-considered case, which expresses the doctrine of all the others cited in this section, — "a plank-road company has erected its toll-gates within the distances authorized by law, and has fixed the rate of toll at several gates, at an amount not exceeding the legal rates for the entire distance, and for the distances between the several gates, it may lawfully exact the full toll thus fixed, at a particular gate; notwithstanding the traveler may not have traveled upon the road a distance which, at the established rate per mile actually traveled, would amount to such toll."<sup>2</sup>

§ 5916. **Whether Toll Demandable for Traveling between Two Gates.** — The inconvenience to the traveling public of the rule stated in the preceding section is offset by a corresponding inconvenience to the turnpike company, resting in a principle, applied under various charters and statutes more or less similar, which is to the effect that the turnpike company *can demand toll only at a gate*, and that it cannot demand and collect toll of a traveler who merely uses its road *between two gates*, unless he *passes around a gate*, with the intent to avoid payment of toll, and *re-enters* upon the road.<sup>3</sup> When, there-

<sup>1</sup> The best opinion in exposition of this principle is probably that of Miller, J., in the Court of Appeals of Maryland, in the case of *Baltimore &c. Turnp. Co. v. Routzahn*, 65 Md. 113, where the reasoning of some of the judges of the court of Baltimore County is quoted with approval.

<sup>2</sup> *Mallory v. Austin*, 7 Barb. (N. Y.) 626. In *Detroit Plank Road Co. v. Fisher*, 4 Mich. 37, 42, it was held that, upon the refusal of the traveler to state how far he is going to travel upon the road, the turnpike company has the right to demand toll to the

next gate. Some charters, however, have been construed as merely authorizing the company to demand toll according to the mileage actually traveled. Such was the construction of a charter which required the company to erect *mile posts* and obliged the traveler, under a penalty for reporting untruly, to report to the toll-gatherer, when requested, the distance he had traveled or intended to travel. *Madison &c. Plank Road Co. v. Reynolds*, 3 Wis. 287.

<sup>3</sup> *Lexington &c. Turnp. Road Co. v. Redd*, 2 B. Mon. (Ky.) 30; *Bun-*

fore, a traveler entered upon a turnpike road and traveled a considerable distance thereon, and then, when arrived near a toll-gate, turned out upon a public highway and thereby passed the toll-gate without paying toll, but *did not again enter upon the turnpike*, it was held that he was not liable to the penalty denounced by a statute<sup>1</sup> for the fraudulent evasion of tolls, although he may have had such an intent.<sup>2</sup> But this rule is not universal. In some States, travelers who use a turnpike road are liable for tolls, whether they pass a gate or not.<sup>3</sup>

§ 5917. **Right to Demand Pre-payment of Tolls.**—Although the charter or governing statute may be silent upon the subject, yet judicial holdings are to the effect that the mere right to erect toll-gates and to demand toll of travelers implies the right to demand toll of travelers *in advance*,—that is to say, before they have traversed the distance which the toll-gate represents.<sup>4</sup>

§ 5918. **Power to Detain Travelers for Non-payment of Tolls.**—This power must be sought for in the charter or governing statute; otherwise it does not exist; for, although a turnpike company has the unquestioned right to prevent a traveler from passing its gates without the payment of toll, just as a land-owner has the right to use reasonable force to prevent a trespasser from climbing over his fence or breaking it down and entering his close,—yet this is a very different

combe Turnp. Co. v. Mills, 10 Ired. L. (N. C.) 30; Centre Turnp. Co. v. Vandusen, 10 Vt. 197; conceded in Baltimore &c. Turnp. Co. v. Routzahn, 65 Md. 113, 116; and in Lincoln Ave. &c. Co. v. Daum, 79 Ill. 299, 302.

<sup>1</sup> The reading of the statute was,—"If any person shall, with his carriages, cattle, or horses, turn out of said road to pass any of said gates, and again enter the said road," etc. As the statute was penal, the court, of course, restrained its meaning to its very language, disregarding the fraudulent intent of the traveler.

<sup>2</sup> Centre Turnp. Co. v. Vandusen, 10 Vt. 197.

<sup>3</sup> Hunter v. Burnsville Turnp. Co., 56 Ind. 213; Morton Gravel Road Co. v. Wysong, 51 Ind. 4; Madison &c. Plank Road Co. v. Reynolds, 3 Wis. 287.

<sup>4</sup> Kenyon v. Seeley, 14 Barb. (N. Y.) 631; Detroit &c. Plank Road Co. v. Fisher, 4 Mich. 37; Rives v. Wood (Ky.), 15 S. W. Rep. 131; 12 Ky. L. J. 691 (not to be officially reported). See this last case for a statute, under which it was held that the company had the *right of pre-payment for a round distance, going and returning*.

thing from *arresting* him and detaining him for his refusal to pay toll in respect of a section of the road over which he has already traveled. The writer has found no decision upholding such a right; but the decisions generally concede the right of the company to prevent the traveler from *passing the toll-gate* without paying toll, unless the charter or governing statute otherwise provides. There are, of course, exceptions to this statement. A toll-gatherer would not, for instance, be justified in detaining a coach carrying the *United States mail*, although there might be an obligation to pay toll; but such an obligation, if existing, could be enforced only by action.<sup>1</sup> The reason is that the States cannot interfere with the agencies of the United States.<sup>2</sup> This matter, however, has been made the subject of compact between the United States and the States of Ohio, Pennsylvania, Maryland, and Virginia, concerning a road built by the United States, called the *Cumberland Road*, and the compact has several times been the subject of judicial construction.<sup>3</sup>

§ 5919. **Fraudulent Evasion of the Payment of Tolls.**— Statutes have been enacted for the protection of the fran-

<sup>1</sup> *Hopkins v. Stockton*, 2 Watts & S. (Pa.) 163.

<sup>2</sup> *Ante*, § 2854.

<sup>3</sup> See, for instance, *Searight v. Stokes*, 3 How. (U. S.) 151, where it was held that a carriage loaded with the United States mail must be held to be laden with the *property of the United States*, within the true meaning of the compact, and consequently exempt from the payment of tolls. See also *Neil v. Ohio*, 3 How. (U. S.) 720, where it was held that under the compact with Ohio, a toll charged upon passengers traveling in the mail-stages, without being charged also upon passengers traveling in other stages, is void; that it rests entirely in the discretion of the Postmaster-General to determine at what hours the mails shall leave particular places and arrive at others, and whether it

shall leave the same place only once a day or more frequently; and consequently that the mere frequency of the departure of carriages, laden with the mail, does not constitute an abuse of the privilege of the United States secured by the compact, though an unnecessary division of the mail-bags amongst a number of carriages, in order to evade the payment of tolls, would be. See also *Achison v. Huddleson*, 12 How. (U. S.) 293, where it was held that an act of the Legislature of Maryland, imposing a toll upon all passengers in mail-coaches upon the same road, and if not paid, a toll of a dollar for each coach for every time that it passed over the road, was contrary to the Federal compact with the State of Maryland and therefore void. Compare *Hollingworth v. State*, 29 Ohio St. 552.

chises of turnpike companies, prohibiting the building of what are called "*shunpikes*,"<sup>1</sup> and also imposing, in various language, *penalties* upon persons turning off a toll-road and passing around the gate for the purpose of evading the payment of toll; and we are now concerned with the construction of such statutes. Where such a statute provided that, if any person with his team, cattle, etc., should, after traveling the road, turn off to pass the gate or gates on ground adjacent thereto, and again enter on said road with intention to defraud the company by evading the payment of toll, he should forfeit the sum of five dollars, etc., — it was held that the fact that the traveler, after turning off, *traversed an old highway*, did not take the offense out of the statute.<sup>2</sup> Where the traveler had used the plank road about one hundred rods, and then, to avoid the payment of toll, turned out at a point more than a mile distant from the toll-gate, and traveled upon another road to a point one hundred and eighty rods beyond the toll-gate, and then re-entered the plank road and traveled thereon four miles, he incurred the penalty of the statute.<sup>3</sup> On the other hand, no matter what may be the intent of the traveler, if he enters a toll-road and traverses it for a considerable distance, and then, immediately before arriving at a toll-gate, quits it and pursues his journey upon an adjacent public highway, and *does not re-enter it*, he does not incur the penalty of such a statute; because the statute predicates the penalty upon turning off the toll-road to avoid the toll-gate and afterwards re-entering upon it.<sup>4</sup> For the traveler to *demand a written receipt* as a condition of paying toll, and to *threaten litigation*, thereby inducing the toll-gate keeper to allow him to pass without payment, is not an offense, within the meaning of a

<sup>1</sup> As to their protection without the aid of such statute, see *ante*, § 5404.

<sup>2</sup> *Carrier v. Schoharie Turnp. Co.*, 18 Johns. (N. Y.) 56.

<sup>3</sup> *Dansville &c. Plank Road Co. v. Hull*, 27 Barb. (N. Y.) 509. In this last case E. Darwin Smith, J., expressed the view that the statute was in-

tended only for cases where there was a *by-way* or a short *private road* (such as we have called a *shunpike*) constructed on purpose to avoid the gate, as in the case in *Croton Turnp. Co. v. Rider*, 1 Johns. Ch. (N. Y.) 611; as to which see *ante*, § 5404.

<sup>4</sup> *Centre Turnp. Co. v. Vandusen*, 10 Vt. 197.

statute imposing a penalty for a fraudulent evasion of the payment of toll by going around the toll-gate or otherwise.<sup>1</sup> The right of a turnpike company to demand tolls from the public, as the recompense granted by the legislature for the public benefit which it has conferred in building its road and keeping it in repair, is, as we have seen, a *franchise*.<sup>2</sup> If this franchise is subsequently taken for public use in the exercise of the right of *eminent domain*, it can only be upon condition of paying just compensation.<sup>3</sup> So, if the *selectmen* of a town lay out a highway around a turnpike gate, for the purpose of enabling those who travel along the turnpike road to avoid the payment of tolls, they are individually liable, in an action on the case, for the damages sustained by the turnpike corporation.<sup>4</sup>

§ 5920. **Exemptions from Payment of Tolls.** — These may arise either (1), upon the general principles of law, either public, private, or constitutional; or (2), upon the express language of charters or statutes; or (3), upon contracts subsisting between the toll-road company and particular individuals. Under the first head may be placed a decision involving the right of a toll-road company to detain a coach *carrying the United States mail* until toll should be paid, with the conclusion that no such right exists, although there may be a right of action to recover the tolls.<sup>5</sup> Under the same head may be placed the proposition that, where a turnpike company has acquired its right of way in the mode pointed out by law,

<sup>1</sup> *Rives v. Wood* (Ky.), 12 Ky. L. Rep. 691; s. c. 15 S. W. Rep. 131 (not to be officially reported).

<sup>2</sup> *Ante*, § 5404.

<sup>3</sup> *Ante*, §§ 5599, 5615, 5616; *Re Flatbush Ave.*, 1 Barb. (N. Y.) 286.

<sup>4</sup> *Cheshire Turnpike v. Stevens*, 10 N. H. 133. A person who had been in the habit of receiving credit for tolls, from a turnpike company, but insisted upon passing the toll-gates without paying, after notice had been given to him that the credit was discon-

tinued, and that he must pay the toll whenever he passed, — was none the less liable to the penalty imposed by such a statute for the offense of passing a toll-gate with intent to avoid payment of the toll; for under such circumstances the intent not to pay is sufficiently indicated by the act itself. *Rome & c. Road Co. v. Stone*, 62 Barb. (N. Y.) 601.

<sup>5</sup> *Hopkins v. Stockton*, 2 Watts & S. (Pa.) 163.

whether by condemnation or by purchase, and has lawfully acquired the franchise of erecting toll-gates and collecting tolls thereon, the *owner of the fee* of the right of way, on which the road has been laid out and the toll-gate erected, has *no right of passage* by virtue of his ownership.<sup>1</sup> Under the same category may be placed the proposition that the mere omission by the corporation, for *twenty years*, to enforce or attempt to enforce payment of toll against such owner, does not exempt him from the obligation to pay toll, nor establish a *prescriptive right* to pass free of toll, although his passing and refusal to pay were under claim of right, but that such a right can be acquired only by contract with the corporation.<sup>2</sup>

**§ 5921. Construction of Statutes, Creating Such Exemptions.**—A statute exempting from toll persons going to and returning from a *blacksmith shop* to which they usually resort, has been restrained to cases where such persons go thither for the purpose of getting work done, and the exemption does not extend to cases where they go to pay for work previously done. The object of getting work done must be the principal, and not the incidental, purpose of going.<sup>3</sup> A statutory exemption in the case of a farmer *going to market* with the produce of his farm and returning therefrom, does not exist where he assumes to *carry other goods*;<sup>4</sup> and the same is true of an exemption in favor of persons going to or returning from a *mill* with grain or flour for family use.<sup>5</sup> But a *clergyman, bona fide*, going to visit a sick parishioner, does not waive his right to the exemption, given by such a statute,<sup>6</sup> by the mere fact of his having *other persons* with him in the carriage.<sup>7</sup> So, a statute, exempting from toll for passing over a certain bridge, “all persons *drawing firewood for their own family use*,” was held to extend as well to a person drawing

<sup>1</sup> *Cleaveland v. Ware*, 98 Mass. 409.

<sup>4</sup> *Hearsey v. Boyd*, 7 Johns. (N. Y.) 183.

<sup>2</sup> *Ibid.*

<sup>5</sup> *Bates v. Sutherland*, 15 Johns.

<sup>3</sup> *Stratton v. Herrick*, 9 Johns. (N. Y.) 510.

<sup>6</sup> 3 Geo. IV., ch. 126, § 132.

<sup>7</sup> *Layard v. Ovey*, L. R. 3 Q. B. 415.

his firewood at one time, with the *assistance of his neighbors* and others hired for the purpose, as where he drew it for himself at the rate of one load a day. In other words, if he got up what is called in the country, a "*bee*" for drawing his firewood, all the members of the "*bee*" were exempt while so engaged.<sup>1</sup>

§ 5922. **Further of Such Statutes.**—Under a statute exempting persons going to or from *religious meetings*, a clergyman is exempt as well as a layman.<sup>2</sup> The "*meetings*" mentioned, in such a statute, were not restricted to those of any particular sect, creed, or denomination, but embraced all having for their professed object the worship of God, and which were tolerated by the third section of the first article of the constitution of New York,—that is, such as did not tend to acts of licentiousness or practices inconsistent with the peace or safety of the State. Nor was there anything in the statute to distinguish between the worshipers; but all persons, in whatever capacity they attended a religious meeting, whether to conduct or unite in the exercise of devotion, were equally exempt from the payment of toll. But it would always be a question of fact whether the traveler was going in good faith to attend a religious meeting, and for no other purpose, or whether the attendance at such a meeting was a mere pretext to evade the payment of the toll imposed upon ordinary travelers.<sup>3</sup> Under a statute exempting any person *passing to or from his common business on his farm*, a person who owned *two neighboring farms* was exempt in passing from one to the other with materials for building and improvements.<sup>4</sup> But a provision exempting a person from paying toll when passing on the turnpike road with his horse, team, or cattle to or from the *common labors* of his farm, does not exempt him when carrying wood to his farm for the purpose of burning bricks which he there makes for sale.<sup>5</sup> Under an act exempting a

<sup>1</sup> *Wooster v. Van Vechten*, 10 Johns. (N. Y.) 467.

<sup>2</sup> *Skinner v. Anderson*, 12 Barb. (N. Y.) 648.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Newburgh & c. Turnp. Co. v. Belknap*, 17 Johns. (N. Y.) 33.

<sup>5</sup> *Medford Turnp. Corp. v. Torrey*, 2 Pick. (Mass.) 538.

person *going to any mill* to which he usually resorts, one is exempt when going to a mill in a town different from that in which he resides, if it appears that he usually goes to such mill when there is no grinding in his own town.<sup>1</sup> It has been held that where such a statute proceeds in the singular number, exempting from the payment of tolls *his* horses, *his* carriage, etc., the exemption nevertheless extends to a *firm* or *copartnership*, sending *their* horses, carriages, etc., over the road.<sup>2</sup> A statute providing that "nothing in this act shall extend to entitle said corporation to demand or receive toll of any person who shall be passing with his horse or carriage to or from public worship, or on military duty, or with his horses, teams, or cattle, to or from any grist or saw-mill, or any other person living within this State and within eight miles of said gate," — has been held to exempt all residents within eight miles of the road from the payment of tolls, whether traveling or on business, and whether driving their team by themselves or by their servants, and also to exempt their stages or horses when they drive a stage on the road.<sup>3</sup> But they cannot make use of the exemption to enable others to avoid the payment of toll who are not so exempt; since the exemption is a *personal privilege* to the persons named in the statute, and is *not transferable*.<sup>4</sup>

§ 5923. *Continued.* — Where the statute exempted those who should reside in or near the line of the road, and who should pass thereon between the gates, "*about their premises* for common and ordinary business," — it was held that the exemption did not apply to one who used the road for travel to and from his store, a distance of one mile from a point where he reached the road, and whose premises did not extend to the road by the distance of half a mile.<sup>5</sup> So, where there was exemption in favor of any person "*passing to or from his common business on his farm*," this applied to those

<sup>1</sup> *Chestney v. Coon*, 8 Johns. (N. Y.) 150.

<sup>2</sup> *Passumpsic Turnp. Co. v. Langdon*, 6 Vt. 546.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Morton Gravel &c. Co. v. Wy-song*, 51 Ind. 4, 12.



who were compelled to pass upon the road in going from one part of their farms to another, or, in going from their dwellings to any farm which they might cultivate, but did not extend so far as to allow the farmer who owned a marl pit, five miles or more from his farm, to haul marl from the pit to his farm without the payment of toll.<sup>1</sup> So, where the exemption was in favor of anyone who should be going "*on ordinary domestic business or family concerns*," this did not extend to one who was carrying materials for the repair of buildings upon a farm six miles distant from his residence, and in the occupation of a tenant.<sup>2</sup> It may be added, in conclusion, that the obligation rests upon any person attempting to pass a toll-gate, and claiming exemption from toll, to *state at the time*, if asked to do so, *the ground on which the exemption is claimed*; otherwise the collection of tolls would be extremely difficult, if not impracticable, especially where the exemption depends upon a fact peculiarly within the knowledge of the traveler, and perhaps upon his mere intention.<sup>3</sup>

§ 5924. **Construction of Contracts Creating Such Exemptions.** — It seems that a contract by a turnpike corporation granting a *perpetual exemption to a certain family* from the payment of tolls, is not *ultra vires*, but is obligatory, although all the shares of the corporation may pass into the hands of a single person.<sup>4</sup> But a contract giving a man and his *family* the right to pass through toll-gates with farm stock and produce does not extend to his *children* who have *married* and left him, although living on the same farm, or to stock purchased on speculation merely; but does apply to such animals

<sup>1</sup> Nicholson v. Williamstown &c. Turnp. Co., 28 N. J. L. 142.

<sup>2</sup> Green Mountain Turnp. Co. v. Hemmingway, 2 Vt. 512. The court reasoned that "it must be ordinary or common business, such as does usually require attention, either at frequent intervals, at the return of the different seasons, or upon such

occasions of necessity as do commonly, though perhaps unfrequently, occur." *Ibid.*

<sup>3</sup> Oleaveland v. Ware, 98 Mass. 409, 413.

<sup>4</sup> Park v. Richmond &c. Turnp. Co. (Ky.), 1 L. R. A. 198; s. c. 10 Ky. L. Rep. 384; 9 S. W. Rep. 252.

as may be required to stock his farm, or which are fed upon it in the ordinary mode of farming.<sup>1</sup>

§ 5925. **No Right to Charge Unreasonable Tolls.**—Where a general grant of power is made to a corporation, without any closely defined limits, the principles of the common law impose upon it the limit that it must be *exercised reasonably*.<sup>2</sup> When, therefore, the charter of a toll-road company confers upon it, in general terms and without any restrictive language, a right to charge tolls for the use of its road, this does not authorize it to charge *unreasonable or excessive tolls*.<sup>3</sup>

§ 5926. **Forfeiture of Franchise for Exacting Illegal Tolls.**—It seems that the mere act of demanding illegal toll, under a *mistaken* construction of the extent of its powers, is not an offense of sufficient gravity to subject the charter of the corporation to *forfeiture*, in an action against it by the State, but that the offense must have been committed knowingly, wrongfully, or in breach of trust.<sup>4</sup> But it is no answer to such an information that the individuals aggrieved have their remedy by *private action*; or that the gates of the turnpike company may be turned open by *public officers*, when the road is so much out of repair as to amount to a *nuisance*; or that a *penalty* is imposed for a particular non-feasance,—unless the remedy by information is taken away by express terms or by necessary implication.<sup>5</sup>

§ 5927. **Right to Exact Tolls within Cities and Towns.**—It seems that the inhabitants of a town may acquire, by *pre-*

<sup>1</sup> *Park v. Richmond &c. Turnp. Co.* (Ky.), 1 L. R. A. 198; s. c. 10 Ky. L. Rep. 384; 9 S. W. Rep. 252. Points of evidence in an action on a contract whereby the plaintiff was to be exempt from paying toll in consideration of repairing the road in a manner specified, and keeping it in repair to the acceptance of the directors: *Wadhams v. Litchfield &c. Turnp. Co.*, 10 Conn. 416. Construction of a covenant between a municipal corporation and a private person, upon the sale of a

bridge to the latter, exempting from the payment of toll persons bringing in country produce to the market: *Adams v. Fort Gaines*, 80 Ga. 85.

<sup>2</sup> *Ante*, § 5647.

<sup>3</sup> *Powell v. Sammons*, 31 Ala. 552, 562.

<sup>4</sup> *People v. Kingston &c. Turnp. Co.*, 23 Wend. (N. Y.) 193, 220; s. c. 35 Am. Dec. 551.

<sup>5</sup> *People v. Bristol &c. Turnp. R. Co.*, 23 Wend. (N. Y.) 222.

*scription*, the right to pass the gate of a turnpike company toll-free. But, it has been held that if this right has been denied by the turnpike company, redress must be sought by the citizens in their *individual* capacity; that it is not a matter of *corporate* concern; and consequently that, if a *selectman* of the corporation, in pursuance of a corporate vote, *demolishes the toll-gate* as a public nuisance, he is liable in an action for damages therefor. As the right of the citizens of the town to pass the gate is not a corporate right, to be defended or vindicated by the corporation, it can no more demolish the gate because of the refusal to allow one of its citizens to pass, than one citizen could demolish it because of the refusal to allow another citizen to pass.<sup>1</sup>

§ 5928. Vehicles how Rated for the Purpose of Tolls. — Upon the principle that grants of corporate franchises against

<sup>1</sup> *Panton Turnp. Co. v. Bishop*, 11 Vt. 198. "Any citizen," observed Redfield, J., "denied permission to pass as he had been accustomed to do, might, perhaps, be justified in passing forcibly; but he could, at most, only use such force as was necessary for that purpose. He could not demolish the gate to-day, because he expected some citizen of the town would wish to pass to-morrow, even although the plaintiffs insisted they should not permit such citizen to pass; nor could the selectmen of the town do the same for the same purpose, any more than one who had been permitted to pass the gate could return and destroy it, lest it might afterwards be shut against some one having equal right to pass." *Ibid.* 202. It has been held that a contract between a turnpike company and a city, allowing the former to make a portion of its road within the limits of the latter, and collect tolls thereon, is to be construed with reference to the laws providing for the location of

toll-gates; and that the company, having a toll-gate properly located, may collect the tolls thereat for the portion of the road within the city, if the contract be not otherwise objectionable. *Springfield &c. Turnp. Co. v. Springfield*, 27 Ohio St. 584. It is held in the same case that the provision of the Ohio turnpike law, that turnpike companies shall not erect or keep up any toll-gate, or receive tolls within the corporate limits of any city or within eighty rods of such limits (2 Swan & C. 295, § 34),—does not take away any previously existing right of a turnpike company to charge and collect tolls for a portion of its road within municipal limits, and eighty rods beyond; and such a company may, at a toll-gate, properly located outside the prescribed boundaries, charge and collect toll, not only for the eighty rods leading to the city limits, but for such portion of the road as is lawfully within the city limits.

common right are to be taken most strongly against the corporation and in favor of the public, it has been held that where a vehicle is within a general description of vehicles subject to a certain toll, and is also embraced by a specific description of vehicles subject to a less toll, the latter is to determine the amount of the toll. Therefore, where the toll prescribed in the charter of a turnpike company, for a four-wheeled pleasure carriage was twenty-five cents, and for a wagon ten cents, — the conclusion was that a vehicle which was a four-wheeled pleasure carriage *and* a wagon, was subject to a toll of ten cents only.<sup>1</sup> A clause in a charter giving the right to levy tolls “upon coaches, chariots, and other four-wheeled pleasure carriages,” has been held to include *stage-coaches* used for the conveyance of the mail or of passengers.<sup>2</sup>

§ 5929. **Penalties against Toll-gatherers.** — Most of the turnpike laws not only denounce penalties against persons fraudulently shunning the toll-gates to avoid the payment of toll,<sup>3</sup> but, on the other hand, denounce penalties against toll-gatherers for the exaction of illegal tolls. These statutes being penal, it is a just conclusion that they ought not to be so construed as to make the toll-gatherer liable for a mere *mistake* in exacting illegal toll, especially where the traveler has paid it without objection.<sup>4</sup> A wife may act as the *agent* of her *husband*, and if he clothes her with authority to act in any particular matter, he adopts her action and is bound thereby.<sup>5</sup> If, therefore, a toll-gatherer appoint his wife to act in his place, she will be deemed his agent for the purpose of demanding and receiving tolls, and as such, authorized to determine, upon his responsibility, the amount or rate

<sup>1</sup> *Middlesex Turnp. Co. v. Freeman*, 14 Conn. 85.

<sup>2</sup> *Cincinnati &c. Turnp. Co. v. Neil*, 9 Ohio, 11.

<sup>3</sup> *Ante*, § 5919.

<sup>4</sup> *Fox v. Francher*, 66 Mich. 536. The court say: “It must be a deliberate and willful violation of the law on the toll-gatherer’s part. Ignorance

of the law would not excuse him; but ignorance of the fact that the traveler intended to go, or had traveled, less than one mile upon the road, would do so.” *Ibid.* 538.

<sup>5</sup> *Hopkins v. Mollinieux*, 4 Wend. (N. Y.) 465; *Riley v. Suydam*, 4 Barb. (N. Y.) 222.

of tolls to be paid by travelers; and if she demands and receives illegal tolls, *he* will be liable for the penalty imposed by such a statute.<sup>1</sup>

§ 5930. **Actions to Recover Tolls.**—Where a traveler passes a toll-gate, without paying the lawful toll, the law *implies a promise* upon his part to pay it, upon which promise an action may be maintained at common law,<sup>2</sup> and the corporation is not restricted to an action for any *penalty* which may be given by a statute,<sup>3</sup> nor to the exercise of its right of *closing its toll-gates*,<sup>4</sup>—these being *cumulative remedies*. But no such implied contract arises after the corporation has abandoned its road, leaving its gates open and keeping no agent there to demand or receive tolls.<sup>5</sup> On the contrary, it has been held that it is not a good defense to such an action that the company failed to erect gates on their road, or that they demanded toll from the traveler when he passed,—the theory being that he is bound to pay the toll prescribed by the char-

<sup>1</sup> *Marselis v. Seaman*, 21 Barb. (N. Y.) 319. That a penalty for unreasonably delaying or hindering travelers, or for taking more than lawful tolls, does not apply to the detention of persons who have a right to pass toll-free,—see *Conklin v. Elting*, 2 Johns. (N. Y.) 410; *Norval v. Cornell*, 16 Johns. (N. Y.) 73.

<sup>2</sup> *New Albany &c. Plank Road Co. v. Lewis*, 49 Ind. 161; *Jordan &c. Plank Road Co. v. Morley*, 23 N. Y. 552; *Seward v. Baker*, 1 T. R. 616; *Cherley v. Smith*, Adams, 20; *Carlisle v. Wilson*, 5 East, 2; *Peacock v. Harris*, 10 East, 104; *Medford Turnp. Corp. v. Torrey*, 2 Pick. (Mass.) 538; *Ayres v. Turnpike Co.*, 9 N. J. L. 33. For precedents of declarations in *indebitatus assumpsit* for tolls at bridges or turnpikes, see 2 Chit. Pl. 13, 15, *et seq.* In such an action, under the Indiana Code of Procedure, a complaint in the nature of a common count, with the additional averment

that the plaintiff has complied with all the statutes of the State requisite to enable it to collect toll, is sufficient on demurrer: *Patterson v. Indianapolis Plank Road Co.*, 56 Ind. 20. In such an action, where the proprietors have, by a vote, exempted from tolls the persons residing or going to or from certain lands, the *burden of proof* is on the plaintiffs, to prove that the defendant is not so exempt. *Central Bridge Corp. v. Butler*, 2 Gray (Mass.), 130. *Evidence* that a third person has been permitted to pass the bridge without paying toll, for the purpose of going to certain lands to which the defendant frequently went, is *admissible* for the purpose of showing that such lands were included within the vote. *Ibid.*

<sup>3</sup> *New Albany &c. Plank Road Co. v. Lewis*, 49 Ind. 161.

<sup>4</sup> *Jordan &c. Plank R. Co. v. Morley*, 23 N. Y. 552.

<sup>5</sup> *Powell v. Sammons*, 31 Ala. 552.

ter of the corporation, whether demanded by him or not;<sup>1</sup> but this is contrary to the general principle of *turnpike law* that *toll is only demandable at a gate*.<sup>2</sup>

§ 5931. **Defenses to Such Actions.** — It has been held *no defense* to an action for tolls that the plaintiff's *title* to the road is invalid because founded on a *sale foreclosing* a mortgage, which mortgage was *ultra vires* and fraudulent; since the decree of foreclosure is conclusive as to the validity of the mortgage;<sup>3</sup> nor that there is a statute authorizing the construction of a *railway* on a portion of the roadbed of the turnpike, with the consent of the turnpike company, which statute does not provide for the condemnation of the fee to the new servitude and the payment of damages to the abutting owners;<sup>4</sup> nor that the turnpike was not completed according to law, provided that the public *inspectors* appointed to inspect it reported it to be complete, — their report being conclusive;<sup>5</sup> nor, it seems, where there is no such examination or certification by a public inspector;<sup>6</sup> nor that there is a *post* at the end of a fence extending from the gate so as to prevent carriages from passing from the highway to the turnpike road, which post stands on the highway;<sup>7</sup> nor that the company failed to keep

<sup>1</sup> *Nicholson v. Williamstown &c. Turnp. Co.*, 28 N. J. L. 142.

<sup>2</sup> *Ante*, § 5916.

<sup>3</sup> *Hunter v. Burnsville Turnp. Co.*, 56 Ind. 213.

<sup>4</sup> *Hooper v. Baltimore &c. Turnp. Co.*, 34 Md. 521.

<sup>5</sup> *Strong v. Dunlap*, 10 Humph. Tenn.) 423; *Hunter v. Burnsville Turnp. Co.*, 56 Ind. 213; *ante*, §§ 5908, 5914. This is especially true where the statute gives a right of *appeal* from the judgment of the inspectors; *Hunter v. Burnsville Turnp. Co.*, *supra*.

<sup>6</sup> *Proprietors v. Newcomb*, 7 Met. (Mass.) 276, 282; *s. c.* 39 Am. Dec. 778. The theory of this conclusion, as stated by Chief Justice Shaw, was this:

"If the canal was opened, and toll claimed, and the public did not interfere, and the defendant used the canal, he thereby subjected himself to the payment of the toll. By demanding the toll, the plaintiffs claim to have complied with the conditions and provisions of their act of incorporation; and the defendant, by using their canal, is estopped to deny their right to the payment of the toll; although they might be proceeded against by *quo warranto* for their repeal and dissolution of their charter, or by indictment for a misdemeanor in not keeping it in repair." *Ibid.* 282.

<sup>7</sup> *Ayres v. Turnpike Co.*, 9 N. J. L. 33.

its rate of toll "*exposed to view*," as required by statute,—the redress being by public prosecution.<sup>1</sup>

§ 5932. **Whether a Defense that the Road is not Properly Constructed or Repaired.**—Upon the question whether a traveler, who is sued for the non-payment of toll, can defend on the ground that the plaintiff has suffered its road to *fall into a state of dilapidation and bad repair*, there is a conflict of authority. The prevailing opinion seems to be that *such a defense cannot be made*, but that, if the corporation has failed to perform its public duties in this regard, the remedy is by an information in the nature of *quo warranto* to vacate its franchises,<sup>2</sup> or, by an *indictment*, under principles elsewhere considered.<sup>3</sup> One theory is that, if the State does not, in one of these two modes, interfere, the traveler who uses the road subjects himself to the payment of toll and *estops* himself, in a sense, from setting up as a defense to an action to recover the same that the road was not in a condition fit to be traveled.<sup>4</sup> Another method of reasoning on this subject is to say that such an act of *misuser of its franchises*, by the corporation, cannot be taken advantage of *collaterally*, by a private individual in this way, but that there must be a judgment of forfeiture in a proceeding instituted by the State to that end. But it is conceded that, in such an action, the defendant may show that the franchise has been *repealed*, or has been *surrendered*, or that it has *expired* by its own limitation.<sup>5</sup> Other

<sup>1</sup> Centre Turnp. Co. v. Smith, 12 Vt. 212.

<sup>2</sup> *Post*, § 6626.

<sup>3</sup> *Post*, § 6429; Strong v. Dunlap, 10 Humph. (Tenn.) 423, 426 (where there was a statute making the offense indictable).

<sup>4</sup> See Proprietors v. Newcomb, 7 Met. (Mass.) 276, 282; s. c. 39 Am. Dec. 778; and the reasoning of Chief Justice Shaw, quoted in the preceding section; but note that that was a canal, and not a turnpike.

<sup>5</sup> Stults v. East Brunswick &c.

Turnp. Co., 48 N. J. L. 596; s. c. 9 Atl. Rep. 193; Adams v. Beach, 6 Hill (N. Y.), 271; *post*, § 5938. In this case the plaintiff was entitled, under a legislative act, to the tolls of a bridge until he should be reimbursed for moneys expended by him in building it; and it was held that he was entitled to exercise the franchise of taking tolls until he should be reimbursed in respect of *interest* accruing subsequently to the passage of the act, though the act was silent as to interest.

courts hold that, where a traveler is sued for the non-payment of toll, he *may defend* on the ground that the road was not kept in the proper repair; and this rule, while somewhat inconvenient to the judges, seems to be a rule of obvious justice. In such a case it is not tenable to say, as Chief Justice Shaw did,<sup>1</sup> that the defendant, by using the toll-road, is *estopped* to deny his obligation to pay toll; since, the road being a public highway, may be, and often is, the only road which he can use; and the best way to hold such companies to the performance of their public obligations is to deny them the right to collect tolls of the traveling public except upon the condition of keeping their roads in a proper state of repair. Thus, we find that in Indiana, where there is an extensive system of turnpike roads, the court takes the view that, although the *certificate of the public inspectors* is conclusive upon the question whether the road has been *properly built*, yet this does not exclude evidence, by the defendant in an action against him for tolls, to the effect that, since the making of their report, the road has been negligently allowed to become and remain out of repair.<sup>2</sup> Other courts take the view that, where the governing statute fixes a *condition precedent* upon which the right of the company to demand tolls is predicated, any person sued for tolls may defend on the ground that this condition precedent has not taken place.<sup>3</sup> On any theory of this subject, the traveler would, on principle, have a right of *recoupment* in respect of any *damages* received by him through delay or otherwise, in consequence of the road being out of repair. On the other hand, if, in point of fact, a toll-road or toll-bridge is safe for public travel, and the defect set up by the defendant, when sued for tolls, does not add to the labor of transportation across it, it does not exhibit a defense to the action.<sup>4</sup>

<sup>1</sup> *Proprietors v. Newcomb*, 7 Met. (Mass.) 276, 282; *s. c.* 39 Am. Dec. 778. It is to be again observed that the observations of Chief Justice Shaw related to a *canal*, which might not stand on the same footing as an ordinary *highway*.

<sup>2</sup> *Hunter v. Burnsville Turnp. Co.*, 56 Ind. 213.

<sup>3</sup> *Waterloo Turnp. Co. v. Cole*, 51 Cal. 381.

<sup>4</sup> *Patterson v. Indianapolis &c. Plank Road Co.*, 56 Ind. 20.



## § 5933. Actions to Recover Back Tolls Illegally Exacted.

By the principles of the common law, money which has been paid under *duress*, or in consequence of *fraud* or *mistake*, may be recovered back; but otherwise an action does not lie to recover back money *voluntarily paid*. Upon this principle, an action will lie to recover tolls illegally demanded where the exigencies of the traveler are such as to oblige him to pass the gate and traverse the road, — as, for instance, where he is *carrying the United States mail*.<sup>1</sup>

§ 5933 a. Penalties for Forcibly Passing Toll-gates without Paying Toll. — A statute of New York imposed a penalty of twenty-five dollars upon every person who should “forcibly or fraudulently pass any gate or any turnpike or plank road, without having paid the legal toll.” This statute, being penal, was strictly construed, and in its application the word “*forcibly*” was interpreted as implying the use of unlawful violence, — that is to say, violence employed to accomplish an unlawful object, consisting either of *actual violence* or of *threats of personal injury*.<sup>2</sup> In another case, it is said that, “to constitute a *forcible passage* of a gate, the passage must be effected by *actual force*, as opening the gate, taking hold of and keeping it open, or some other similar act, or at least offer some violence to overcome, remove, or prevent the obstacle of the gate to the passage”; and that, to constitute a *fraudulent passage* of the gate, “some artifice must be employed, or some deception practiced on the toll-gatherer, in effecting the passage.”<sup>3</sup> Accordingly, the penalty of the statute was not incurred where the traveler merely *rode through the gate* without paying toll, and without offering any force or violence;<sup>4</sup>

<sup>1</sup> Newland v. Buncombe Turnp. Co., 4 Ired. L. (N. C.) 372. Such an action was successful in Griffen v. House, 18 Johns. (N. Y.) 397.

<sup>2</sup> Bridgewater &c. Plank Road Co. v. Robbins, 22 Barb. (N. Y.) 662; citing Co. Litt. 161 b; People v.

Rickert, 8 Cow. (N. Y.) 226; Willard v. Warren, 17 Wend. (N. Y.) 257.

<sup>3</sup> Monterey &c. Plank Road Co. v. Faulkner, 21 Barb. (N. Y.) 212. See also Hammonds Port &c. Plank Road Co. v. Brundage, 13 How. Pr. (N. Y.) 448.

<sup>4</sup> Columbia Turnpike v. Woodworth, 2 Caines (N. Y.), 97.

or where, finding the gate open, he *drove through* with his team, saying, in answer to a request for toll, that he ought not to pay it, that the road was bad, but would do so if the superintendent of the road said he must;<sup>1</sup> or where, on a subsequent occasion, finding the gate open, he again drove through without paying toll, although informed that the superintendent said that he must pay toll, — no effort, however, being made, by word or deed, on either occasion, to stop him;<sup>2</sup> or where he merely passed through an open gate with his team, and offered a bank bill in payment of the toll, and refused to pay it in any other way.<sup>3</sup> Where the statute denounced a penalty against any person who “should attempt forcibly to pass any gate, without having paid the legal toll at said gate,” it was held that a person who was *exempt* from the payment of toll, by reason of the nature of his business at the time of passing, did not incur the penalty, even though he refused to pay toll, and forcibly passed the gate without making known his business, or notifying his exemption to the toll-gatherer.<sup>4</sup> If the gate is lawfully there, the traveler incurs the penalty of such a statute, although he may have *passed it in good faith*, believing that it was maintained unlawfully.<sup>5</sup> The *directors* of such a company cannot establish a by-law, prescribing the rate of tolls and fixing a penalty for refusing to pay toll; because unless the power to establish *by-laws* is conferred upon the directors by charter or statute, it resides in the corporation or stockholders.<sup>6</sup>

§ 5934. **Breaking the Toll-gate and Passing.** — Upon the question of the right of a traveler to break down a toll-gate

<sup>1</sup> Bridgewater &c. Plank Road Co. v. Robbins, 22 Barb. (N. Y.) 662.

<sup>2</sup> *Ibid.*

<sup>3</sup> Monterey &c. Plank Road Co. v. Faulkner, 21 Barb. (N. Y.) 212.

<sup>4</sup> Green Mountain Turnp. Co. v. Hemmingway, 3 Vt. 512.

<sup>5</sup> Detroit &c. Plank Road Co. v. Mahoney, 68 Mich. 265. The fact that there was an *executory* agreement

between a city alderman and the directors of the plank-road company, whereby the latter were to cease collecting toll on its portion of the road within the city limits and to remove the gate in question, was no defense. *Ibid.*

<sup>6</sup> Morton Gravel Co. v. Wysong, 51 Ind. 4; *ante*, § 956.

for the purpose of passing, it may be recalled that a statute authorizing a turnpike company to erect a toll-gate carries with it the conclusion, by necessary implication, that the company may rightfully close the gates against all travelers who are liable to pay toll but refuse so to do.<sup>1</sup> When the gate is thus closed against a traveler who refuses to pay lawful toll, if he forcibly saws it open and makes a passage through it, he may be prosecuted for the misdemeanor of *malicious trespass* upon property.<sup>2</sup> It may also be recalled that if the toll-gate is entirely unlawful,—if it has no legal right to be there,—then it is a mere *purpresture* of the highway and a *public nuisance*. And every traveler represents the public, in such a sense, that, under the principles of the common law, he is entitled to remove it, using no more force than is necessary.<sup>3</sup> But, if it was placed there by lawful authority, but its maintenance may or may not have become unlawful, accordingly as the question shall be decided whether the turnpike company has performed the conditions upon which its charter or governing statute authorizes it to maintain the gate and demand toll from travelers,—the condition of keeping their road in proper repair for the purposes of public travel,—then public convenience, justice, and the necessity of preserving the peace forbid that each particular traveler should be a judge in his own case, and decide as between the turnpike company and the State, but really for his own purposes, whether or not the road is in a reasonable state of repair, and whether or not he therefore has the right to break the gate as a public nuisance. If, therefore, he tears down such a gate, he cannot defend an action for the trespass on the ground that the turnpike company had incurred a forfeiture of its franchises by a misuser of them; because that is a question which can only

<sup>1</sup> *Ante*, § 5919; *Bock v. State*, 50 Ind. 281.

<sup>2</sup> *Bock v. State*, 50 Ind. 281.

<sup>3</sup> *Cooley on Torts*, 46; *Addison on Torts*, § 270; *Earp v. Lee*, 71 Ill. 193 (doctrine conceded in respect of pur-

prestures); *Selman v. Wolfe*, 27 Tex. 68 (holding that private persons may remove obstructions to navigation); *Clark v. Lake St. Clair &c. Ice Co.*, 24 Mich. 508, and cases collected in reporter's foot-note.

be litigated between it and the State;<sup>1</sup> but he may show that the *franchise* of the corporation has been *repealed*, or has been *voluntarily surrendered*, or that it has *expired by its own limitation*.<sup>2</sup>

§ 5935. **Further of This Subject.** — But, in Indiana, where, as we have seen,<sup>3</sup> a traveler may defend an action for tolls, on the ground that the road was out of repair, the analogous rule prevails, founded on the construction of statutes, that a turnpike company has no right to maintain a toll-gate upon a part of its road which has remained out of repair for an unreasonable time, and that if it persists in so doing, the toll-gate becomes an obstruction which may be abated by a private person as a public nuisance. The franchise of collecting tolls in such a case is said to lapse until the road is put in repair. A limitation of the right is that the traveler must use no more force than necessary, and must not commit a breach of the peace; and if he keeps within these bounds, he cannot be successfully prosecuted for the statutory misdemeanor of breaking down a toll-gate.<sup>4</sup> If such a gate has been erected under public authority, such as an order of the County Court, a traveler who breaks it down is guilty of the statutory misdemeanor of *malicious trespass* upon property, although the order may have been erroneous; and, although the circumstances may exist which will justify a traveler in removing such a gate, presumably on the ground of its being a public nuisance, yet if he *destroys it*, he will commit an offense under such a statute.<sup>5</sup> A turnpike company may also maintain a civil action, in the nature of *trespass*, at common law, for *damages*, in case of an unlawful breaking of its gates; and the mere fact that it has *mortgaged its income* and tolls does not preclude it from maintaining such an action because it is still the owner of its fixed property;<sup>6</sup> nor does the fact

<sup>1</sup> *Adams v. Beach*, 6 Hill (N. Y.), 271.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ante*, § 5932.

<sup>4</sup> *State v. Flannagan*, 67 Ind. 140.

<sup>5</sup> *Smart v. Com.*, 27 Gratt. (Va.) 950.

<sup>6</sup> *Farmers' Turnp. Road v. Coventry*, 10 Johns. (N. Y.) 389.

that a *penalty* is given by statute preclude the common-law right of action.<sup>1</sup> Where such a gate had been erected at the customary height, and a traveler came along with a load too high to drive under it, he was not justified in forcibly removing the cross-beams and roof of the gate, but was liable therefor in an action of trespass.<sup>2</sup>

§ 5936. **Penal Liability of Officers.**—A statute imposing a *fine* upon the officers of turnpike companies for passing or causing to be passed through any of the toll-gates, without pay, any cattle or teams, has been held valid.<sup>3</sup> If a statute renders the *directors* of a turnpike road and bridge company liable to *indictment* for *failure to keep the road in repair*, this liability will not be cast off by an act of the legislature authorizing a severance of the corporation into two companies, a road company and a bridge company. Nor will an act of the legislature, permitting the turnpike company to abandon a part of its road, discharge the directors from any penalty incurred previous to the taking effect of the act.<sup>4</sup>

§ 5937. **Liability for Failure to Perform its Public Duties.** It is a principle of law that where a private corporation is chartered for the purpose of performing duties for the public benefit distributively, upon the request of any member of the public, and upon payment by him of compensation in the way of tolls, it is liable to him for any damages which may have accrued to him through the non-performance of such *public duties*. If, for instance, a turnpike company *suffers its road to get out of repair*, it becomes liable in damages, under this principle, to any traveler who has paid or who has become liable to pay tolls, for any injury he may have received, without negligence or fault on his part, while using its road.<sup>5</sup> It may become liable for damages to a traveler for an injury re-

<sup>1</sup> Farmers' Turnp. Road v. Coventry, 10 Johns. (N. Y.) 389.

<sup>2</sup> Straits Turnp. Co. v. Hoadley, 11 Conn. 464.

<sup>3</sup> Wilson v. Com., 7 Bush (Ky.), 536.

<sup>4</sup> Kane v. People, 8 Wend. (N. Y.) 203.

<sup>5</sup> 1 Thomp. Neg. (1st ed.), pp. 541, 555, *et seq.*; *post*, § 6358.

ceived by him through an obstruction in its road while undergoing repairs, unless he is warned of the danger by a suitable device; and the fact that he has paid no toll is immaterial.<sup>1</sup> If a portion of its road lies within an *incorporated town*, and the town, in performance of its general duty of keeping its streets in order, repairs the street upon which such road is situated, it can recover from the company the reasonable amount expended in making such repairs.<sup>2</sup> There is judicial authority for the proposition that if a plank-road company fails to keep its road in repair, it may be *enjoined*, at the suit of the State, *from the further collecting of tolls*; but where, after the filing of such a bill and before the hearing, it put its road in repair, it was held that a decree denying the injunction would not be disturbed.<sup>3</sup>

§ 5938. **Effect of an Abandonment by the Turnpike Company.** — When a toll-road is abandoned by the corporation possessing the franchise of maintaining it and collecting tolls thereon, then it *becomes a free public highway*, and this without reference to the manner in which the corporation may have acquired the easement, — whether by purchase, or by condemnation, or by the appropriation of existing public highways.<sup>4</sup> The estate of the corporation being merely an easement burdened with the public duty of maintaining the road, when it abandons the duty it loses the estate, and thereafter it has no right to complain that some new servitude has been imposed upon it. It cannot, for instance, after hav-

<sup>1</sup> Lancaster Avenue Imp. Co. v. Rhoads, 116 Pa. St. 377; s. c. 2 Am. St. Rep. 608. See further, as to this obligation, Goodale v. Portage Lake Bridge Co., 55 Mich. 413; Carver v. Detroit &c. Plank Road Co., 61 Mich. 584; s. c. 28 N. W. Rep. 781.

<sup>2</sup> Versailles &c. Turnp. Co. v. Versailles (Ky.), 10 S. W. Rep. 280; and 11 S. W. Rep. 712. Effect of failing to inform the toll-gatherer of the weight of a load passing over a toll-bridge, upon liability of corporation:

Pomeroy v. Fifth Mass. Turnp. Corp., 10 Pick. (Mass.) 35.

<sup>3</sup> People v. Grand Rapids &c. R. Co., 67 Mich. 5.

<sup>4</sup> Craig v. People, 47 Ill. 487; McMullin v. Leitch, 83 Cal. 239; s. c. 26 Pac. Rep. 293; People v. Davidson, 79 Cal. 166; s. c. 21 Pac. Rep. 538; People v. O'Keefe, 79 Cal. 171; s. c. 21 Pac. Rep. 539; Western Plank Road Co. v. Central Union Telephone Co., 116 Ind. 229; s. c. 18 N. E. Rep. 114.

ing clearly abandoned its public duty of keeping up the road, complain that a *telegraph* or *telephone company* has established its line upon it.<sup>1</sup> Nor can it abandon its duty of maintaining its road in a proper state of repair, and at the same time close it against the public, although it may have acquired its right of way by purchase, and not by condemnation. The reason is that, in consequence of the establishment of such an improved road, other public highways which might be available to the public pass into disuse and dilapidation; and consequently that such an act on the part of the toll-road company takes the public at a disadvantage, and in effect deprives them of the use of any practicable highway whatever.<sup>2</sup> A more difficult question is presented as to the effect of an abandonment on the rights of the owners of the fee,—whether upon the public taking possession of the road as a common highway they are entitled to additional compensation. This must depend upon what sort of an easement was originally contemplated when the toll-road was established, whether an easement for the incorporated life of the toll-road company, or a perpetual easement. If only an easement for the incorporated life of the toll-road company, then it would seem clear that the owner of the fee has such an interest in the reversion as entitles him, upon the fact of abandonment, to a new assessment of damages for the perpetual easement required by the public.<sup>3</sup> Judicial theory in California is to the effect that toll-roads, constructed under the act of 1853 of that State, become public highways by dedication, subject to the right to collect tolls for a limited period; so that when this limited period expires, the dedication to the public remains, and the

<sup>1</sup> *Western Plank Road Co. v. Central Union Telephone Co.*, 116 Ind. 229.

<sup>2</sup> *Craig v. People*, 47 Ill. 487.

<sup>3</sup> It has been held that where a plank-road company has a mere easement in the land over which it has procured the right of way, if such plank road is abandoned, and the legislature, in the exercise of its right of

eminent domain, takes it for public use as a highway, the owners of the fee are entitled to be compensated for their entire reversionary interest therein, including the soil, the fences thereon, the right of way, and all the advantages arising from its former use. *People v. Lawrence*, 54 Barb. (N. Y.) 589.

road may be declared a highway by the supervisors, and neither the corporation nor its stockholders thereafter have any interest for which compensation can be demanded;<sup>1</sup> and the owner of the fee will not be entitled to any further compensation.<sup>2</sup> But, in that State, a *turnpike company may, by reorganizing* under the provisions of the code and extending its existence, prolong its right to collect tolls beyond the period originally limited for its existence.<sup>3</sup> In New York, a corporation organized under the plank-road laws is authorized to take by purchase the *entire fee* of lands needed for its road,<sup>4</sup> and no condition or qualification of the grant is implied from the use to which the land is intended to be put. The grantor retains no property therein which will prevent a division of the property among the stockholders of the corporation, or which will preclude the State, with the assent of the company, from diverting the land to other uses, or from declaring, by law, that a surrender of any part of the road, by the company, shall operate to transfer the title of the company to the town in which the land is so located.<sup>5</sup> It may be added in conclusion that a *voluntary abandonment*, by a toll-road company, of a substantial part of its road for a considerable period of time, during which it fails to render the public services for which it is bound, is good ground for declaring a *forfeiture of its franchises* at the suit of the State, and without the aid of a statute.<sup>6</sup>

<sup>1</sup> *People v. Davidson*, 79 Cal. 166; s. c. 21 Pac. Rep. 538; *People v. O'Keefe*, 79 Cal. 171; s. c. 21 Pac. Rep. 539; *McMullin v. Leitch*, 83 Cal. 239.

<sup>2</sup> *People v. Davidson*, 79 Cal. 166; Cal. Pol. Code, § 2619; *People v. O'Keefe*, 79 Cal. 171.

<sup>3</sup> *People v. Pfister*, 57 Cal. 532. The theory of this case is, that a corporation organized prior to the adoption of the codes, whose existence has been continued under the codes, becomes a *code corporation*, so to speak;

so that it may extend the term of its business existence, in conformity with the codes, beyond the original period. *Ross, J.*, dissented.

<sup>4</sup> *People v. Mauran*, 5 Denio (N. Y.), 389.

<sup>5</sup> *Heath v. Barmore*, 50 N. Y. 302.

<sup>6</sup> *Kenton County Court v. Bank Lick Turnp. Co.*, 10 Bush (Ky.), 529, 533; *People v. Royaltown Turnp. Co.*, 11 Vt. 431; *People v. Hillsdale &c. Turnp. Co.*, 23 Wend. (N. Y.) 254; *Attorney-General v. Petersburg &c. R. Co.*, 6 Ired. L. (N. C.) 456.



## § 5939. What will be Evidence of an Abandonment.

Where the assignee of a plank-road company published a notice that, owing to the bad condition of the road, and the high price of materials and labor, they could not profitably keep up the road at the prescribed tolls, and that unless the county bought their entire interest in the roadway, bridges, plank, toll-gates, etc., the road would be closed up as private property,—it was held that such notice was in effect an abandonment of the road, and that it became a common highway.<sup>1</sup> Mere *delay* in the construction of the road of a turnpike company does not amount to an abandonment of the corporate enterprise, such as will excuse the stockholder from paying for his shares, so long as the directors continue to hold meetings, make efforts to obtain the means of completing the work, and exhibit no intention of abandoning it.<sup>2</sup> A statute declaring that the failure of a gravel-road company to complete its road within four years shall work a forfeiture of its charter, but providing that if the road is, during that time, partly completed, the company shall retain all its rights and privileges for so much of the road as is completed,—prevents a forfeiture of the part actually completed, although it fails to complete its entire line.<sup>3</sup> Where a toll-road company *suffers a railroad company to build its road* upon a section of the toll-road, without any public objection so far as appears, its consent thereto will be presumed, and this will be an abandonment of that portion of its road, and of its franchises in respect thereto, such as would incur a forfeiture at the suit of the State.<sup>4</sup> Under a statute of Connecticut, making it an abandonment for the company to cease making repairs or taking tolls for the period of one year, no certificate, or other act, of the turnpike commissioners is necessary to make the abandonment complete.<sup>5</sup>

<sup>1</sup> Craig v. People, 47 Ill. 487.<sup>2</sup> Gibson v. Columbia &c. Bridge Co., 18 Ohio St. 396.<sup>3</sup> State v. Brownstown &c. Gravel Road Co., 120 Ind. 337; s. c. 22 N. E. Rep. 316.<sup>4</sup> Reasoning in Kenton County Court v. Bank Lick Turnp. Co., 10 10 Bush (Ky.), 529.<sup>5</sup> Lee v. Barkhamsted, 46 Conn. 213.

§ 5940. **Public Proceedings to Vacate Such Roads and to Open Them as Common Highways.** — The *franchises* of a corporation are as much subject to the right of *eminent domain* as any other species of property;<sup>1</sup> and, accordingly, the property and franchises of a toll-road company may be *condemned to the public use*, and the road may thereby be reduced to the condition of an ordinary highway; and statutes exist in many States providing for such condemnations.<sup>2</sup> The county authorities will not be authorized to seize the property of a toll-road company, merely because the directors failed to *make* to them the *reports* required by law; but, on the other hand, if the company voluntarily abandons its road, the county authorities may take possession of it, without any judgment in the nature of a condemnation, and devote it to the use of a free public highway.<sup>3</sup> Such a condemnation cannot be made by the mere *ex parte* order of the County Court or other public board, but can only be made in a proceeding where due *notice* is given and where the corporation has an opportunity of being heard.<sup>4</sup> A toll-road company has such a proprietary interest in the land upon which its road rests, as will enable it to maintain an action against the county, to prevent it from unlawfully interfering with its franchises, under the

<sup>1</sup> *Ante*, § 5615.

<sup>2</sup> For proceedings under the Pennsylvania statute, see *Re Kensington &c. Turnp. Co.*, 97 Pa. St. 260. Proceedings under a New Jersey charter, authorizing the appointment of commissioners, and the closing of the toll-gates when the road is not in a proper state of repair: *State v. Trenton &c. Turnp. Co.*, 34 N. J. L. 182. Constitutionality of a statute providing for the distribution of the public burdens of such a condemnation: *Salem &c. Turnp. Co. v. Essex County*, 100 Mass. 282; *Gilson v. Rush County*, 128 Ind. 65; *s. c.* 27 N. E. Rep. 235; 11 L. R. A. 835. Award set aside after distribution, because of a corrupt under-valuation:

*Re Kensington &c. Turnp. Co.*, 12 Phila. (Pa.) 611. That *objections* to petition, notice, appraisement, etc., must be made before final order of purchase, entered by the board of commissioners: *Gilson v. Rush County*, 128 Ind. 65; *s. c.* 27 N. E. Rep. 235; 11 L. R. A. 835.

<sup>3</sup> *Western Plank Road Co. v. Central Union Telephone Co.*, 116 Ind. 229; *s. c.* 18 N. E. Rep. 14.

<sup>4</sup> *Ibid.*; *Moore v. Schoppert*, 22 W. Va. 282. The fact that some of the *stockholders* waive notice by appearing in court and asking for a rescission of the order does not take the case out of the principle. *Moore v. Schoppert*, 22 W. Va. 282.

pretext of opening the road as a free public highway; and so has the assignee of such a corporation; and relief may be had by way of an injunction, restraining the county, through its board of supervisors, from depriving the plaintiff of the use and enjoyment of the property, without due process of law and without compensation.<sup>1</sup>

§ 5941. Acts which Turnpike Companies may and may not do.—A turnpike company can execute to a county, in consideration of a subscription of the latter to the capital stock of the company, a penal bond, with the condition that the company shall be free from debt when the road is completed,—the object being to compel the raising of the balance necessary to complete the road by stock subscriptions.<sup>2</sup> It has power, as incident to the purposes of its incorporation, to take and hold under a lease, premises necessary for storing the implements used in repairing its road and for sheltering its servants.<sup>3</sup> It has power to enter into an agreement with a contractor for the building of its road, whereby he is to reimburse himself out of tolls arising from the same.<sup>4</sup> The power to construct a road upon a given route carries with it, by implication, the power to *purchase* a road already built on that route.<sup>5</sup> But it has been held that the president and directors of such a corporation have no power to embark its funds in the purchase of a new turnpike road, whose stock is without value, by paying therefor in the stock of their own company which is very valuable, thereby lessening the dividends to existing stockholders; and that such an act is *ultra vires*, although sanctioned by a legislative enactment, unless the stockholders whose rights are thereby impaired assent thereto.<sup>6</sup> Such a company cannot be organized in Indiana,

<sup>1</sup> Welsh v. Plumas County, 80 Cal. 338; s. c. 22 Pac. Rep. 254.

<sup>2</sup> Harrison County v. Berry &c. Turnp. Co. (Ky.), 12 S. W. Rep. 258 (not to be officially reported).

<sup>3</sup> Crawford v. Longstreet, 43 N. J. L. 325.

<sup>4</sup> Boykin v. Shaffer, 13 La. An. 129.

<sup>5</sup> State v. Hannibal &c. Gravel Road Co., 37 Mo. App. 496; *ante*, § 5879.

<sup>6</sup> Shaw v. Campbell Turnp. Road Co. (Ky.), 15 S. W. Rep. 245; *ante*, § 5879.

for the purpose of buying up existing roads owned by different corporations.<sup>1</sup> Such a company cannot, unless authorized thereto by charter or statute, *lend out its money* for mere profit, though it can lend a sum to one of its contractors to enable him to build a section of its road.<sup>2</sup>

### § 5942. Powers as Depending upon a Valid Organization.

This subject has been elsewhere considered;<sup>3</sup> but a decision may be adverted to to the effect that, where a turnpike company adopts a code of by-laws and in good faith acts thereafter as a corporation, it becomes a *corporation de facto*, although a final organization is not effected, in such a sense as will enable it to maintain an action against a mere *trespasser* who seizes a portion of its right of way.<sup>4</sup> Even the county *supervisors* cannot, it has been held, raise the question of the lawful organization of the company, and whether it has become entitled to the possession of its toll-road of which it has long had possession, as a reason for refusing to *fix its rate of toll*, as required to do by statute.<sup>5</sup>

<sup>1</sup> *State v. Beck*, 81 Ind. 500.

<sup>2</sup> *Madison &c. Plank Road Co. v. Watertown &c. Plank Road Co.*, 5 Wis. 173.

<sup>3</sup> *Ante*, § 495, *et seq.*

<sup>4</sup> *Stockton &c. Gray. R. Co. v. Stockton &c. R. Co.*, 45 Cal. 680.

<sup>5</sup> *Volcano Cañon Road Co. v. Placer County*, 88 Cal. 634.

*General Note on the Subject of Turnpike Companies.*—That a road on which toll-gates are erected and tolls taken, is a *turnpike road*: *Northam Bridge & Roads v. London &c. R. Co.*, 6 Mees. & W. 428; *s. c.* 1 Eng. Rail. Cas. 653; *Reg. v. East & West India Docks &c. R. Co.*, 22 Eng. L. & Eq. 113; *s. c.* 22 L. J. (Q. B.) 380; 17 Jur. 1181. That "*turnpike roads*" in Indiana statute include *gravel roads*: *Neff v. Mooresville &c. Gravel Road Co.*, 66 Ind. 279. Illegality of a *corporate meeting* of such company in Kentucky: *Cassell v. Lexington &c.*

*Turnp. Road Co. (Ky.)*, 10 Ky. L. Rep. 486; *s. c.* 9 S. W. Rep. 502. Right of *officers to hold over* until successors elected and qualified: *Ibid.* That *corporation exists from recording of articles* in recorder's office: *Ather-ton v. Sugar Creek &c. Turnp. Co.*, 67 Ind. 334. What *articles of association* sufficient for the formation of such a company: *Wert v. Crawfordsville &c. Turnp. Co.*, 19 Ind. 242. Incorporation not prevented by *omission of charter to designate amount of capital stock*, value of shares, etc.: *Kirksey v. Florida &c. Plank Road Co.*, 7 Fla. 23; *s. c.* 68 Am. Dec. 426. Effect of *petitioners withdrawing their names*, so that not enough land-owners remain in the petition to authorize incorporation: *Hord v. Elliott*, 33 Ind. 220. Sufficiency of the *articles of association*, and *certificates of incorporation* of such companies, under statutes of Indiana: *State v. Needham*, 32 Ind.

ARTICLE IV. MISCELLANEOUS CORPORATIONS.

SECTION	SECTION
5948. Savings banks.	5957. Power of mining companies to borrow money.
5949. Other banking corporations.	5958. Boom companies.
5950. Distinction between discounting and purchasing commercial paper.	5959. Whaling companies.
5951. Power of banks to receive special deposits.	5960. Land improvement companies.
5952. Illegal banking.	5961. When manufacturing corporations may purchase in order to re-sell.
5953. Dry dock company cannot engage in navigation.	5962. Other powers conceded to manufacturing corporations.
5954. Incorporated common carriers.	5963. What powers have been denied to manufacturing corporations.
5955. Mining corporations.	
5956. Power to locate mining claims.	

§ 5948. **Savings Banks.**—A power to take, hold, and convey any property, real, personal, or mixed, in order to retain or secure the payment of any indebtedness or liability belonging to the corporation, and the further power to discount non-negotiable notes,—confers upon a savings bank the power to pur-

325; *Vansickle v. Erdelmeyer*, 36 Ind. 262; *State v. Dillon*, 36 Ind. 388; *Busenback v. Attica &c. Gravel Road Co.*, 43 Ind. 265; *Fox v. Allenville &c. Turnp. Co.*, 46 Ind. 31; *Miller v. Wild Cat Gravel Road Co.*, 57 Ind. 241. Such companies deemed *corporations*, although called "*joint-stock companies*" in the statute: *Blanchard v. Kaull*, 44 Cal. 440. *Constitutionality* of a statute authorizing the *county supervisors to create such corporations*: *Waterloo Turnp. Road Co. v. Cole*, 51 Cal. 381. Turnpike road stock as a security held by a banking corporation: *Holbrook v. Union Bank*, 7 Wheat. (U. S.) 553. Enforcement of verbal subscriptions to stock of turnpike companies: *Bullock v. Falmouth &c. Road Co.*, 85 Ky. 184; s. c. 3 S. W. Rep. 129. Venue of actions against such corporations on the theory of their toll-houses being their "established or usual place of business": *Rhodes v. Salem Turnp. &c. Corp.*,

98 Mass. 95. *Taxation* in aid of such corporations: *Walton v. Riley*, 85 Ky. 413. *County aid* to the same: *Davis v. Yuba County*, 75 Cal. 452. *Constitutionality* of a statute dividing turnpike companies into *separate classes*: *State v. Turnpike Co.*, 37 Ohio St. 481. Statutory provisions for the collection of judgments against persons, etc., owning and operating toll-roads and wagon roads: *Colorado Laws 1889*, p. 450. *Discretion of the directors* in directing income to repairs or additional construction: *Lewis &c. Turnp. Road Co. v. Thomas*, 3 S. W. Rep. 907. Who not occupiers of "*adjoining lands*" under a statute with reference to injuries to a turnpike road: *Merivale v. Exeter Turnp. Road*, L. R. 3 Q. B. 149. *Application of funds* received for tolls under statutes: *Trustees of Brighton &c. Turnp. Roads v. Surveyors of Highways*, L. R. 5 Q. B. 146; *Bruton Turnp. Trustees v. Wincanton Highway Board*,

chase and *hold city warrants*, which are in effect the promissory notes of the city.<sup>1</sup> A power, under its charter, to invest its capital in "bonds, notes, . . . and other evidences of debt," and "to hold any real estate necessary to carry on its business," includes a power to *lend money* and to secure the same by a deed of trust.<sup>2</sup> Under the power to keep its available funds "on deposit, on interest, or otherwise, or in such available form as the trustees may direct," it has the power to *lend money on the promissory note* of the borrower.<sup>3</sup> A statute prohibiting such institutions from lending money on the security of names alone, has been held to be *directory* to the trustees, and designed for the protection of the depositors, in such a sense as will not prevent the bank from enforcing payment of a promissory note whether the purchase of it was or was not in conformity with its governing statute;<sup>4</sup> otherwise a statute designed as a protection to the funds of such institutions would be turned into a means of destroying them. Another court reaches the same conclusion by applying the doctrine<sup>5</sup> that, although the *security is void*, by reason of the illegality of the contract, yet this does not prevent the corporation from recovering the money advanced in purchasing it in an action, or under account, for *money had and received*, and that the person receiving the money will be *estopped* from defending on the ground of the illegality of the contract, until he does equity by restoring it.<sup>6</sup> On the other hand, a savings bank, incorporated for the purpose of receiving deposits, etc., with

L. R. 5 Q. B. 437; *Local Board of Health v. Rochester &c. Road Comm'rs*, L. R. 1 Q. B. 24. Statutory authority of turnpike companies to operate *street railways*, and to use *electricity* as a motive power: *Hudson River Tel. Co. v. Watervliet &c. R. Co.*, 29 N. Y. St. Rep. 694. Charter right of company to *take possession of highway* without consent of commissioners of highways, and right to exact toll without recording the survey of their road: *Detroit &c. Plank Road Co. v. Fisher*, 4 Mich. 37.

<sup>1</sup> *Aull Sav. Bank v. Lexington*, 74 Mo. 104. As to the nature of *city warrants*, see *International Bank v. Franklin Co.*, 65 Mo. 105, 109; s. c. 27 Am. Rep. 261.

<sup>2</sup> *Tishimingo Sav. Inst. v. Buchanan*, 60 Miss. 496.

<sup>3</sup> *Rome Sav. Bank v. Kramer*, 32 Hun (N. Y.), 270.

<sup>4</sup> *Farmington Sav. Bank v. Fall*, 71 Me. 49.

<sup>5</sup> *Ante*, § 5714.

<sup>6</sup> *Pratt v. Short*, 79 N. Y. 437, 449; s. c. 35 Am. Rep. 531.

the power to loan money, to discount according to the usages of banks, and "to borrow money, buy and sell exchanges, bullion, bank notes, government stocks, and other securities,"—has *no power to deal in cotton futures*, and if it does so and is sued by its broker for his *commissions and advances*, it may avail itself of the defense of *ultra vires*.<sup>1</sup>

§ 5949. **Other Banking Corporations.**—A bank, empowered under its charter to receive deposits, possesses, by necessary implication, the power to *receive money as a loan*. This flows from the power ascribed to all corporations to contract debts; since a corporation which can contract a debt can, by implication, borrow money to pay it, and, by another implication, can execute the proper security therefor.<sup>2</sup> A bank having, by its charter, the most specific and ample powers, as to receiving deposits, taking money and lending securities, may, it has been held, *establish an investment department* of its business, in which certificates issued for loans and deposits are secured by the transfer to a trustee of notes, etc., to be held in trust solely for the benefit of the depositors and others dealing in such bank or agency of the bank, so that the general creditors, not thus secured, will not be entitled to share in the securities thus deposited in trust until those so secured are first paid.<sup>3</sup> A bank possessing the ordinary powers ascribed by statute law to such institutions, cannot go into the business of buying and selling merchandise; and is hence not liable for a *purchase of boots and shoes*, made in its name by its cashier, for the benefit of a third person, in the absence of knowledge on its part of the purchase when made, or a ratification since the purchase.<sup>4</sup> Unless the charter or governing statute in express terms authorizes a banking corporation to *become a surety* for another individual or corporation, it is quite clear that the officers of such a corpo-

<sup>1</sup> *Jemison v. Citizens' Sav. Bank*, 122 N. Y. 135; s. c. 19 Am. St. Rep. 482; 25 N. E. Rep. 264; affirming 44 Hun (N. Y.), 412.

<sup>2</sup> *Ward v. Johnson*, 95 Ill. 215.

<sup>3</sup> *Ibid.*

<sup>4</sup> *North Star Boot &c. Co. v. Stebbins*, 2 S. Dak. 74; s. c. 48 S. W. Rep. 833.

ration have no power to engage the institution in such a way.<sup>1</sup> Making *advances upon cotton*, and taking bills or notes with indorsers as evidence of the amount advanced, under a scheme by which the bank takes possession of the cotton by its agent and sells it, and applies the proceeds to its reimbursement, reserving a commission for effecting the sale, is not, it has been held, a "dealing in goods, wares, and merchandise," within the prohibitory language of the charter of the bank.<sup>2</sup>

§ 5950. **Distinction between Discounting and Purchasing Commercial Paper.** — A senseless distinction has been taken by many courts between the power of a bank to *discount*, and its power to *purchase* negotiable paper.<sup>3</sup> Assuming that there is any difference between the real nature of a transaction where a bank sends its agent into the market and buys negotiable paper from one who is willing to sell it as a commodity, and where its agent stands behind its counter and waits for the same person to bring such paper to it to be discounted by it, yet a line of holdings that such a violation of law *can only be taken advantage of by the government* in an action to forfeit the franchises of the bank, renders a further dis-

<sup>1</sup> *Ante*, § 5721; *Bank of Genesee v. Patchin Bank*, 19 N. Y. 312; *Morford v. Farmers' Bank*, 26 Barb. (N. Y.) 568; *Bridgeport City Bank v. Empire Stone Dressing Co.*, 30 Barb. (N. Y.) 421. Compare *Farmers' &c. Bank v. Butchers' & Drovers' Bank*, 16 N. Y. 125; *s. c.* 69 Am. Dec. 678.

<sup>2</sup> *Bates v. Bank of Alabama*, 2 Ala. 451.

<sup>3</sup> *Ante*, § 5751; *Lazear v. National Union Bank*, 5 Md. 78, 124; *Farmers' &c. Bank v. Baldwin*, 23 Minn. 198; *s. c.* 23 Am. Rep. 683; *First Nat. Bank v. Pierson*, 24 Minn. 140; *s. c.* 31 Am. Rep. 341; *Niagara County Bank v. Baker*, 15 Ohio St. 68. See *Fleckner v. Bank of United States*, 8

*Wheat.* (U. S.) 338, 351, where the subject is discussed by Mr. Justice Story, who concludes by saying: "If, therefore, the discounting of a promissory note, according to the usage of banks, be a purchase, within the meaning of the ninth rule above stated (upon which serious doubts may well be entertained), it is a purchase by way of discount, and permitted, by necessary inference, from the last clause in that rule." This question has arisen in most of the cases in respect of the power of *national banks* to discount and negotiate promissory notes, drafts, bills of exchange, and other evidences of debt, etc. *Rev. Stat. U. S.*, § 5136.



cussion of the question unimportant.<sup>1</sup> But as the bank necessarily purchases a note and becomes the owner of it for all purposes legal and equitable, whenever it discounts it, the sensible conclusion is, that a *power to discount includes the power to buy* commercial paper.<sup>2</sup>

§ 5951. **Power of Banks to Receive Special Deposits.**—The popular understanding of the term “special deposit” doubtless very closely corresponds to the definition of Mr. Justice Miller,<sup>3</sup> as being a deposit of which the bank becomes the bailee of the depositor, the title to the thing remaining with the latter, as distinguished from a deposit of money, peculiar to banking business, in which the depositor, for his own convenience, parts with the title to his money, and loans it to the banker. The reception of special deposits is not a necessary incident of a banking business. Banks have, however, from the earliest periods of their existence, commonly consented to become bailees of specific articles of great value in small bulk, performing in this particular many of the functions of the modern safety deposit companies. Few courts, it is conceived, would hold that it is *ultra vires* of a banking corporation, unless specially restricted by its charter, to incur a liability for a bailment of this kind;<sup>4</sup> and it has been held, upon thorough consideration, that where the practice of receiving special deposits is *known to the directors*, the corporation must be considered as the depositary, and not the cashier or other officer through whose particular agency the commodities

<sup>1</sup> National Bank v. Matthews, 98 U. S. 621; National Bank v. Whitney, 103 U. S. 99. See also Prescott Nat. Bank v. Butler, 157 Mass. 548; Merchants' Nat. Bank v. Hanson, 33 Minn. 40; s. c. 53 Am. Rep. 5; Slater Woolen Co. v. Lamb, 143 Mass. 420.

<sup>2</sup> Smith v. Exchange Bank, 26 Ohio St. 141; Pape v. Capitol Bank, 20 Kan. 440; s. c. 27 Am. Rep. 183; First Nat. Bank v. Harris, 108 Mass. 514; Pemberton Nat. Bank v. Porter, 125 Mass. 333; s. c. 28 Am. Rep. 235;

Atlas Bank v. Savery, 127 Mass. 75, 77; s. c. 34 Am. Rep. 345; Prescott Nat. Bank v. Butler, 157 Mass. 548; s. c. 32 N. E. Rep. 909; 8 Bank. L. J. 145.

<sup>3</sup> Marine Bank v. Fulton Bank, 2 Wall. (U. S.) 252.

<sup>4</sup> See Pattison v. Syracuse Nat. Bank, 80 N. Y. 82; s. c. 36 Am. Rep. 582; Turner v. First Nat. Bank, 26 Iowa, 562, 567. *Contra*, Wiley v. First Nat. Bank, 47 Vt. 546; s. c. 19 Am. Rep. 122; Whitney v. First Nat. Bank, 50 Vt. 388; s. c. 28 Am. Rep. 503.

may have been received into the bank.<sup>1</sup> But proof of actual knowledge on the part of the board of directors would not seem to be necessary to establish the validity of the acts of the officers of a bank in receiving special deposits. This knowledge may presumptively appear, as where the cashier habitually receives deposits of this character. In such a case, the duty of knowing will be tantamount to actual knowledge, and, although the deposit be kept gratuitously, for mere accommodation, the bank will incur liability for gross negligence in its keeping.<sup>2</sup>

§ 5952. **Illegal Banking.**—In the early commercial development of our country, the policy of many of the States was to make a *monopoly of banking*. Such legislation was justified under the specious pretense of protecting the people from losses through irresponsible banking institutions; but it really had its foundation in the influence, more or less corrupting, of the banking corporations in existence, exerted upon the State legislatures, to prevent other corporations from coming into competition with them in their business. Those statutes gave rise to a series of decisions, which happily have no longer any place in American jurisprudence, and which will hence be adverted to in the briefest manner.<sup>3</sup> Under the operation of restraining statutes existing at that period, *insurance companies could not go into the banking business*, and if they did, they could not recover upon the commercial paper

<sup>1</sup> Foster v. Essex Bank, 17 Mass. 479; s. c. 9 Am. Dec. 168.

<sup>2</sup> Chattahoochee Nat. Bank v. Schley, 58 Ga. 369; Pattison v. Syracuse Nat. Bank, 80 N. Y. 82; s. c. 36 Am. Rep. 582; Lloyd v. West Branch Bank, 15 Pa. St. 172; s. c. 53 Am. Dec. 581; Lancaster County Nat. Bank v. Smith, 62 Pa. St. 47; Scott v. National Bank, 72 Pa. St. 471; s. c. 13 Am. Rep. 711; First Nat. Bank v. Graham, 79 Pa. St. 106; s. c. 21 Am.

Rep. 49; Smith v. First Nat. Bank, 99 Mass. 605; s. c. 97 Am. Dec. 59.

<sup>3</sup> For a statement of the policy of New York on this subject and the change of the policy which took place in that State in 1837 (N. Y. Laws 1837, ch. 20), reducing banking to a private business, except in the matter of issuing circulating notes, — see Curtis v. Leavitt, 15 N. Y. 9, 97; and Pratt v. Short, 79 N. Y. 437, 448; s. c. 35 Am. Rep. 531.

discounted by them, though they could sue for the consideration as so much money had and received.<sup>1</sup>

§ 5953. **Dry Dock Company cannot Engage in Navigation.** The owning and navigating of steamboats being a distinct business from the docking and repairing of such vessels, a corporation formed solely for the latter business cannot lawfully engage in the former, and a subscription of such a corporation to the stock of a corporation engaged solely in the former business is not enforceable.<sup>2</sup>

§ 5954. **Incorporated Common Carriers.**—A corporation created for the mere purpose of engaging in the business of common carrier cannot engage in the general business of *buying grain*; though in such a case it has been said: "Possibly it might lawfully purchase grain and other produce for storage and shipment, for the purpose of keeping its ware-

<sup>1</sup> *Utica Ins. Co. v. Scott*, 19 Johns. (N. Y.) 1; *Utica Ins. Co. v. Kip*, 8 Cow. (N. Y.) 20; *Utica Ins. Co. v. Cadwell*, 3 Wend. (N. Y.) 296; *Utica Ins. Co. v. Bloodgood*, 4 Wend. (N. Y.) 652. See also *Pratt v. Short*, 79 N. Y. 437; *s. c.* 35 Am. Rep. 531. In Missouri a drastic statute was enacted (Rev. Code Mo. 1855, p. 289, § 14), which was construed as intending to exclude foreign corporations from coming into competition with the authorized banking establishments of the State, and to prevent them from circulating depreciated currency therein. As thus interpreted, it rendered void all bonds, bills, notes, or other instruments of writing, securing the payment of any money or bank notes, loaned or advanced by any foreign corporation or incorporated banking company situated or located, or which is doing business by its officers or agents, within the State. Under its operation a note given to secure a loan,

made in foreign bank notes by a foreign banking corporation doing business by its agent in the State of Missouri, was void, and notes given in renewal of such original note were also void. *Bank of Louisville v. Young*, 37 Mo. 398, 405. Another statute of the same State prohibited corporations from circulating, within the State, notes of a less denomination than five dollars, under a penalty of a forfeiture of their charters, and provided, as judicially construed, that the fact of *forfeiture* might be pleaded as a defense to any action brought by a corporation so offending, and that it might in any action be *tried collaterally* by the court. Rev. Stat. Mo. 1855, p. 286, § 4; *Ibid.*, p. 288, § 9. See *North Missouri R. Co. v. Winkler*, 33 Mo. 354; *Christian University v. Jordan*, 29 Mo. 68.

<sup>2</sup> *New Orleans &c. Steamship Co. v. Ocean Dry Dock Co.*, 28 La. An. 173; *s. c.* 26 Am. Rep. 90.

houses and boats employed, which but for such purchase would have been unemployed; although such power, even under such circumstances, may well be doubted.”<sup>1</sup> Such a corporation *cannot*, therefore, *recover damages* for the breach of a contract for the non-delivery of grain which it has purchased, but it can recover back so much of the purchase-money as it has paid.<sup>2</sup>

§ 5955. **Mining Corporations.**—Mining corporations being private, not only in the sense by which they are distinguished from municipal bodies, but in that which relates to the industry in which they are engaged, have *no power to condemn private property* for their use.<sup>3</sup> Being organized for mining purposes alone, they cannot lawfully engage in other occupations, not necessarily incidental to the business for which they are incorporated.<sup>4</sup> It is not essential, however, that the articles of incorporation of a mining company shall expressly enumerate the particular powers necessarily implied in the authority granted to any corporation to enable it to perform its ordinary business functions, as to make contracts, incur debts, and mortgage its property to secure the same, and the like.<sup>5</sup> Nor would a corporation created for mining purposes be restricted as to its implied powers, precisely as would a manufacturing, banking, or other corporation. Whatever might be fairly regarded as a legitimate means to the profitable carrying on of the business of mining is, by implication, if not expressly mentioned, included in its corporate powers. And while it is true that these charter priv-

<sup>1</sup> Northwestern Union Packet Co. v. Shaw, 37 Wis. 655; s. c. 19 Am. Rep. 781.

<sup>2</sup> *Ibid.*

<sup>3</sup> Consolidated Channel Co. v. Central Pac. R. Co., 51 Cal. 269; Amador &c. M. Co. v. Dewitt, 73 Cal. 482.

<sup>4</sup> Byers v. Franklin Coal Co., 106 Mass. 131; People v. Pittsburgh R. Co., 53 Cal. 694; Chewacla Lime Works v. Dismukes, 87 Ala. 344; s. c.

6 South. Rep. 122. Nor can a corporation organized for railroad, manufacturing, or other purposes, engage in the business of mining, when that is not one of their charter privileges. Ecclesiastical Comm'rs &c. v. North Eastern R. Co., L. R. 4 Ch. Div. 845.

<sup>5</sup> Union Water Co. v. Murphy's Flat Fluming Co., 22 Cal. 620; Watts's Appeal, 78 Pa. St. 370; Wood Hydraulic &c. Co. v. King, 45 Ga. 34.

ileges cannot be indefinitely enlarged to suit the notions, as to convenience, of the officers and directors of a particular corporation, yet the peculiar requirements of this branch of industry are so various that a mining company may find it necessary, in order to mine profitably, to engage in auxiliary enterprises, which are usually carried on by individuals or corporate bodies, quite independently.<sup>1</sup> Thus, a mining corporation may, without being specially authorized thereto, engage in the business of developing water and building flumes, ditches, and reservoirs, and may in its corporate capacity acquire water rights, under the same circumstances and upon like conditions as may be done by natural persons, where the use of water is essential to the business of mining.<sup>2</sup> So, also, has it been held that a mining corporation may enter into a valid contract to advance money to another mining corporation, to aid in the construction of a tunnel to drain the mines of the company making the advance.<sup>3</sup> So, also, if the governing statute authorizes every corporation to purchase and convey such real and *personal* estate as its purposes may require, not exceeding a prescribed amount, a corporation created for the mining and *transportation* of coal, etc., has power to purchase and use a *steamboat* for transporting and delivering coal, etc.;<sup>4</sup> but a corporation organized for the general purpose of mining and manufacturing limestone and keeping up and running such machinery as may be necessary to saw lumber and make barrels for the packing of lime, having by the language of its charter the power "to have, purchase, re-

<sup>1</sup> Thus, though it was held in *People v. Pittsburgh R. Co.*, 53 Cal. 694, that a mining corporation could not, even by incorporating as a railroad company, become empowered to *exercise the right of eminent domain*, the road intended to be built being for private and not for public use (see *Consolidated &c. Co. v. Central Pac. R. Co.*, 51 Cal. 269; *Amador &c. M. Co. v. Dewitt*, 73 Cal. 482; *Cherokee Iron Co. v. Jones*, 52 Ga. 276), still, it

was not claimed that the mining corporation could not, as an aid to its principal business, *construct a private railroad*. See *Trowbridge v. Scudder*, 11 Cush. (Mass.) 83.

<sup>2</sup> *Cole Silver Min. Co. v. Virginia &c. Water Co.*, 1 Sawy. (U. S.) 470.

<sup>3</sup> *Sutro Tunnel Co. v. Segregated Belcher Min. Co.*, 19 Nev. 121; *Wood Hydraulic Min. Co. v. King*, 45 Ga. 34.

<sup>4</sup> *Callaway Min. &c. Co. v. Clark*, 32 Mo. 305.

ceive, possess, and enjoy lands, rights, tenements, hereditaments, goods, chattels, and effects, in any amount the corporate body may deem necessary to carry all the objects of said corporation into full force and effect," — has no power to engage in the mercantile business by keeping what is called a "*truck-store*" for the sale of truck to its employés; and if it does engage in such business, and in carrying it on purchases, on credit, goods of a third party, its successor in right may repudiate the contract as being *ultra vires*: the law thus enabling it to cheat its employés on the one hand, and innocent strangers on the other.<sup>1</sup>

**§ 5956. Power to Locate Mining Claims.** — The statutes of the United States provide that mineral lands may be occupied and purchased "by citizens of the United States, and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners," etc.<sup>2</sup> They also provide that "proofs of citizenship, under this chapter, may consist . . . in the case of . . . a corporation organized under the laws of the United States, or of any State or Territory thereof, by filing a certificate of the charter," etc.<sup>3</sup> By another section, which relates to the manner and conditions of obtaining a patent for a mining claim, it is provided that "any person, association, or corporation, authorized to locate a claim under this chapter," may file an application, etc.<sup>4</sup> Construing these provisions, it is held, as a most obvious conclusion, that a *corporation, all of whose members are citizens of the United States*, is competent to locate a mining claim.<sup>5</sup>

<sup>1</sup> *Chewacla Lime Works v. Dis-  
mukes*, 87 Ala. 344; s.c. 6 South Rep.  
122. But for the stockholders in a  
mining corporation to become part-  
ners in a firm which runs a "*truck-  
store*" selling merchandise to the  
employés of the corporation, has been  
held not to be *per se* a violation of a  
statute forbidding mining corpora-  
tions to engage in selling merchandise.

*Evans v. Kingston Coal Co.*, 6 Kulp.  
(Pa.) 351.

<sup>2</sup> Rev. Stats. U. S., § 2319.

<sup>3</sup> *Ibid.*, § 2321.

<sup>4</sup> *Ibid.*, § 2325.

<sup>5</sup> *McKinley v. Wheeler*, 130 U. S.  
630; citing for analogy, *Bank v. De-  
veaux*, 5 Oranch (U. S.), 61; *Society  
v. New Haven*, 8 Wheat. (U. S.) 464,  
491. The court conceded that there

**§ 5957. Power of Mining Companies to Borrow Money.**

It has been long the rule in England that the directors and managers of mining companies have no power to involve the private fortunes of the members by borrowing money, unless such power is conferred upon them in express terms. And this is so, although the money borrowed is absolutely necessary for the preservation of the mines, and although the deed of settlement commits the sole management of the mines to the directors in the largest general language.<sup>1</sup> But this doctrine would not be applicable to an American mining company of limited liability, because the reasoning on which the English judges place the rule would not be applicable: the exercise of such power would merely involve the social assets, and not the private fortunes of the stockholders.

**§ 5958. Boom Companies.**—It has been held, under a very narrow conception, that a corporation authorized by its charter to *boom lumber*, and to receive toll therefor, cannot recover toll for *driving lumber*, under a contract, made by its agent in its behalf, although it has rendered the services and they are meritorious,—they being beyond the scope of its

might be some question as to the extent of the claim which a corporation might be permitted to locate as an original discoverer, but that question was not before the court.

<sup>1</sup> *Burmester v. Norris*, 6 Ex. 796; s. c. 21 L. J. Ex. 143; *Hawtayne v. Bourne*, 7 Mees. & W. 595. The rule is the same in the case of a mine conducted by adventurers on the *cost book principle*. *Ricketts v. Bennett*, 4 Com. B. 686. Neither was one of the shareholders in a mine bound by an acceptance of bills by the directors. *Dickinson v. Valpy*, 10 Barn. & C. 128; s. c. 5 Man. & Ry. 126. But in *Tredwen v. Bourne*, 6 Mees. & W. 461, the question of the authority of the directors of a mining company to *purchase goods on credit*, for the carrying on of the mine, was put to the jury as a

*question of fact based upon usage*; and upon their finding that there was such authority, a judgment was given for the plaintiff. But in *Hawken v. Bourne*, 8 Mees. & W. 703, it was held that a restriction or limitation of the authority of the directors of such a concern, not known to the outside world, would bind no one to whom it was unknown: the public would still have a right to presume that the directors of the company possessed the powers usual to the directors of such concerns. This doctrine is obviously of application to the by-laws and other private instruments for the government of American corporations, but not to the deeds of settlement of English registered companies, which are notice to persons dealing with them.

authority.<sup>1</sup> With more liberality and better sense, another court held that the charter of such a company, prescribing the conditions on which it alone shall be obliged to receive and store logs in its booms, does not limit the power of the company, under its general power of contracting in relation to its business, to receive and store logs tendered to it under other conditions, or to agree for their storage in any way in which a lawful contract may be made.<sup>2</sup>

§ 5959. **Whaling Companies.**—A corporation chartered “for the purpose of engaging in the whale fishery and in the manufacture of oil and spermaceti candles,” has no authority to purchase or *deal in State bonds*. But it was held that, where such a company gave its obligation for State bonds, it could not avoid its obligation on this ground.<sup>3</sup>

§ 5960. **Land Improvement Companies.**—A corporation whose charter confers the power to “buy, own, and sell real and personal property, and to *improve* the same,” has power to *erect a college* on land purchased by it.<sup>4</sup>

§ 5961. **When Manufacturing Corporations may Purchase in Order to Re-sell.**—It has been held that a corporation, created to manufacture and sell goods of a certain kind, has an implied power to purchase goods of that kind for the purpose of keeping up its stock and supplying its customers until it can get its works in order to manufacture.<sup>5</sup> But another court has held that a manufacturing corporation, created to engage “in the conversion and disposal of agricultural products, by means of mills, elevators, stores, or otherwise,” hav-

<sup>1</sup> Bangor Boom Corp. v. Whiting, 29 Me. 123. In this case, according to well-understood principles, the defendant having *got the benefit* of the contract, ought to have been *estopped* from setting up that the corporation had no power to do for him what it did: *Ante*, §§ 5258, 5303.

<sup>2</sup> Wausau Boom Co. v. Plumer, 35 Wis. 274. Construction of a statute

authorizing a corporation, under certain restrictions, to erect a boom in a navigable river: Mason v. Boom Co., 3 Wall. Jr. (U. S.) 252.

<sup>3</sup> State v. Woram, 6 Hill (N. Y.), 33; s. c. 40 Am. Dec. 378.

<sup>4</sup> Fulton v. Sterling Land &c. Co., 47 Kan. 621; s. c. 28 Pac. Rep. 720.

<sup>5</sup> Lyndeborough Glass Co. v. Massachusetts Glass Co., 111 Mass. 315.



ing the power, under its charter, to carry on the business of *buying grain (not flour)*, and of making flour and meal and of selling and disposing of its grain, flour, and meal through its elevators, stores, and otherwise, — has no power to engage in the *general business* of purchasing and selling flour for profit. Such a business being *prima facie* outside the scope of its powers, if its president assumes to involve the corporation in it, the corporation will not be liable for any of the unpaid purchase price, where it does not get the proceeds of the purchase, and where there are otherwise no circumstances of estoppel. It is, however, conceded, that under particular circumstances such a corporation might purchase flour to sell again, to meet some temporary want, or to supply and protect its trade; but the court hold that it cannot engage in this class of business as a business.<sup>1</sup>

**§ 5962. Other Powers Conceded to Manufacturing Corporations.**—Without attempting a full explanation of the grounds on which each decision proceeds, but proceeding rather with a view of making a continued index of a large number of holdings, it may be stated that it has been held, under many statutes and for various reasons, as follows:—That a manufacturing corporation, organized under a statute which declares that it shall not be lawful for it “to direct its operation or appropriate its funds to any other purpose” than that specified in its articles of incorporation, may *take insurance* in a millers and manufacturers’ insurance company, so as to be bound by the premium notes given therefor;<sup>2</sup> that a

<sup>1</sup> *Getty v. Barnes Milling Co.*, 40 Kan. 281. Quite in the opposite direction, it has been held that a corporation incorporated under the laws of New York “for the purpose of engaging in the *whale fishery*, and in the manufacture of oil and spermaceti candles,” has power to become a *purchaser of the bonds of the State of Indiana*, so that the State may maintain an action against an individual guaranteeing payment or per-

formance by the corporation: See *ante*, § 5959. That a corporation may be organized for the gathering, storing, and vending of *ice*, under a statute permitting the organization of corporations for manufacturing purposes (*How. Stat. Mich.*, § 4004),—see *Attorney-General v. Lorman*, 59 Mich. 157; *s. c.* 60 Am. Rep. 287.

<sup>2</sup> *St. Paul Trust Co. v. Wampach Man. Co.*, 50 Minn. 93; *s. c.* 52 N. W. Rep. 274.

corporation created for the purpose of manufacturing, disposing of, and dealing in, machinery, may make valid contracts for the *sale of machinery*, not only in the State of its creation, but *in any other State* where such contracts are not prohibited by the local law;<sup>1</sup> that, after the dissolution of a manufacturing partnership and the formation of a corporation by the dissolving partners, to which all the firm property and *patents* are transferred, such corporation can *engage in the same business* as that of the firm, and the remaining partner cannot restrain the corporation from using a patent owned, in whole or in part, by the former partners, or from selling articles in common use to any person, whether an old customer of the firm or not;<sup>2</sup> that such a corporation may, through its directors and president, make or ratify an agreement with a banking corporation with which it has an account, to the effect that the proceeds of paper of the manufacturing corporation, turned over to the bank, shall not be applied on the old indebtedness to the bank, but shall be applied to the payment of supplies, etc., for carrying on the current expenses;<sup>3</sup> that such a corporation, against which a large judgment has been recovered for the *infringement of patents*, which it is unable to pay, has the power to *turn over to the plaintiff in the judgment all its other patent rights* not decreed to be an infringement, although essential to the prosecution of its business,—it not appearing that the value of the patents, when compared with the amount of the judgment, is excessive in such a sense as to constitute a fraudulent conveyance,—and the case not being within the prohibition of a statute against corporations making assignments in contemplation of insolvency;<sup>4</sup> that a corporation, created to *manufacture* certain articles, may fill an order made up and accepted by a third party for an article of the same kind;<sup>5</sup> that a manufacturing corporation may *purchase*

<sup>1</sup> Hall v. Tanner &c. Engine Co., 91 Ala. 363; s. c. 8 South. Rep. 348.

<sup>2</sup> Macdonald v. Trojan Button Fastener Co., 31 N. Y. St. Rep. 374; s. c. 9 N. Y. Supp. 383.

<sup>3</sup> Patterson v. Robinson, 116 N. Y. 193; s. c. 26 N. Y. St. Rep. 685; 6 Rail.

& Corp. L. J. 483; 28 Am. & Eng. Corp. Cas. 632; 22 N. E. Rep. 372.

<sup>4</sup> Sheldon Hat &c. Co. v. Eickmeyer Hat &c. Co., 56 How. Pr. (N. Y.) 70.

<sup>5</sup> Louis Cook Man. Co. v. Randall, 62 Iowa, 244.

of one of its agents a note acquired by him through the sale of an article manufactured by the corporation;<sup>1</sup> that a corporation created to carry on an iron furnace may keep a "*supply store*" for the purpose of selling goods to his employés,—the power being regarded as one conferred by implication;<sup>2</sup> that a manufacturing corporation which keeps a "*supply store*" where there is no statutory prohibition, by means of an undisclosed agent, may maintain an action against a person not in its employ for goods purchased by him from the store, where he retains and uses them, even if the contract of sale is in excess of the powers of the corporation.<sup>3</sup>

**§ 5963. What Powers have been Denied to Manufacturing Corporations.**—It has been held that a corporation, organized to carry on a foundry and *machine-shop*, has no power to enter into a contract to furnish an individual with a certain quantity of *ice* for a year, at specified prices, and that an action for damages for the breach of such a contract cannot be maintained;<sup>4</sup> that a corporation created for the sole purpose of "manufacturing and repairing machinery," and prohibited from contracting any debt without the written consent of its board of directors, cannot make a sale of machinery as the agent of a third person; and if it assumes to do so, and takes a note from the purchaser, and indorses it to the person from

<sup>1</sup> *Western Cottage Organ Co. v. Reddish*, 51 Iowa, 55. The courts say: "The power to purchase the note in question is not prohibited by the law under which the plaintiff was organized, nor is it expressly granted. In the absence of such prohibition, the power exists, if its exercise was necessary and proper for the purpose of carrying out the objects of the corporation." *Ibid.* 57; citing *Thompson v. Lambert*, 44 Iowa, 239.

<sup>2</sup> *Searight v. Payne*, 6 Lea (Tenn.), 283. Compare *ante*, § 5491, *et seq.* Means of evading statutes prohibiting corporations from keeping such stores is found in having the store

kept by a stockholder. *McManaman v. Hanover Coal Co.*, 6 Kulp. (Pa.) 181. Compare *Slater Woollen Co. v. Lamb*, 143 Mass. 420; and *Chester Glass Co. v. Dewey*, 16 Mass. 94; *s. c.* 8 Am. Dec. 128.

<sup>3</sup> *Slater Woollen Co. v. Lamb*, 143 Mass. 420. The case proceeds on the doctrine already considered (*ante*, §§ 5258, 5383), that in such a case the party to the contract, so long as he retains the benefits of it, is estopped from setting up that it was *ultra vires*. See also *Chester Glass Co. v. Dewey*, 16 Mass. 94; *s. c.* 8 Am. Dec. 128.

<sup>4</sup> *Simmons v. Troy Iron Works*, 92 Ala. 427; *s. c.* 9 South. Rep. 160.

whom it took it as agent, no recovery can be had thereon, he being cognizant of all the facts;<sup>1</sup> that a manufacturing corporation cannot legally invest money in the shares of a banking corporation for the purpose of carrying on a banking business, nor issue notes in payment of shares which it takes in such a company, which will bind the corporation or its members;<sup>2</sup> that a company created for the "conversion and disposal of agricultural products by means of *mills*, elevators, stores, or otherwise," cannot engage in the *purchase* and sale of flour as a business;<sup>3</sup> that a company created to mine limestone, and to manufacture and sell lime, with power to buy and hold real or personal property, in such amounts as it may deem necessary to accomplish the purposes of its creation, cannot *purchase* goods, to be resold, except to carry on a "*supply store*," or otherwise aid in its principal business;<sup>4</sup> that a manufacturing company, organized under the laws of Missouri, has no authority to engage in a business not within the scope of its purposes, as set forth in its articles of incorporation; nor to engage in *selling oysters*, under articles of association empowering it "to buy and sell *dairy products*, especially milk, butter, cheese, and ice-cream, and to purchase, hold, mortgage, or otherwise convey such real and personal property as the purposes of the corporation shall require."<sup>5</sup>

<sup>1</sup> Westinghouse Machine Co. v. Wilkinson, 79 Ala. 312.

<sup>2</sup> Sumner v. Marcy, 3 Woodb. & M. (U. S.) 105.

<sup>3</sup> Getty v. Barnes Milling Co., 40 Kan. 281; s. c. 19 Pac. Rep. 617.

<sup>4</sup> Chewacla Lime Works v. Dis-

mukes, 87 Ala. 344; s. c. 6 South. Rep. 122. Compare Slater Woollen Co. v. Lamb, 143 Mass. 420. Compare *ante*, § 5491, *et seq.*

<sup>5</sup> Bowman Dairy Co. v. Mooney, 41 Mo. App. 665.

## CHAPTER CXXX.

### DOCTRINE OF ULTRA VIRES.

#### ART. I. NATURE AND EXTENT OF THIS DOCTRINE.

#### II. THEORIES UNDER WHICH ITS APPLICATION IS DENIED.

#### ARTICLE I. NATURE AND EXTENT OF THIS DOCTRINE.

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§ 5967. **Presumption that Corporations Act within their Powers.** — At the outset of this discussion we may renew attention to a principle already adverted to,<sup>1</sup> that the *presumption of right-acting* extends to private corporations in such a sense that they are always presumed to act within their granted powers until the contrary is made to appear. So that, in general, the *burden* of showing that a contract made, or an act done, by such a corporation was *ultra vires*, is upon him who alleges that fact as the foundation of his action or defense.<sup>2</sup> This presumption operates in several ways. If the powers possessed by the particular corporation do not appear at all, and are not judicially noticed by the court, then it operates, within certain limits, to carry with it the general presumption that the act or contract which is challenged was

<sup>1</sup> *Ante*, § 5644.

<sup>2</sup> *Chautauque County Bank v. Risley*, 19 N. Y. 369; *s. c.* 75 Am. Dec. 347; *Rider Life-Raft Co. v. Roach*, 97 N. Y. 378; *Farmers' Loan &c. Co. v. Curtis*, 7 N. Y. 466; *De Graff v. Am-*

*erican &c. Co.*, 21 N. Y. 124; *Kappel v. Chaari Zedek Congregation*, 19 Hun (N. Y.), 364; *Morris &c. R. Co. v. Sussex R. Co.*, 20 N. J. Eq. 542; *Dana v. Bank of St. Paul*, 4 Minn. 385.

within its powers.<sup>1</sup> If it has the power to do a given act, or to make a contract of a given nature under prescribed conditions, then the principle operates to create the presumption that *those conditions existed* in the particular instance.<sup>2</sup> It also operates as a principle of *favorable interpretation* in respect of corporate contracts; so that where the words employed in such a contract admit of a double construction, they are to be construed consistently with the provisions of its charter.<sup>3</sup> It also operates to cast the *burden of proof* upon the party setting up the want of power. If, for instance, a contract, made in the name of a corporation by its president, is one which the corporation has the power to make, or to ratify after it has been made, and an action is brought under a statute to charge the trustees of the corporation on the ground that the *indebtedness was in excess of the capital stock* of the corporation, and the defendants place their defense upon the ground that the creation of the debt was not authorized or ratified by the corporation, the *burden* is upon them to show that fact.<sup>4</sup>

§ 5968. General Statement of the Doctrine of Ultra Vires.—Perhaps the most general statement which can be made of the doctrine of *ultra vires* is to say that a contract of a corporation which is unauthorized by, or in violation of, its charter or other governing statute, or entirely outside of the

<sup>1</sup> Dana v. Bank of St. Paul, 4 Minn. 385.

<sup>2</sup> Thus, if a corporation has power to hold and convey real estate for *some purposes*, the court will presume, until the contrary is shown, that real estate conveyed by it was taken, held, and conveyed by virtue of the powers granted to it. Farmers' Loan & Co. v. Curtis, 7 N. Y. 466. So, where a banking corporation, having by its charter power to acquire real estate in "satisfaction of debts," took from the holder of a sheriff's certificate of sale, after it had become absolute, an assignment of all his right, and then

received the sheriff's deed, and the assignment was expressed to be "for value received," it was held, in the absence of proof of any other consideration, that it would be *presumed* that the corporation had taken the assignment "in satisfaction of debts," and that it would hold the real estate by virtue of the sheriff's deed. Chautauque County Bank v. Risley, 19 N. Y. 369; s. c. 75 Am. Dec. 347.

<sup>3</sup> Morris & Co. R. Co. v. Sussex B. Co., 20 N. J. Eq. 542.

<sup>4</sup> Patterson v. Robinson, 116 N. Y. 193.

scope of the purpose of its creation,<sup>1</sup> is void in the sense of being no contract at all, because of a total want of power to enter into it;<sup>2</sup> that such a contract will not be enforced by any species of action in a court of justice;<sup>3</sup> that, being void *ab initio*, it cannot be made good by *ratification*,<sup>4</sup> or by any succession of *renewals*;<sup>5</sup> and that no *performance* on either side can give validity to the unlawful contract, or form the foundation of any right of action upon it.<sup>6</sup>

§ 5969. **How the Doctrine of Ultra Vires Started and was Misapplied in Growing.**—The doctrine of *ultra vires* originated at a period when nearly all corporations were created for public purposes, and it grew up principally with reference to the transactions of municipal corporations. The courts of an early day transferred a rigorous rule created by the demands of a sound public policy, to private corporations, where no sound principles demanded the application of the rule; and they held again and again, not without any special reference to the rights of the public which did not through the State intervene, but where only the rights concerned were the rights of stockholders and creditors who did not move to assert their own rights,—that obligations entered into by corporations, whether in writing or otherwise, for objects not authorized by their charters, could not be made obligatory upon them,—and this without any reference to the question of estoppel.

<sup>1</sup> *Davis v. Old Colony R. Co.*, 131 Mass. 258; *s. c.* 41 Am. Rep. 221. In this case there is an elaborate opinion by Mr. Chief Justice Gray, collecting many of the best decisions on the doctrine of *ultra vires*. What the court held was, that neither a *railroad corporation* nor a *manufacturing corporation* can guarantee the expenses of a *public festival*, although pecuniarily beneficial to the guarantors.

<sup>2</sup> *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 24; *Rock River Bank v. Sherwood*, 10 Wis. 230; *s. c.* 78 Am. Dec. 669.

<sup>3</sup> *Elevator Co. v. Memphis &c. R. Co.*, 85 Tenn. 703; *s. c.* 4 Am. St. Rep. 798; 5 S. W. Rep. 52.

<sup>4</sup> *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 24.

<sup>5</sup> *Orr v. Lacey*, 2 Dougl. (Mich.) 230.

<sup>6</sup> *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 24; *Thomas v. Railroad Co.*, 101 U. S. 71, 86. See also, as to the doctrine and its reasons, *Re Cork &c. R. Co.*, L. R. 4 Ch. 748; *Re National &c. Soc.*, L. R. 5 Ch. 309.



On the one hand, they applied the principle that where the corporation is moving affirmatively to enforce its unlawful or prohibited contracts, courts of justice will withhold their aid,—as where a banking corporation sues to enforce a contract reserving a *prohibited rate of interest*;<sup>1</sup> or where a corporation, which is expressly prohibited from exercising *banking powers*, sues to recover upon a promissory note which it has discounted.<sup>2</sup> On the other hand, they applied it with equal rigor in the destruction of the rights of persons contracting with corporations, holding them conclusively bound to know—what the judges themselves did not in many cases know—the limitations of the power of the corporation, by holding that where the corporation had made an obligation in favor of an individual in excess of its granted powers, he could not maintain an action against the corporation and recover thereon,—as where a corporation had executed its promissory note for a purpose not warranted by its charter.<sup>3</sup>

<sup>1</sup> Bank of Chillicothe v. Swayne, 8 Ohio, 257; s. c. 32 Am. Dec. 707. See also Bank of Wooster v. Stevens, 1 Ohio St. 233, 235; s. c. 59 Am. Dec. 619; Preble County Bank v. Russell, 1 Ohio St. 320; Russell v. Failor, 1 Ohio St. 327, 329; s. c. 59 Am. Dec. 631; Union Bank v. Bell, 14 Ohio St. 200, 209; Hitchcock's Heirs v. Bank of United States, 7 Ala. 386, 434; Evansville R. Co. v. Evansville, 15 Ind. 395, 414. Other courts have refused to go to the length of holding that the reserving of *usurious interest* by a bank renders the contract wholly void: Rock River Bank v. Sherwood, 10 Wis. 230, 237; s. c. 78 Am. Dec. 669; McLean v. Lafayette Bank, 3 McLean (U. S.), 537; Commercial Bank v. Nolan, 7 How. (Miss.) 508; First Nat. Bank of Columbus v. Garlinghouse, 22 Ohio St. 492, 502; s. c. 10 Am. Rep. 751; Farmers' &c. Bank v. Harrison, 57 Mo. 503.

<sup>2</sup> New York Firemen's Ins. Co. v. Ely, 5 Conn. 560; s. c. 13 Am. Dec.

100; Fleckner v. Bank of United States, 8 Wheat. (U. S.) 338, 355; Bank of United States v. Waggener, 9 Pet. (U. S.) 378; New York State Loan &c. Co. v. Helmer, 77 N. Y. 64, 71.

<sup>3</sup> Moss v. Rossie Lead Min. Co., 5 Denio (N. Y.), 567; reversing s. c. 5 Hill (N. Y.), 137. See also Pennsylvania &c. Co. v. Dandridge, 8 Gill & J. (Md.) 248, 319; s. c. 29 Am. Dec. 543. The unjust results to which this doctrine led may be disclosed by the facts of a modern case, decided by one of the most enlightened of the State courts. A corporation had been formed for the purpose of mining lime rock and manufacturing the same into lime. It established, as such corporations often do, what is called a "company store" or a "supply store," for the purpose, it must be assumed, on experience, of cheating and oppressing its own employes by compelling them to take their pay in the goods of the corporation sold

§ 5970. **Judicial Statements of the Reasons on Which the Doctrine of Ultra Vires Rests.** — Two reasons were stated by Mr. Justice Gray as the grounds on which the so-called doctrine of *ultra vires* rests, when appealed to for the purpose of overthrowing corporate bonds and mortgages which have been taken in good faith by creditors:—(1) That the charter of the corporation, which contains its grants of powers, is a public statute which all persons are bound to take notice of and be governed by; (2) that the restraints thereby established on the alienation of the franchise and property of the corporation are founded in considerations of public policy, which neither the corporation nor any other person can be allowed to evade or disregard.<sup>1</sup> In a later case, and from a loftier seat, the same eminent judge restated these reasons as follows, adding a third: "The reasons why a corporation is not liable upon a contract *ultra vires*, that is to say, beyond the powers conferred upon it by the legislature, and varying from

to them at enormous profits. It subsequently changed its name, much as a snake changes its skin without changing its nature; and the new corporation succeeded to the assets and assumed the liabilities of its predecessor. Among these liabilities was a demand for a small bill of goods which a partnership firm had sold to the predecessor corporation, to be used in its "company store." The successor corporation pleaded as a defense that, at the time of the sale of the goods, its predecessor "was keeping a store and carrying on a mercantile business, and bought such goods for the purpose of selling the same at a profit as other merchants do." The trial court charged the jury that this was no defense; and, as the demand otherwise stood proved, instructed them to find for the plaintiff. The Supreme Court of Alabama, reversing this judgment, held the defense a good one, and reiterated its settled doctrine that a corporation is

not estopped, by reason of receiving the benefits of a contract which is *ultra vires*, from setting up its invalidity in defense of a suit brought to enforce it. By thus entering upon a business outside of its charter powers, the corporation was enabled, through the instrumentality of a court of justice, to cheat its own employes on the one hand, who bought its goods, and on the other hand, its customer from whom it bought them. *Chewacla Lime Works v. Dismukes*, 87 Ala. 344; *s. c.* 6 South. Rep. 122. See also *ante*, §§ 5491, 5492.

<sup>1</sup> *Richardson v. Sibley*, 11 Allen (Mass.), 65, 72; *s. c.* 87 Am. Dec. 700; citing *Pearce v. Madison & Co. R. Co.*, 21 How. (U. S.) 441, 443; *Zabriskie v. Cleveland & Co. R. Co.*, 23 How. (U. S.) 381, 398; *Whittenton Mills v. Upton*, 10 Gray (Mass.), 582, 598; *s. c.* 71 Am. Dec. 681; *Com. v. Smith*, 10 Allen (Mass.), 448; *s. c.* 87 Am. Dec. 672.

the objects of its creation as declared in the law of its organization, are: (1) The interest of the public that the corporation shall not transcend the powers granted; (2) the interest of the stockholders that the capital shall not be subjected to the risk of enterprises not contemplated by the charter, and therefore not authorized by the stockholders in subscribing for the stock; (3) the obligation of everyone entering into a contract with a corporation, to take notice of the legal limits of its powers."<sup>1</sup> Somewhat differently, Mr. Chief Justice Cooley stated two reasons for the doctrine as follows: 1 The State has not by law consented that its corporations, of the kind or class to which the one in question belongs, shall be at liberty to make contracts such as the one in question, but for reasons of sound public policy has withheld from them the power to do so. 2 Nor have the incorporators of the corporation consented that their interests may be put in jeopardy by such contracts.<sup>2</sup>

<sup>1</sup> Pittsburgh &c. R. Co. v. Keokuk &c. Bridge Co., 131 U. S. 371; citing Pearce v. Madison &c. Co., 21 How. (U. S.) 441.

<sup>2</sup> Day v. Spiral Spring Buggy Co., 57 Mich. 146; s. c. 58 Am. Rep. 352, 354. Mr. Justice Rothrock, in a modern case, stated the doctrine and the reasons upon which it rests, as follows: "A corporation exists and exercises its franchise only by virtue of a grant from the legislative power. The granting and acceptance of a charter in the case of private corporations for pecuniary profit are based on the theory that the prosecution of the business proposed will be a benefit to the public, and that the investment of capital therein will result in pecuniary profit to the stockholders, and that it is an undertaking, on the part of the corporation and all of its stockholders, that, in consideration of the grant of power, the capital shall be used for the prosecution of the purpose named in the

charter, and no other. There is also an undertaking on the part of the corporation with each stockholder that the capital he invests shall be put to no other use, and subject to no other hazard, than that contemplated by the powers expressed in the charter, and that those things which are within the scope or object of the corporation shall be done in the manner pointed out in the charter and the laws governing its action. But corporations and officers do not always keep within their powers, and the application of the doctrine of *ultra vires* is often attended with very perplexing questions. By the application of a few plain rules, however, we may readily reach the proper answer to the question involved in the case. 1. Every person dealing with a corporation is charged with knowledge of its powers as set out in its recorded articles of incorporation. 2. Where a corporation exercises powers not given by its charter, it

## § 5971. Comments on These Statements of Doctrine. —

The first reason advanced by Mr. Justice Gray would have no just application in the case of those corporations created and existing under charters granted in the form of *special acts* of the legislature; because it would be a hard rule that would require a stranger to the corporation to take notice of a statute which the judge would not notice until it was proved to him. And yet the doctrine of *ultra vires* had its origin, and was applied in the most drastic manner, in respect of corporations created either by royal charters or by special acts of legislation, as all our early corporations were. The other reason advanced by Mr. Chief Justice Cooley, and by other eminent judges, as the foundation of the doctrine, that it is contrary to public policy to allow corporations to overstep the limits of the powers granted to them by the legislature, and that the rights of their stockholders are concerned in preventing this, — can have no more than a somewhat fanciful application to corporations of a strictly private character. Where the powers and properties of a corporation are devoted to public uses, as in the case of a municipal corporation, a railway corporation, and others of the like kind, then public policy, that is to say, the interest of the State, is undoubtedly concerned in seeing that those who wield those powers and

violates the law of its organization and may be proceeded against by the State, through its attorney-general, as provided by the statute, and the unanimous consent of all the stockholders cannot make illegal acts valid. The State has the right to interfere in such case. 3. Where a third party makes with the officers of a corporation an illegal contract beyond the powers of the corporation, as shown by its charter, such third party cannot recover; because he acts with knowledge that the officers have exceeded their power, and between him and the corporation or its stockholders no amount of ratification by those authorized to make the contract will

make it valid. 4. Where the officers of a corporation make a contract with third parties in regard to matters apparently within their corporate powers, but which, upon the proof of extrinsic facts (of which such parties had no notice), lie beyond their powers, the corporation must be held, unless it may avoid liability by taking timely steps to prevent loss or damage to such third parties; for in such cases the third party is innocent, and the corporation or stockholders less innocent for having selected officers not worthy of the trust reposed in them." *Lucas v. White Line Transfer Co.*, 70 Iowa, 541; s. c. 59 Am. Rep. 449, 452, 453.

manage those properties do not wield them and manage them for other purposes than the carrying out of the public trust confided in them. But in the case of a strictly private corporation, a mining, manufacturing, or commercial company, it becomes a mere question of the *private agent* of a *private principal* overstepping the limits of an *agency*, or a private trustee of a private *cestui que trust* acting in breach of his trust. In such a case it is mere nonsense to impute to the State a special concern with preventing such agents from acting in excess of their powers, or such trustees from committing breaches of their trust, so long as the principals or the beneficiaries do not interpose. The State has no more concern with preventing such wrongs than it has with preventing a partner from endeavoring to charge the partnership assets by making an accommodation note in the name of the firm. The principles of the common law, even in many matters of crime, have always left it to private prosecutors to put in motion the criminal laws; and in matters which merely respect private rights that law has always remained passive, so long as the persons injured did not appeal to the sovereign and demand redress through the courts. Nay, they were required to demand redress in person, and were not allowed to sell their rights of action to others, even where they had not the pecuniary means of litigating for their own rights themselves; and the doctrine of champerty and maintenance was originally founded in the principles of the common law, and the numerous statutes denouncing those offenses were always regarded as declaratory of the common law. If we turn this theory of public policy the other way, we shall find that the State will not interfere to dissolve a strictly private corporation, merely because of one or more *ultra vires* acts upon the part of those who wield its powers.<sup>1</sup> We shall further find that when the State does interfere through its attorney-general to dissolve a corporation on this ground, the courts oppose every obstacle in its way. The proceeding is in the nature of a criminal proceeding; the end sought to be obtained is a forfeiture;

<sup>1</sup> *Post*, §§ 6615, 6616.

courts do not favor, but often relieve against, forfeitures; and therefore the State must prove every essential fact to a certain intent; and, as in a criminal case, must prove the commission of the offenses charged beyond a reasonable doubt. Again, in so far as the doctrine rests upon the theory of protecting the rights of the stockholders, it is fanciful for the courts to apply it where the stockholders do not complain; and if they do complain and come into a court of equity, and ask to be permitted to sue in the name of the corporation to redress *ultra vires* breaches of trust on the part of its unfaithful directors and officers, the courts, as we have seen, will often throw every technical obstacle in their way which judicial ingenuity can invent. They will not allow them to be heard until they have pleaded and proved they have gone to the nonsensical length of requesting the unfaithful directors to sue themselves in the name of the corporation; and then they raise all sorts of obstructions against relieving them, on the theory of estoppel and laches.<sup>1</sup> It thus practically comes to this, and such, in substance, is the contradictory and unjust condition of many of the judicial holdings, — that in a case where the State would not interfere if it could because it has no interest, and where the judge would not allow it to interfere if it would, and where the stockholders will not interfere, either because they have no interest in so doing, or because the judge would obstruct them if they tried to interfere, — the judge will, when a party, who has honestly parted with his money or property under a contract with a corporation in excess of its granted powers, sues the corporation to enforce that contract, thrust his meddlesome nose between the parties, and declare, upon a vague and fanciful theory of public policy, that the contract shall not be executed, — forgetting that honesty is the highest public policy; that corporations ought not to be upheld in dishonesty any more than individuals; and that it is contrary to the highest public policy for the judicial courts to sustain a corporation in dishonesty by assisting it in repudiating its honest contracts.

<sup>1</sup> *Ante*, § 4494, *et seq.*

§ 5972. **Ultra Vires Acts of Corporations Deemed "Unlawful."**—It is said that the word "unlawful," as applied to corporations, is not used exclusively in the sense of *malum in se* or *malum prohibitum*, but that it is also used to designate powers which corporations are not authorized to exercise, or contracts which they are not authorized to make, or acts which they are not authorized to do,—or, in other words, such acts, powers, and contracts as are *ultra vires*.<sup>1</sup>

§ 5973. **Doctrine that Persons Dealing with Corporations are Bound to Take Notice of their Powers.**—The so-called doctrine of *ultra vires* is necessarily based upon the proposition that every person dealing with a corporation is bound, at his peril, to take notice of the limits of its capacity, imposed by its charter or governing statute.<sup>2</sup> The doctrine is sometimes more shortly stated by saying that "every person dealing with a corporation is bound to take notice of its constitution, by-laws, and ways of doing business."<sup>3</sup> Or, as was said by Mr. Chief Justice Waite: "Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence. It may be restricted in the use of some of its powers while doing business away from its corporate home, but every person who deals with it everywhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs, both in life and after dissolution."<sup>4</sup> Cases are found in which such reasoning as the following occurs: "As corporations are created by *public acts of the legislature*, and all their powers,

<sup>1</sup> *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 292; *s. c.* 17 Am. St. Rep. 319; *State v. Nebraska Distilling Co.*, 29 Neb. 700, 714.

<sup>2</sup> *Haden v. Farmers' &c. Fire Asso.*, 80 Va. 683, 691; *Bockover v. Life Asso.*, 77 Va. 85, 91; *Pearce v. Madison &c. R. Co.*, 21 How. (U. S.) 441; *Davis v. Old Colony R. Co.*, 131 Mass. 258; *s. c.* 41 Am. Rep. 221; *Elevator Co. v. Memphis &c. R. Co.*, 85 Tenn. 703; *s. c.* 4 Am. St. Rep. 798;

*Merritt v. Lambert*, 1 Hoffm. (N. Y.) 166; *Wilson v. Kings Co. Elev. R. Co.*, 114 N. Y. 487; *s. c.* 24 N. Y. St. Rep. 81; 21 N. E. Rep. 1015; *Bocock v. Alleghany Coal & Iron Co.*, 82 Va. 913; *s. c.* 3 Am. St. Rep. 128; 1 S. E. Rep. 325; *Whitehurst v. Whitehurst*, 83 Va. 153; *s. c.* 1 S. E. Rep. 101.

<sup>3</sup> *Bockover v. Life Asso.*, 77 Va. 85, 91.

<sup>4</sup> *Relfe v. Rundle*, 103 U. S. 222.

duties, and obligations are declared and clearly defined by *public law*, parties dealing with them must take notice of those powers and the limitations upon them, at their peril; and will not be allowed to plead ignorance of those powers and limitations in avoidance of the defense of *ultra vires*.”<sup>1</sup> But suppose that the corporation is created by a *private act* of the legislature, or what is more, by such an act supplemented by a number of amendments, all of them private acts and scattered through several books,—here it is well settled that the courts, presided over by men learned in the law, and who have the acts of the legislature at hand as the people have not, will not take notice of such charters unless authorized by the legislature to do so, but that they must be pleaded and proved. Upon what principle then, consistent with practical justice, can lay persons dealing with corporations be charged with notice of them? The writer is of opinion that the doctrine now under consideration has no just application except to municipal and other public corporations. When private corporations, acting through their boards of directors or other authorized agents, make a proposal for a contract, they represent, expressly or impliedly, that they possess the power, under their charter or governing statute, to enter into the contract. The law ought to be in such a state as to allow the public to act with safety upon that representation, except in cases where the want of power is so glaring as to be obvious to business men of ordinary intelligence and information, in which case for a person to act upon the representation might of itself be evidence of fraud.

**§ 5974. Persons Dealing with Corporations Bound to Take Notice of the Powers of their Agents.**—A correlative proposition, but one which rests upon a totally different principle, is that persons dealing with corporations through their agents, as they must if they deal with them at all, are bound at their peril to *take notice that the agent is duly empowered* in

<sup>1</sup> Franklin Co. v. Lewiston Inst., 68 Me. 43; s. c. 28 Am. Rep. 9; citing How. (U. S.) 441; Andrews v. Union Mut. Fire Ins. Co., 37 Me. 256.  
Pearce v. Madison &c. R. Co., 21



the premises, and are chargeable with knowledge of his authority, or want of authority, to bind the corporation.<sup>1</sup> The principle has been stated by the Court of Appeals of New York thus: "Persons dealing with the officers of a corporation, or with persons assuming to represent it, are chargeable with notice of the purpose of its creation and its powers, and with the authority, actual or apparent, of its officers or agents with whom they deal; and when they seek to charge the corporation with liability upon a contract made apparently in its behalf, the *burden* is upon them to prove the authority of the person assuming to act as such officer or agent to so make it."<sup>2</sup> In this statement the proposition of this and that of the preceding section are blended together, as though they rested upon the same principle. They rest on totally different principles. The proposition of this section rests upon a well understood and necessary principle in the law of agency,—which is, that one person cannot make himself the agent of another so as to bind that other, by merely representing that he is such agent; but that the party to whom he makes a proposal for a contract in behalf of his alleged principal is bound at his peril to inquire and find out whether he has authority so to contract.<sup>3</sup> The proposition of the preceding section, if it rests upon any foundation at all, and the author is of opinion that it does not, rests upon the artificial presumption that every man is bound to know the law, and is bound to know the powers of corporations created by law, whether they are public or private corporations, and whether the statutes by which they are created are public statutes such as the courts will notice judicially, or private statutes such as the courts will not even know unless they are proved to them. It rests upon the idea that corporations are not to be allowed in any instance to exceed their powers,

<sup>1</sup> *Ante*, § 4887, *et seq.*; De Bost v. Albert Palmer Co., 35 Hun (N. Y.), 386; Middletown First Nat. Bank v. Council Bluffs City Water-works Co., 56 Hun (N. Y.), 412; *s. c.* 32 N. Y. St. Rep. 85; 9 N. Y. Supp. 859; Bohm v. Loewer's Gambrinous Brewery Co.,

30 N. Y. St. Rep. 424; *s. c.* 9 N. Y. Supp. 514.

<sup>2</sup> *Wilson v. Kings County &c. R. Co.*, 114 N. Y. 487; *Adriance v. Roome*, 52 Barb. (N. Y.) 399; *Alexander v. Cauldwell*, 83 N. Y. 480; *Woodruff v. Rochester &c. R. Co.*, 108 N. Y. 39.

<sup>3</sup> *Ante*, § 4887, *et seq.*

and that any person who makes or takes a contract with or from a corporation, in excess of its powers, assists it in some way in breaking the law. This doctrine makes every person to whom a corporation proposes a contract a sort of agent or representative of the State, charged at his peril with the duty of seeing, in the interest of the State, that the corporation does not exceed its powers in the given particular. The doctrine is a just doctrine when applied to municipal and other public corporations; because in such an application the question is not whether the corporation is exceeding its powers, but whether its officers or contracting agents, charged with a public trust, are endeavoring to act in violation of that trust. As the author has already pointed out, the doctrine had its origin at a period when nearly all corporations were municipal and public in their character; and so far as it still exists,—for it is now honored more in the breach than in the observance,—it has been passed over, by a careless misapplication, to private corporations,—often to private trading companies,—and is kept alive by a species of ape-like repetition, so characteristic of a profession which, from its habit of defending wrong and vindicating right for a pecuniary reward with the same zeal in either case, falls into the habit of dismissing conscience from its methods of reasoning, and of following worn-out precedents with an easy conservatism and a careless indifference to justice.

**§ 5975. Distinction between Contracts Wholly Outside of the Power of the Corporation and Those Outside of It in a Given Particular, or through Some Undisclosed Circumstance.**—Proceeding with this subject, we come to a class of decisions which take the very sound and just distinction between cases where a contract entered into by a corporation is entirely and obviously outside of its granted powers, and where the contract, while within the general scope of its granted powers, is *ultra vires*, because of some particular circumstance which may or may not be known to the other contracting party. This distinction is thrown into very clear light by an opinion of the Supreme Court of California, deliv-

ered by Mr. Chief Justice Sawyer, in which the following language occurs: "The term '*ultra vires*,' whether with strict propriety or not, is also used in different senses. An act is said to be *ultra vires* when it is not within the scope of the powers of the corporation to perform it under any circumstances, or for any purpose. An act is also, sometimes, said to be *ultra vires* with reference to the rights of certain parties, when the corporation is not authorized to perform it without their consent; or with reference to some specific purpose, when it is not authorized to perform it for that purpose, although fully within the scope of the general powers of the corporation, with the consent of the parties interested, or for some other purpose. And the rights of strangers dealing with corporations may vary, according as the act is *ultra vires* in one, or the other, of these senses. All these distinctions must be constantly borne in mind in considering a question arising out of dealings with a corporation. When an act is *ultra vires* in the first sense mentioned it is generally, if not always, void *in toto*, and the corporation may avail itself of the plea. But when it is *ultra vires* in the second sense, the right of the corporation to avail itself of the plea will depend upon the circumstances of the case. . . . Strangers are presumed to know the law of the land, and they are bound, when dealing with corporations, to know the powers conferred by their charter. These are open to their inspection, and it is easy to determine whether the act is within the scope of the general powers conferred for that purpose. But they have no access to the private papers of the corporation, or to the motives which govern directors and stockholders, and no means of knowing the purposes for which an act, that may be lawful for some purposes, is done. The very fact that the appointed officers of the corporation assume to do an act in the apparent performance of their duties, which they are authorized to perform for the lawful purposes of the corporation, is a representation to those dealing with them that the act performed is for a proper purpose. And such is the presumption of the law, and upon this presumption, strangers having no notice in fact of the unlaw-

ful purpose are entitled to rely. . . . Upon any other principle there would be no safety in dealing with corporations, and the business operations of these institutions would be greatly crippled, while the interests of the stockholders and the public, and their general usefulness, would be seriously impaired. The officers are appointed by the corporation, and if any loss results to strangers dealing with the corporation from their misrepresentation in matters within the general scope of their duties, it should fall upon the corporation, which is responsible for their appointment, rather than upon parties who have no other means of ascertaining the facts, and must rely upon their assurances, or not deal with the corporation at all.”<sup>1</sup> The distinction, then, is that while a corporation cannot maintain an action upon a contract which is wholly beyond its power to make,<sup>2</sup>—yet it may maintain an action upon a contract which is within the general scope of its powers, but which, *in some particular*, is in excess of those powers.<sup>3</sup>

**§ 5976. Illustrations of This Doctrine.**—To illustrate this distinction, let us suppose a state of the law under which an *insurance company* is prohibited from engaging in the business of *banking*, but is not prohibited from *taking promissory notes* in the ordinary course of its business. It is sued by a policy-holder to recover indemnity for a loss, and it pleads as a *set-off* a promissory note of the policy-holder which it has acquired. Here, although insurance companies are not in general allowed to buy up the outstanding notes of their policy-holders for the purpose of using them as a set-off against their

<sup>1</sup> *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 578, 587, 588; *s. c.* 99 Am. Dec. 300.

<sup>2</sup> *Madison &c. Plank Road Co. v. Watertown &c. Plank Road Co.*, 7 Wis. 59; *Northwestern Union Packet Co. v. Shaw*, 37 Wis. 655; *s. c.* 19 Am. Rep. 781.

<sup>3</sup> *Rock River Bank v. Sherwood*, 10 Wis. 280; *s. c.* 78 Am. Dec. 669; *Germantown &c. Ins. Co. v. Dhein*, 43 Wis. 420; *s. c.* 28 Am. Rep. 549;

*Littlewort v. Davis*, 50 Miss. 403; *Haynes v. Covington*, 13 Smedes & M. (Miss.) 408; *Alward v. Holmes*, 10 Abb. N. Cas. (N. Y.) 96; *Fleckner v. Bank of United States*, 8 Wheat. (U. S.) 338, 353. Much to the same effect see *Silver Lake Bank v. North*, 4 Johns. Ch. (N. Y.) 370; *Little v. O'Brien*, 9 Mass. 423; *Banks v. Poitiaux*, 3 Rand. (Va.) 136; *s. c.* 15 Am. Dec. 706.

liability for losses,<sup>1</sup>—yet, as such a company has the general power to take promissory notes in the course of its business, it devolves upon the plaintiff to allege and prove that it had not the power in the particular instance,<sup>2</sup>—an illustration of the doctrine elsewhere stated, that where the want of power is not obvious, it devolves upon the party setting it up to allege it and prove it.<sup>3</sup> So, although a party contracting with a corporation is, under the operation of the doctrine of *ultra vires*, held bound to inquire and take notice of the limitations of its power as contained in its charter, governing statute, or articles of association,<sup>4</sup>—yet where its power to make the particular contract depends upon some extrinsic fact known only to its officers, and not to the other contracting party, such party is not bound to suspect fraud or want of compliance with law, and at his peril find out whether a state of facts exists rendering it unlawful for the corporation to make the contract.<sup>5</sup>

§ 5977. **Further Illustrations.**—So, where a plank-road company had attempted, without authority, to loan its credit,<sup>6</sup> and where a packet company embarked in the business of purchasing grain,<sup>7</sup>—it was held that no action could be maintained on such a contract. But where a bank loaned money on a promissory note at a rate of interest in excess of the rate which it was authorized to take, and there was no penalty for taking the excess, it was allowed to recover on the note for the principal sum and so much of the interest as was lawful.<sup>8</sup> So, as already seen, where the governing statute of an

<sup>1</sup> *Ante*, § 5854.

<sup>2</sup> *Hart v. Missouri &c. Ins. Co.*, 21 Mo. 91.

<sup>3</sup> *Ante*, § 5644.

<sup>4</sup> *Ante*, § 5973.

<sup>5</sup> Thus, where the articles of association limit the debts of the corporation to a certain amount, but its officers nevertheless, in dealing with third persons, ran it in debt in a greater amount without the knowledge or means of knowledge of such third person, the corporation cannot escape payment of the debt under the plea of *ultra vires*. *Humphrey v. Patrons' Mercantile Asso.*, 50 Iowa, 607. *Contra*, *Weber v. Spokane Nat. Bank*, 50 Fed. Rep. 735.

<sup>6</sup> *Madison &c. Plank Road Co. v. Watertown &c. Plank Road Co.*, 7 Wis. 59.

<sup>7</sup> *Northwestern Union Packet Co. v. Shaw*, 37 Wis. 655; *s. c.* 19 Am. Rep. 781. Here it was held that while the packet company could not maintain an action for non-delivery of grain which it had purchased, it could recover back such part of the purchase-money as it had already paid.

<sup>8</sup> *Rock River Bank v. Sherwood*, 10 Wis. 230; *s. c.* 78 Am. Dec. 669; *Farmers' &c. Bank v. Harrison*, 57 Mo. 503, 512.

insurance company allowed it to loan its surplus money for *one year* upon a *bond* and mortgage, and it made a loan for *two years* upon a *note* and mortgage, it was held that it might maintain an action to foreclose the mortgage.<sup>1</sup> So, where a board of school trustees, who were a quasi-corporation, had power to lend out the school moneys on promissory notes with good personal sureties, and they loaned them on a bond and deed in fee intended as a mortgage, the fact that the board had acted contrary to the statutory direction in making the loan was no defense to an action to foreclose the mortgage. The reasoning was that it was within the general powers of the corporation to make the loan, but that the trustees of those powers had acted irregularly in disobeying the statutory direction in respect of the kind of security to be taken.<sup>2</sup> So, where a bank had a general power to discount notes, the fact that it discounted them at a *usurious* rate of interest would not disable it from recovering upon such notes, in the absence of a statute avoiding such a contract. The court reasoned that for such a violation of the charter of the bank, the remedy was the proceeding of the government to vacate its franchises.<sup>3</sup> So, where a bank in its discounts exceeded the rate of interest allowed by its charter, but which rate did not transcend the general usury law of the State, the contract was held not void for illegality, though the bank forfeited all interest.<sup>4</sup>

**§ 5978. Distinction between a Want of Power, and a Want of the Necessary Formality in Executing a Power.** There is an obvious distinction between an act done wholly

<sup>1</sup> *Germantown &c. Ins. Co. v. Dhein*, 43 Wis. 420; *s. c.* 28 Am. Rep. 549.

<sup>2</sup> *Littlewort v. Davis*, 50 Miss. 403. It is to be noted that the irregularity consisted, without doubt, in taking a *better* security than that permitted by the statute.

<sup>3</sup> *Fleckner v. Bank of United States*, 8 Wheat. (U. S.) 338, 353.

<sup>4</sup> *Commercial Bank v. Nolan*, 7 How. (Miss.) 508. The reason was that the contract was not void because the power of lending money upon a discount of notes had been granted to the bank; that the contract was hence within the general

powers of the corporation, that might be valid in part and void in part, and would be upheld in so far as valid and discharged only in so far as illegal. The rule that where a corporate act is within the general power of the corporation, and its invalidity arises from something not apparent in the grant of power to the body, and which is intrinsic thereto, one dealing with the corporation in ignorance of that which vitiates will not be affected thereby,—has been applied to protect a title acquired by a foreign bank for value at a foreclosure sale, and of long standing. *Alward v. Holmes*, 10 Abb. N. Cas. (N. Y.) 96.

without power to do it, and an act done with power to do it, but without the *formality* prescribed for the executing of the power. In the former case, the act, if *ultra vires* the directors, will be void, without ratification; if *ultra vires* the company itself, it will generally be wholly void. But in the latter case, persons dealing with the company are not bound to do more than to ascertain that the power to do the proposed act exists. Having ascertained this, they have a right to presume that the persons who offer to do the act are proceeding to do it with the requisite formality, unless they are apprised to the contrary.<sup>1</sup> To illustrate this, if the deed of settlement of an English company confers upon the directors power to borrow money when so authorized by a joint resolution of the company, a banker advancing money upon an instrument executed by two of the directors of the company, under the company's seal, need look no further than to see that there was a power to borrow: he is not bound to inquire whether a joint resolution to borrow in the particular case was, or was not passed.<sup>2</sup> It is upon this ground that where a deed is executed in the name of a corporation by its proper officers,—generally its president and secretary,<sup>3</sup>—under its proper seal, this carries with it a presumption that the officers were thereto duly authorized by a resolution of the board of directors where such authority is required by its governing instrument, and strangers will be protected in taking such a deed, if they act in good faith.<sup>4</sup> The general rule is said to be that “if a corporation, in the exercise of a franchise not granted to it by the legislature, makes a contract or does an act, they may plead their want of authority, on the ground that the courts will not interfere to grant redress between two persons engaged in an illegal enterprise. But if the contract be within the scope of

<sup>1</sup> Royal British Bank v. Turquand, 6 El. & Bl. 327; affirming s. c. in Q. B. 5 El. & Bl. 248; 2 Jur. (N. S.) 663; 25 L. J. Q. B. 317. See also Miners' Ditch Co. v. Zellerbach, 37 Cal. 543; s. c. 99 Am. Dec. 300, as quoted *ante*, § 5975, where this doctrine is ably enforced by Sawyer, O. J.

<sup>2</sup> Royal British Bank v. Turquand, *supra*.

<sup>3</sup> *Ante*, § 5090.

<sup>4</sup> Miners' Ditch Co. v. Zellerbach, 37 Cal. 543; s. c. 99 Am. Dec. 300.—able opinion of Sawyer, C. J.

the franchise, but fail to conform to the regulations prescribed by the charter for the guidance of its officers and the protection of the rights of the members as to each other, the corporation may be held liable, under the general rules of law as to agents, estoppel, waiver, etc.”<sup>1</sup>

**§ 5979. Right of Subrogation in Respect of Ultra Vires Debts.** — There are many demands which cannot be sustained in a court of law, and which are yet good in equity; and hence has arisen the distinction between legal and equitable rights, and legal and equitable titles. And although, with the advance of jurisprudence, and especially with the blending of legal and equitable remedies, these distinctions are rapidly passing away, yet they still remain in the national courts; and instances of them are met with elsewhere in the modern English and American books. To take some old cases for illustration:—An infant borrowed money and applied it to the buying of necessities. Now, if he were sued for money lent, he could plead *non assumpsit*, and give in evidence his infancy, and there could be no recovery against him;<sup>2</sup> yet he was liable in equity; and therefore if he devised his lands for the payment of his debts generally, such a debt would fall within the trust.<sup>3</sup> And the same principle governed the liability of a husband for necessities contracted for by his wife.<sup>4</sup> Upon a similar principle it has been held that,

<sup>1</sup> *City Fire &c. Ins. Co. v. Carrugi*, 41 Ga. 660, 671, *per* McKay, J. Nor is such a rule in contravention of the clause of the *Revised Statutes of New York* which reads that “no conveyance, assignment, or transfer not authorized by a previous resolution of its board of directors, shall be made by any such corporation, of any of its real estate, or of any of its effects, *exceeding the value of one thousand dollars*”; but this section shall “not be construed to render void any conveyance, assignment, or transfer in the hands of a purchaser for a valuable consideration, and without notice.”

*Ogden v. Raymond*, 1 Keyes (N. Y.), 42; *s. c.* 3 Abb. App. Dec. (N. Y.) 396; affirming *s. c.* 5 Bosw. (N. Y.) 16; *Ogden v. Andre*, 4 Bosw. (N. Y.) 583; *s. c.* affirmed, see 1 Keyes (N. Y.), 42; 3 Abb. App. Dec. (N. Y.) 397; *Merchants’ Bank v. McCall*, 6 Bosw. (N. Y.) 473; *Hollbrook v. Basset*, 5 Bosw. (N. Y.) 147; *Brookman v. Metcalf*, 5 Bosw. (N. Y.) 429; *Scott v. Johnson*, 5 Bosw. (N. Y.) 213.

<sup>2</sup> *Darby v. Boucher*, 1 Salk. 279.

<sup>3</sup> *Marlow v. Pitfield*, 1 P. Wms. 558.

<sup>4</sup> *Harris v. Lee*, 1 P. Wms. 482.



although directors, or the acting managers of a mining company, have no power to borrow money, even for necessities, so as to bind the shareholders for the repayment of the same,<sup>1</sup> yet if they do borrow money for the necessary carrying on of the company, and repay the same, and the company is afterwards wound up, they will be entitled to be reimbursed, just as other trustees are entitled to indemnity from their *cestuis que trust* for expenses *bona fide* incurred. On like grounds, if shareholders, under the same circumstances, advance money to the directors for the carrying on of the company, and it is afterwards wound up, they will be entitled to offset such advances against their liability for calls.<sup>2</sup> So, if a railway company borrows money in contravention of a statute imposing a penalty for so doing, and uses the money in the payment of existing valid debts, the person advancing the money is not to lose it, but is entitled to stand in the place of the creditor to whom it was paid; and it is further held that, in so far as the company has had the benefit of the money so borrowed for its legitimate purposes, the person making the advances is entitled to be repaid.<sup>3</sup>

<sup>1</sup> *Ricketts v. Bennett*, 4 C. B. 686; *Burmester v. Norris*, 6 Ex. 796; *Hawtayne v. Bourne*, 7 Mees. & W. 595.

<sup>2</sup> *Re German Min. Co.*, 4 De Gex, M. & G. 19.

<sup>3</sup> *Re Cork & Youghal R. Co.*, L. R. 4 Ch. App. 748, 759. This last case is said by the judges who decided it, not to impugn the case of *Chambers v. Manchester &c. R. Co.*, 5 Best & S. 588, which decided that where a company is authorized only to raise a given amount of capital on shares, and a certain other sum by debentures or mortgages, it cannot issue any debenture, or loan-note, or any other security of that description, merely for the purpose of raising money; and, although that case was decided in a court of law, it was conceded that such an instrument would be just as invalid in a court of equity

as in a court of law. In a later case Lord Justice Gifford, referring to these cases, called attention to the principle upon which they proceeded, namely, that, although the party loaning the money, where the directors had no power to borrow, could maintain an action, yet, inasmuch as his money had gone to pay debts which would be recoverable at law, he could come into a court of equity and stand in the place of those creditors whose debts had been so paid. "That," said he, "is the principle of those cases. It is a very clear and definite principle, and a principle which should not be departed from." At the same time he denied the contention that in cases of this kind there is a distinction between a legal debt and an equitable debt, and had no hesitation in de-

§ 5980. **Ultra Vires Contracts between Two Corporations.** A contract between *two* corporations, in order to bind either of them, must be *within the corporate powers of both*.<sup>1</sup>

§ 5981. **Contracts Void in Part and Good in Part.**—Lord Coke says: “Where a man doth that which he is authorized to doe, and *more*, there it is good for that which is warranted, and void for the rest.”<sup>2</sup> A *statute* may be valid in part, because constitutional, and void in part, because unconstitutional.<sup>3</sup> So, a *by-law* may be valid in part and void in part.<sup>4</sup> So, a *contract* containing independent and separable covenants may be valid as to those covenants which are lawful, and void as to those which are unlawful. In like manner, it has been held that a contract made by a corporation may be valid in so far as it is within the power of the corporation, and void in so far as it transcends that power, or is prohibited in positive terms by its charter.<sup>5</sup> On this principle it is frequently held that where a banking or other corporation has, by its charter, power to lend money at a lawful rate of interest, a note in which *usurious interest* is reserved will not be void *in toto*, but will be void only as to the usury, that is to say, only in so far as it is unlawful.<sup>6</sup> But the analogy of the doctrine of *fraudulent conveyances* will suggest a limitation of this principle. Where a conveyance is made by one party, and accepted by the other, with the corrupt intent of hindering, delaying, or defrauding the creditors of the grantor, the law will not hold any part of it valid, although the circumstances may be such that, but for the corrupt intent, it would have been severable and valid in part.<sup>7</sup> So, it is plain that a contract made by a

clarifying it as his conviction that those cases had gone quite far enough. Ex parte Williamson, L. R. 5 Ch. 309, 313.

<sup>1</sup> Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S. 24; s. c. 9 Rail. & Corp. L. J. 342; 45 Am. & Eng. Rail. Cas. 607; 43 Alb. L. J. 328.

<sup>2</sup> Co. Litt. 258.

<sup>3</sup> Ante, § 658.

<sup>4</sup> Ante, § 1048.

<sup>5</sup> Farmers' &c. Bank v. Harrison, 57 Mo. 503, 512; Grand Gulf Bank v. Archer, 8 Smedes & M. (Miss.) 151.

<sup>6</sup> Farmers' &c. Bank v. Harrison, 57 Mo. 503, 512; Rock River Bank v. Sherwood, 10 Wis. 230; s. c. 78 Am. Dec. 667.

<sup>7</sup> St. Louis Coffin Co. v. Rubelman, 15 Mo. App. 280; McNichols v. Rich-

**5 Thomp. Corp. § 5983.] POWERS AND ULTRA VIRES.**

corporation may not only be *ultra vires*, but may be otherwise tainted with fraud or illegality, under such circumstances or to such an extent that the law will not be nice in searching to find out whether some part of it might not be separated from the rest, and upheld as valid and legal.

**§ 5982. Exercise of Power Which has been Exhausted.—**

If the power conferred by a charter has been *exhausted*, then, in respect of any further exercise of it, the case stands as though it had never been granted. For instance, a power is conferred upon a railroad corporation by an act of the legislature to issue bonds, secured by a mortgage, to raise money to complete its road and put it in operation. When it has done this, and, through the exercise of the power, has completed its road, and put it in operation, it cannot, under this power, issue any further mortgage bonds; and if there is a general law authorizing railroad companies to issue such bonds, any further issue of them will be ascribed to the general law, and not to the special statute.<sup>1</sup>

**§ 5983. Money Paid on Ultra Vires Contract may be Recovered Back.—**A party who is not *in pari delicto* may recover from a corporation money which he has paid to it on a contract which is beyond the power of the corporation, or prohibited by its governing statute, provided he himself has not received from the corporation the consideration for the payment.<sup>2</sup> Thus, where a *municipal corporation*, having a general power to borrow, issued certain of its bonds which were void, a person purchasing them in good faith was held, upon offering to restore them to the corporation, entitled to maintain an action against the corporation for money had

ter, 13 Mo. App. 515; *Allen v. Berry*, 50 Mo. 90.

<sup>1</sup> *East Tennessee &c. R. Co. v. Frazier*, 139 U. S. 288.

<sup>2</sup> *White v. Franklin Bank*, 22 Pick. (Mass.) 181; *Dill v. Wareham*, 7 Met. (Mass.) 438; *Utica Ins. Co. v. Scott*, 19 Johns. (N. Y.) 1; *Utica Ins.*

*Co. v. Cadwell*, 3 Wend. (N. Y.) 296; *Utica Ins. Co. v. Bloodgood*, 4 Wend. (N. Y.) 652; *Morville v. American Tract Soc.*, 123 Mass. 129; s. c. 25 Am. Rep. 40; *Pittsburgh &c. R. Co. v. Keokuk &c. Bridge Co.*, 131 U. S. 371; s. c. 6 Rail. & Corp. L. J. 89.

and received, to recover the money with which he had parted, and which the corporation had received on account of them.<sup>1</sup> So, where a town made a contract with reference to certain fisheries within its limits, which it had no authority to make and which it refused to perform, it was held that the other contracting party might recover back money paid in advance on the contract, as money had and received by the town to his use.<sup>2</sup> So, where a religious corporation, in excess of its powers, received money on the condition that it should be returned unless a certain additional amount should be received by it within a certain time, and the condition was broken,—it was held that an action would lie to recover the money, and that a demand for it might be submitted to arbitration.<sup>3</sup>

§ 5984. **Further of This Subject.**—The present doctrine of the Supreme Court of the United States, on this subject, is that a contract made by a corporation which is unlawful and void because beyond the scope of its corporate powers, at least where questions of public policy are involved, does not become lawful by being carried into execution; but, though it will not be disturbed so far as it has been executed, it may be disaffirmed by either party, upon restoring what he has received under it, which has not been earned under it; and if he fails to make such restoration, the other party may recover it in an action on a *quantum meruit*.<sup>4</sup> So, where a corporation borrows money upon an agreement to repay it in its preferred shares to be subsequently issued, and it is ascertained that it has no power to issue preferred shares, the lender may maintain an action to recover the money, and will succeed in such action, although, before the trial, the corporation receives authority, by an act of the legislature, to issue preferred shares to its stockholders in proportion to their several holdings of its capital stock. The theory of the court is,

<sup>1</sup> *Louisiana v. Wood*, 102 U. S. 294.

<sup>2</sup> *Dill v. Wareham*, 7 Met. (Mass.) 438.

<sup>3</sup> *Morville v. American Tract Soc.*, 123 Mass. 129; *s. c.* 25 Am. Rep. 40.

<sup>4</sup> *Gray, J., in Pittsburgh & C. R. Co. v. Keokuk & C. Co.*, 131 U. S. 371, 389; *s. c.* 6 Rail. & Corp. L. J. 89; *post*, §§ 5999, 6003, 6004.

that the contract, being a nullity, is not revived by a subsequent act authorizing the preferred stock to be issued.<sup>1</sup>

§ 5985. **Where the Illegality is Known to Both Parties.**—On the other hand, there is judicial authority to the effect that where an *ultra vires* contract is entered into with a corporation, *known to be such by both parties*, and the corporation has received benefits under it, it is liable to pay for the benefits received, not exceeding the agreed price in the contract, although the other party, and not the corporation, has refused complete execution of the contract.<sup>2</sup>

§ 5986. **Contracts Prohibited by the By-laws of the Corporation.**—The general rule is that the *by-laws* of a cor-

<sup>1</sup> Anthony v. Household Sewing Machine Co., 16 R. I. 571; s. c. 18 Atl. Rep. 176; 5 L. R. A. 575.

<sup>2</sup> Thus, a person agreed to sell to a manufacturing company a quantity of goods to be delivered from time to time in installments and paid for at an agreed price, knowing that they were purchased by the company, not for the purposes of its business, but merely to be resold on a speculation. After a part of the goods had been delivered, and after the corporation had paid for some of those which had been delivered, the market rose, and the other contracting party refused to deliver any more. Thereupon the corporation refused payment for what had been delivered and not paid for. The vendor brought an action against the corporation to recover the reasonable value of such of the goods as had been delivered to the corporation and not paid for, and it was held, reversing the trial court, that the action would lie. The court, speaking through Mr. Chief Justice Cooley, said: "The defendant has had the goods, and there is no want of equity in requiring it to make pay-

ment. They were delivered under a contract which bound neither party, and though the plaintiff is the party who now refuses to go on with it, the defendant was at liberty to do the same, and we cannot know that it would not have done so if the change in market value had been such as to make it for its interest. But however that may be, if the defendant pays for the property received, the parties will have justice meted out to them as nearly as is now possible. It is to be observed that the contract, though void in law, involved no element of criminality, and nothing of an immoral nature. The case is not therefore one in which the law will leave the parties without redress for the consequences of criminal or immoral action. The plaintiff had a right to sell her manufacture, and to be paid for it; the defendant has received something of value from her, and there is manifest equity in its being required to make payment, notwithstanding it exceeded its powers in the purchase." Day v. Spiral Springs Buggy Co., 57 Mich. 146; s. c. 58 Am. Rep. 352.

poration are in the nature of *private regulations* for the government of its officers and agents, in the transaction of its business, and that parties dealing with the corporation, who are not members of it, are not affected with notice of the terms of the by-laws, unless knowledge of the same is brought home to them.<sup>1</sup> Thus, if it is within the apparent scope of the powers of an agent of a corporation to do certain acts, or to make certain contracts, an innocent third party dealing with him will not be affected by one of its by-laws, of which he has no knowledge or notice, restraining his powers in respect of such act or contract.<sup>2</sup> For instance, where an *insurance company* has an agent who takes surveys of property for the purpose of applications for insurance thereon, such agent remains what he is in point of fact, the agent of the company, although the company has a by-law declaring him the agent of the assured.<sup>3</sup> But where there is no question of agency founded upon a holding out by the corporation, and no estoppel growing out of its permitting the agent to exercise certain powers in its behalf, but where, on the contrary, the question arises, what powers have actually been conferred upon it, then the by-laws may be material evidence of such powers, just as any other private instrument creating an agency or instructing an agent might be; and in such a case it may well be held that the corporation is not bound, in the absence of a holding-out or other proof of agency, where its by-laws show that the agent was without authority in the premises.<sup>4</sup> There are decisions which carry the obligation of third persons to take notice of the by-laws of private corporations to an extent which seems clearly untenable,—imposing the obligation upon every person dealing with a corporation to take notice of its *constitution, by-laws, and ways of doing business*.<sup>5</sup>

<sup>1</sup> *Ante*, § 942.

<sup>2</sup> *Walker v. Wilmington &c. R. Co.*, 26 S. C. 80. See also *Sherman v. Commercial Printing Co.*, 29 Mo. App. 31.

<sup>3</sup> *Masters v. Madison Co. &c. Ins. Co.*, 11 Barb. (N. Y.) 624.

<sup>4</sup> *Bocock v. Alleghany Coal & Iron Co.*, 82 Va. 913; *s. c.* 3 Am. St. Rep. 128.

<sup>5</sup> *Bockover v. Life Asso.*, 77 Va. 85, 91; *Relfe v. Rundle*, 103 U. S. 222; *Haden v. Farmers' &c. Fire*

§ 5987. **Effect of By-laws on Contracts with Members of Corporation.**—The by-laws of a corporation, as already seen, may operate as a contract among its members,<sup>1</sup> and they are, in general, conclusively presumed to have *notice* of them.<sup>2</sup> When, therefore, a corporation enters into a contract with one of its members upon a matter which is regulated by its by-laws, they are deemed, in the absence of circumstances repelling the presumption, to contract with reference to the by-laws, just as they are deemed to contract with reference to the charter. Thus it is that the *by-laws* of *mutual benefit societies* are generally regarded as a *part of the contract* subsisting among the members,—to be read in determining the rights of a member in the society in respect of his membership and

Asso., 80 Va. 683, 691; *Bocock v. Alleghany Coal &c. Co.*, 82 Va. 913; s. c. 3 Am. St. Rep. 128. In this last case there had been a contract for the sale of land to a mining corporation, through its agent. The company refused to take the land, and denied the authority of the agent to bind it in the premises. In an action for a *specific performance*, the vendors failed to prove the authority of the agent, and it was held that they were affected with notice of its mode, under its by-laws, of authorizing agents to bind it by purchases of land, and that they dealt with its agent at their peril, and would not be heard to complain of its refusal to recognize his action in the premises. This is merely a branch of the principle in the law of agency, that a man does not make himself the agent of another by saying that he is such agent, and that persons dealing with him as such agent are bound to find out whether he is authorized. In addition to what has already been said as to the interpretation of by-laws (*ante*, § 948), a decision may be noted in which it is said that the by-laws of a corpora-

tion “should be deemed to have been adopted with an intention of facilitating the exercise of all the powers given by the charter, and should have a liberal construction in order to give just effect to the deliberate arrangement of the corporation, if not found directly opposed to the provisions of the charter.” *Warren v. Ocean Ins. Co.*, 16 Me. 439; s. c. 33 Am. Dec. 674. A doctrine crops up in one case that a clause in a charter, giving “the force and effect of legal enactment” to the “constitution and by-laws” that may be adopted, confers greater power than is usually given in charters without such clause. *Martin v. Nashville Building Asso.*, 2 Coldw. (Tenn.) 418. This may be true. But yet it is believed that it is beyond the power of the legislature to authorize a private corporation to enlarge its charter powers through the enactment of by-laws, or to clothe its by-laws with the quality of statutes; for this would involve a *delegation of legislative power*,—as to which see *ante*, § 643, *et seq.*

<sup>1</sup> *Ante*, § 940.

<sup>2</sup> *Ante*, § 941.

insurance.<sup>1</sup> So, it has been held that an association for the transaction of the business of life and *casualty* insurance on the co-operative or assessment plan, is, in effect, a *mutual benefit society*, the members of which must take notice of and are bound by its by-laws and articles of association.<sup>2</sup> So, according to the doctrine of most of the courts, a person who insures in a *mutual benefit insurance company* becomes a member of the company by the fact of insurance therein, and as such is bound to inform himself, and is conclusively charged with knowledge, of its rules and regulations.<sup>3</sup> In one case it was said that "it is clear that a member of the company is chargeable with notice of all the by-laws of the company and of the conditions of insurance adopted by the company, whether contained in the by-laws or in resolutions."<sup>4</sup> Hence, if there is a by-law of such a company which makes the surveyor of the company the agent of the insured, this operates to relieve the company from responsibility for the inaccuracy of the survey, or its want of compliance with the by-laws. Therefore, according to an old holding, if the particulars of description which are required by the by-laws are omitted in the application, the policy creates no liability on the part of the company.<sup>5</sup> This operates to make the by-laws a mere means by which the agents of the company cheat and defraud strangers whom they induce to insure therein; and it is believed not to express

<sup>1</sup> *Sabin v. Grand Lodge*, 28 N. Y. St. Rep. 45; *s. c.* 8 N. Y. Supp. 136.

<sup>2</sup> *Hesinger v. Home Ben. Asso.*, 41 Minn. 516; *s. c.* 43 N. W. Rep. 481; *Davidson v. Old People's &c. Soc.*, 39 Minn. 303; *s. c.* 39 N. W. Rep. 803.

<sup>3</sup> *Mitchell v. Lycoming &c. Ins. Co.*, 51 Pa. St. 402; *Susquehanna Ins. Co. v. Perrine*, 7 Watts & S. (Pa.) 348; *Protection Life Ins. Co. v. Foote*, 79 Ill. 361; *Treadway v. Hamilton &c. Ins. Co.*, 29 Conn. 68; *Simeral v. Dubuque &c. Ins. Co.*, 18 Iowa, 319; *Coles v. Iowa &c. Ins. Co.*, 18 Iowa, 425; *Pfister v. Gerwig*, 122 Ind. 567; *s. c.* 23 N. E. Rep. 1041; *Bauer v.*

*Samson Lodge*, 102 Ind. 262; *Holland v. Taylor*, 111 Ind. 121; *Supreme Lodge v. Knight*, 117 Ind. 489; *Gray v. Supreme Lodge*, 118 Ind. 293; *Miller v. Hillsborough Mutual Ins. Asso.*, 42 N. J. Eq. 459. Somewhat to the same effect, see *Korn v. Mutual Assurance Soc.*, 6 Cranch (U. S.), 192; *Burger v. Farmers' Mut. Ins. Co.*, 71 Pa. St. 422.

<sup>4</sup> *Miller v. Hillsborough Mut. Ins. Asso.*, 42 N. J. Eq. 459; *s. c.* 4 Atl. Rep. 278.

<sup>5</sup> *Susquehanna Ins. Co. v. Perrine*, 7 Watts & S. (Pa.) 348.



the modern law. The true principle is that, in relation to everything affecting him *after he becomes a member*, the member is bound by its rules, but he is not bound by them in respect of the process by which they induce him to become a member, because, while that process is *in fieri*, he is a stranger to them. In some cases the policy contains the express provision that the by-laws shall form a part of it. When this is the case, a party accepting such a policy makes the by-laws a part of the contract by his own voluntary act, and if he does not demand an inspection of them and does not read them, it is his own fault. If, therefore, in such a case, the by-laws provide that the written application shall be a part of the policy, and shall be a part of the contract, binding on the party insured, and that the policy shall be void unless the true title and interest of the insured are stated in the application and all incumbrances on the property disclosed, — an erroneous or false statement as to the title or incumbrances will avoid the policy. A person who becomes a member of a mutual insurance company assents to the by-laws which he finds in force, in such a sense as disables him from subsequently setting up that they were not regularly adopted.<sup>1</sup> But, according to the doctrine of the foregoing cases, a member of a mutual insurance company is bound to take notice of the by-laws in force when he becomes a member, although there is no provision in the policy that they shall form a part of the contract, and although they are not set forth in the policy. When, therefore, there was a by-law rendering the insurance void in case of any transfer or incumbrance of the property, which by-law was not set forth in the policy, and, so far as appears, was unknown to the insured, and the insured subsequently executed a mortgage upon the property, and there was a subsequent loss, it was held that he could not recover for the same.<sup>2</sup> But it has been held that where a mutual insurance company has, by the terms of its charter, the power to make contracts of a certain kind, and the company makes such contracts, it is bound by its contracts, and not by the terms of its by-laws

<sup>1</sup> Pfister v. Gerwig, 122 Ind. 567, 571; s. c. 23 N. E. Rep. 1041.      <sup>2</sup> *Ibid.*

inconsistent with its contracts, although the contracts are made with its own members.<sup>1</sup>

**§ 5988. What By-laws the Corporation may Enact Affecting the Rights of Members.**— We come now to a still more difficult question. It is not competent for the legislature of a State to pass a law *impairing the obligation of contracts*. A State legislature cannot repeal or substantially alter a charter, by curtailing the rights therein granted, without the consent of the corporation, or of its members;<sup>2</sup> but it can do this where, in the charter, in the State constitution, or in an existing general statute, it has reserved the right to do so.<sup>3</sup> Even where it has reserved the right to do so, it cannot so exercise it as to confiscate and destroy established rights without due process of law.<sup>4</sup> For stronger reasons, a corporation cannot, by enacting a *by-law*, disturb the rights of its members which have already become *vested* under its charter and governing instrument.<sup>5</sup> But as all corporations possess, by mere implication of law, and generally by express grant, the power to make reasonable by-laws, rules, and regulations, every member of a corporation or society is deemed to accept his rights of membership therein, subject to the reasonable exercise of this power. In such a case his position toward the corporation is analogous to the position which the corporation would occupy toward the State, in respect of the power of the State to alter or amend its charter where the State had reserved the power to do so. The power is lawfully exercised against the particular member so as to affect his rights in the corporation, because he has agreed in advance that it may be so exercised. But there are several fundamental limitations upon the power of a corporation to make by-laws, which have already been noted. They must not be contrary to the charter,<sup>6</sup> nor to

<sup>1</sup> *Doane v. Millville &c. Mut. Ins. Co.*, 45 N. J. Eq. 274; *s. c.* 17 Atl. Rep. 625; reversing *s. c.* 43 N. J. Eq. 522. Compare *Miller v. Hillsborough Mut. Ins. Asso.*, 42 N. J. Eq. 459; *s. c.* 4 Atl. Rep. 278.

<sup>2</sup> *Ante*, § 5381.

<sup>3</sup> *Ante*, §§ 92, 3034, 5382, 5408.

<sup>4</sup> *Ante*, § 5410.

<sup>5</sup> *Ante*, § 1019.

<sup>6</sup> *Ante*, § 1011.

the law of the land,<sup>1</sup> nor to the articles of incorporation,<sup>2</sup> nor to common right;<sup>3</sup> and they must operate equally,<sup>4</sup> and not disturb vested rights,<sup>5</sup> and not be oppressive or extortionate,<sup>6</sup> and must be reasonable;<sup>7</sup> and whether they are reasonable or not is a question of law;<sup>8</sup> and the judicial courts have power to nullify their operation in a given case where they are unreasonable.<sup>9</sup> The member, therefore, when he joins the corporation, is deemed to consent to the power of the corporation to make by-laws affecting his rights, but subject to these limitations. He does not consent that the corporation may wantonly destroy his rights by the mere enacting of a by-law. Such being the limitations of the power of the corporation to change his rights by enacting or amending its by-laws, we find that the power has been conceded to make a by-law providing that "no stockholder shall be permitted to *transfer his stock* of the company while he is in default," — that is, in default in the payment of his indebtedness to the corporation, — not on account of the stock, but arising out of another transaction.<sup>10</sup> On the other hand, the principle has been asserted that the rights of a member of a mutual insurance company, resting, as they do, in the contract which he has made with the company, will be as fully protected against subsequent changes by the company as those of a stranger would be; that the only remedies to which the

<sup>1</sup> *Ante*, § 1013.

<sup>2</sup> *Ante*, § 1015.

<sup>3</sup> *Ante*, § 1016.

<sup>4</sup> *Ante*, § 1018.

<sup>5</sup> *Ante*, § 1019.

<sup>6</sup> *Ante*, § 1020.

<sup>7</sup> *Ante*, § 1021.

<sup>8</sup> *Ante*, § 1022.

<sup>9</sup> *Ibid.* That a court will not declare invalid a by-law of a *voluntary association*, agreed upon by its members, because, in the opinion of the court, it is unreasonable, — see *Kehlenbeck v. Logeman*, 10 Daly (N. Y.), 447.

<sup>10</sup> *Cunningham v. Alabama &c. Ins. Co.*, 4 Ala. 652; *ante*, § 1031. So it has

been held that a mutual insurance company, unless prevented by the terms of its charter, may enact a by-law providing that if an assessment on a premium note is not paid within thirty days after demand, the policy for which said note is given shall be void until the assessment is paid. *Fogel v. Lycoming Ins. Co.*, 3 Grant Cas. (Pa.) 77. That the members of an insurance association are bound by the act of the majority, unless there is some restriction in the articles of association, — see *Korn v. Mutual Assurance Soc.*, 6 Cranch (U. S.), 192; *Dean v. Tucker*, 2 Cranch (U. S.), 26.

company can resort are those provided for at the time of the making of the contract; and that a by-law altering those remedies so as to make them operate more severely against the member, does not, in the absence of his assent thereto, affect his rights.<sup>1</sup>

§ 5989. **By-laws Overrule Discretion of Directors.**—Although the directors of a corporation are, in the absence of restraining instruments, vested with a general discretion in the management of its business,<sup>2</sup> yet, if the principle of the preceding sections be sound, that the by-laws operate as a contract among the members, especially in the case of *mutual benefit societies*,—it must follow that where the members have established by-laws prescribing the course of action of the directors in a given particular, they cannot override those by-laws and take a different course of action; because, to do so would be to set aside the contract which the members have established among themselves for the settlement of their own rights. Thus, if, in a mutual insurance company, the members have established a by-law prescribing certain conditions for the assessment of members for losses, the directors have no power to make assessments in a different manner.<sup>3</sup> It is conceived that the rule might be different, if, as in some cases,<sup>4</sup> the directors are clothed with the power of making by-laws,—in

<sup>1</sup> Thus, one who had insured his property in such a company and given his note for the amount of premium and interest, was not affected by a by-law subsequently enacted by the company, at a meeting where he was not present, declaring that if the interest on any premium note shall be three months in arrears, “the policy shall be suspended, and of no effect to make the company liable for loss, until the interest be paid”; so that, where his property, covered by the insurance, was destroyed by fire at a time when the interest on his note had been more than three months in arrears, it was held that this by-law

had no effect upon his rights, but that the company must pay him the amount of his loss. *Insurance Co. v. Connor*, 17 Pa. St. 136. In like manner, it has been held that a certificate in a mutual benefit society is not affected by a subsequent by-law exempting the society from losses in cases of suicide. *Northwestern Benev. & Mut. Aid Asso. v. Wamner*, 24 Ill. App. 357.

<sup>2</sup> *Ante*, § 3974.

<sup>3</sup> *Susquehanna Mut. Fire Ins. Co. v. Gackenbach*, 115 Pa. St. 492; *s. c.* 9 Atl. Rep. 90.

<sup>4</sup> *Ante*, § 957.

which case, what they could make they could change, subject to the limitations upon the power of making by-laws, already stated.<sup>1</sup>

§ 5990. **By-laws Evidence against the Company.** — On the other hand, in a controversy between the corporation and a stranger, documents issued and published by the corporation, containing the rules governing it in the transaction of its business with the public, seem to be admissible in evidence, on the footing of *self-dis-serving declarations* or *admissions*, provided they are relevant and material to the issues on trial, without proof that the plaintiff suing the corporation had knowledge of them, or was influenced by them in dealing with it.<sup>2</sup>

§ 5991. **By-laws in Excess of the Powers Embraced in the Articles of Association.** — As a corporation organized under a general statute cannot take to itself, in its articles of association, larger powers than those authorized in the statute,<sup>3</sup> so it cannot, by establishing by-laws, enlarge the powers taken in its articles; but, in so far as the by-laws provide for the exercise of powers larger than those provided for in the articles, they are void. In the absence of an estoppel, a member is entitled to an *injunction* restraining the directors and officers of the corporation from enforcing such by-laws against him to the prejudice of his individual rights, — as where, without authority thereto in the articles of association, an incorporated exchange of dealers in fuel undertook to establish and enforce by-laws disciplining their members in the conduct of their private trade in respect of advertising, establishing prices, etc.<sup>4</sup> The reason is that the articles of association, provided they are within the powers conferred by the governing statute and the constitution of the State, constitute the fundamental and organic law of the corporation. They are in the nature of a fundamental contract between the

<sup>1</sup> *Ante*, § 1010, *et seq.*

<sup>2</sup> *Ante*, § 229; *post*, §§ 5996, 6019.

<sup>3</sup> *Walsh v. Ætna &c. Ins. Co.*, 30 Iowa, 133, 146; *s. c.* 6 Am. Rep. 664.

<sup>4</sup> *Kolff v. St. Paul Fuel Exch.*, 48 Minn. 215; *s. c.* 50 N. W. Rep. 1036.

corporators, establishing their rights; and they stand in a sense as a contract between the corporation and its members or stockholders, which neither is at liberty to violate. It follows that this fundamental compact cannot be violated by by-laws or resolutions adopted by the stockholders; since the authority to pass by-laws is an authority to pass such only as are consistent with the articles of incorporation.<sup>1</sup>

**§ 5992. Distinction between Tortious and Contractual Liability for Ultra Vires Acts.**—A distinction is taken between the liability of corporations for *tortious acts* which are done, and *contracts* which are made, in excess of their granted powers. In the former case, they are held liable in actions for damages; in the latter case, they are not always held liable for a breach of contract.<sup>2</sup> It may be observed that this distinction holds with reference to persons who are under disability to make contracts. Thus, an *infant* is not bound by his contracts, but he is answerable in damages for his torts. Neither is a *married woman* answerable at common law for any contract which she may attempt to make, nor, generally, for any fraud which may spring out of any such attempted contract; but she is answerable in an action at law for a *tort simpliciter*, in like manner as if she were sole, her husband, in most cases, standing liable with her. An *infant*, when sued upon a *contract*, may plead his infancy; and a *married woman*, when so sued at law, may plead her coverture; just as a corporation, when so sued, may plead its want of power to make the contract. In another respect the question of the liability of corporations upon contracts which the law does not authorize them to make and which are wholly beyond the scope of their powers, and their liability for torts, rest upon a totally different principle, and the same principle is applicable to the question in respect of persons under disability, whether natural or artificial. "The party dealing with the corporation is under no obligation to enter into the

<sup>1</sup> *Bergman v. St. Paul Mut. Building Asso.*, 29 Minn. 275; s. c. 13 N. W. Rep. 120.

<sup>2</sup> *Alexander v. Relfe*, 74 Mo. 495.

contract. No force, or restraint, or fraud is practiced on him. The powers of these corporations are matters of public law, open to his examination, and he may and must judge for himself as to the power of the corporation to bind itself by the proposed agreement.”<sup>1</sup> But, although the person upon whom a tort is committed by a corporation, acting through its agents, may come into relations with it under a contract, — as where a passenger purchases a railway ticket and takes passage in the carriage of a corporation, — yet he does not voluntarily consent to the doing of the act of which the tort consists. The *ultra vires* contract takes place with his consent, and the law holds him blamable if he does not discover that it is *ultra vires* before he enters into it; but the *ultra vires* tort does not take place with his consent, and the law does not hold him blamable for not anticipating it and intercepting it.

§ 5993. **Torts Committed in the Prosecution of an Ultra Vires Business.** — It has been held that the defense of *ultra vires* cannot be successfully interposed by the corporation, where the action brought against it is an action *ex delicto*, to recover damages for a tort committed by it in the performance of an act not authorized by its charter, — as where a railway and banking company, having no authority to run a *steamboat*, nevertheless engages in such business, and while so engaged an injury happens to a passenger on the boat;<sup>2</sup> or, where two railway companies have illegally united their lines, and, thus running together, have entered into a contract for the carriage of a passenger, and he has been hurt while being so carried.<sup>3</sup>

<sup>1</sup> Reasoning of Mr. Justice Miller in *Salt Lake City v. Hollister*, 118 U. S. 256, 263.

<sup>2</sup> *Central R. & Co. v. Smith*, 76 Ala. 572; s. c. 52 Am. Rep. 353.

<sup>3</sup> *Bissell v. Michigan Southern R. Co.*, 22 N. Y. 258. In these cases it was said: “The plaintiff’s claim, however, rests not upon his contract, but upon the right which every man has to be protected from injury

through the carelessness of others. It has the same legal foundation as that of one who has been injured by the negligent driving of some person upon the public highway, or who has been run over by a train of cars when crossing the railroad track. The duty to observe care in these cases arises, not upon any contract, but from the obligation which rests upon all persons, whether natural or artificial, so to con-

This principle has been applied in a case where the plaintiff was injured by the negligent management of a street horse-car in the use of a steam railway company, so as to avoid the defense that the corporation had no franchise to operate a street railway;<sup>1</sup> and also in a case where a company, chartered to operate a *railway* between two points, ran a *sleigh* to carry passengers beyond one of its terminal points.<sup>2</sup>

**§ 5994. Constitutional Prohibition against Ultra Vires Acts.**—The constitutions of many of the States contain express prohibitions against *ultra vires* acts by corporations. Some of these will be quoted:—“No corporation shall engage in any business other than that expressly authorized in its charter.”<sup>3</sup> “No corporation shall engage in any business other than that expressly authorized in its charter, or the law under which it may have been or may hereafter be organized; nor shall it hold for a longer period than five years any real estate, except such as may be necessary for carrying on its business.”<sup>4</sup> “No corporation shall hold any real estate hereafter acquired for a longer period than ten years, except such real estate as shall be actually occupied by such corporation in the exercise of its franchises.”<sup>5</sup> “No corporation shall engage in business, other than that expressly authorized in its charter or the law under which it may have been or hereafter may be organized; nor shall it hold any real estate for any period longer than six years, except such as may be necessary and proper for carrying on its legitimate business.”<sup>6</sup> “No

duet themselves as not, through their negligence, to inflict injury upon others.” Selden, J., in *Bissell v. Michigan Southern R. Co.*, *supra*; quoted with approval in *Central R. & C. Co. v. Smith*, *supra*.

<sup>1</sup> *New York & C. R. Co. v. Haring*, 47 N. J. L. 137; *s. c.* 54 Am. Rep. 123.

<sup>2</sup> *Buffett v. Troy & C. R. Co.*, 40 N. Y. 168. Out of line with these holdings, and with sound principle, is a decision to the effect that an *agricultural society* which employs *hack-*

*men* to convey persons to and from its fair grounds, is not liable to a passenger injured through the negligence of a hackman so employed, because it is beyond its power to enter upon such business. *Bathe v. Decatur County Agric. Soc.*, 73 Iowa, 11; *s. c.* 5 Am. St. Rep. 651; 34 N. W. Rep. 484.

<sup>3</sup> Ala. Const. 1875, art. 13, § 5.

<sup>4</sup> Cal. State Const. 1879, art. 12, § 9.

<sup>5</sup> Mich. Const. 1850, art. 15, § 12.

<sup>6</sup> Mo. Const. 1875, art. 12, § 7.



corporation shall engage in any business other than that expressly authorized in its charter, nor shall it take or hold any real estate except such as may be necessary and proper for its legitimate business.”<sup>1</sup>

§ 5995. **Obligations Imposed in Favor of Third Parties by the Charter.** — The charter of a corporation constitutes the law of its existence, and the burdens, duties, obligations, and liabilities which it imposes are an inseparable part of its being. If, therefore, a number of co-adventurers accept a corporate charter from the legislature, which binds them to assume certain *obligations in favor of third parties*, an action can be maintained by such parties to enforce the obligations, irrespective of any other consideration than the force of the statute and their acceptance of it.<sup>2</sup>

§ 5996. **Assuming Power by Claiming It in Articles of Association.** — A corporation, formed under a general statute, cannot assume any larger powers than the statute confers, by merely declaring in its articles of association that it possesses them.<sup>3</sup> On the other hand, it may assume, in its articles, more restrictive powers than it might have assumed under the statute. It follows that its charter does not consist of its articles alone, but of its articles when read in connection with the enabling statute, which enters into and forms a part of its charter.<sup>4</sup>

§ 5997. **Power Exercised by Majority of Stockholders.** — While the management of the business of private corporations is generally committed to a *board of directors*, yet the principle has been recognized that a *majority of the stockholders* may, at a stockholders’ meeting, authorize a course of conduct affecting the corporation, so as to charge the corporation

<sup>1</sup> Penn. Const. 1873, art. 16, § 6.

<sup>2</sup> *Welsh v. First Division &c. R. Co.*, 25 Minn. 314.

<sup>3</sup> *Oregon Rail. & Nav. Co. v. Oregonian R. Co.*, 130 U. S. 1; *ante*, §§ 229, 5991.

<sup>4</sup> *People v. Chicago Gas Trust Co.*, 130 Ill. 268; *s. c.* 17 Am. St. Rep. 319; 22 N. E. Rep. 793; 8 L. R. A. 497.

with liability for expenses thereby incurred. They may, for instance, pass a resolution appointing a committee of their number to *investigate the accounts* of the company, and the committee has implied authority to *employ expert assistance*, and to charge the company with the reasonable value of such service.<sup>1</sup>

**§ 5998. Contracts by Which Corporations Abnegate their Public Duties.** — It is settled law, of which we have already had occasion to note illustrations,<sup>2</sup> that where franchises are conferred upon corporations in consideration of the performance by them of certain public duties, they cannot transfer those duties to other corporations, or to individuals, without the consent of the legislature; and hence that any *lease*,<sup>3</sup> *mortgage*,<sup>4</sup> *sale*,<sup>5</sup> or any other contract by which they attempt so to do, is *ultra vires* and void.<sup>6</sup> In such a case, a *continuing duty* rests upon both parties to the contract to *disaffirm* it at the earliest moment, upon doing justice to the other party, which duty is not diminished by the lapse of years;<sup>7</sup> and while the courts will not aid either party to it to undo it, so far as it has been executed between them,<sup>8</sup> yet they will do nothing to aid in its enforcement; and neither party will be allowed to sustain an action against the other upon it, so far as it remains unexecuted. Thus, if it consists of an unlawful *lease*, it may be disaffirmed by the lessee after the lapse of *sixteen years*, and the lessor cannot maintain an action of

<sup>1</sup> *Star Line v. Van Vliet*, 43 Mich. 364.

<sup>2</sup> *Ante*, §§ 5356, 5357, 5881, *et seq.*

<sup>3</sup> *Ante*, § 5880.

<sup>4</sup> *Post*, § 6137.

<sup>5</sup> *Ante*, § 5355.

<sup>6</sup> *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 51; *Chicago Gaslight Co. v. People's Gaslight Co.*, 121 Ill. 530; *s. c.* 2 Am. St. Rep. 124; *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34; *Thomas v. Railroad Co.*, 101 U. S. 71; *Pennsylvania R. Co. v. St. Louis & C. R.*

*Co.*, 118 U. S. 290; *New York & C. R. Co. v. Winans*, 17 How. (U. S.) 30, 39; *Oregon Rail. & Nav. Co. v. Oregonian R. Co.*, 130 U. S. 1; *Railroad Co. v. Lockwood*, 17 Wall. (U. S.) 357; *Liverpool & C. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397; *St. Louis & C. R. Co. v. Terre Haute & C. R. Co.*, 145 U. S. 393.

<sup>7</sup> *Thomas v. Railroad Co.*, 101 U. S. 71, 86; *Pennsylvania R. Co. v. St. Louis & C. R. Co.*, 118 U. S. 290, 317.

<sup>8</sup> *Pennsylvania R. Co. v. St. Louis & C. R. Co.*, 118 U. S. 290.

covenant against the lessee to recover installments of rent accruing after the disaffirmance.<sup>1</sup> It follows that where the charter of a corporation has clothed it with the franchise and devolved upon it the duty of using the streets of a city for the conveyance of *illuminating gas* to its inhabitants, a contract made by this company with another company by which it disables itself for a term of years, *e. g.*, for one hundred years, from performing this duty, will be regarded as *ultra vires*, and hence will not be enforced in equity.<sup>2</sup> But in so far as the charter confers upon the corporation a mere *privilege* to be exercised for its own benefit, this it may, of course, release to another; and whether the charter is to be regarded as conferring a privilege or imposing a public duty is, of course, a question of interpretation.<sup>3</sup> But, on the other hand, a court of equity will not aid either party by setting aside and canceling the unlawful contract; but, in pursuance of the maxim *in pari delicto potior est conditio defendentis*, will leave them where they have placed themselves, subject to the right of either party to defend, in a court of law, any action brought to compel him further to execute the contract on his part, on the ground of its illegality.<sup>4</sup>

### § 5999. Right to Disaffirm after Part Performance. —

There are decisions which uphold the right of the corporation to *disaffirm* an *ultra vires* contract after it has been *partly executed*;<sup>5</sup> but other courts find an *estoppel* in a part performance by the other party to the contract.<sup>6</sup> A comparison of the

<sup>1</sup> Central Transportation Co. v. Pullman's Palace Car Co., 129 U. S. 24.

<sup>2</sup> Chicago Gaslight Co. v. People's Gaslight Co., 121 Ill. 530; *s. c.* 2 Am. St. Rep. 124.

<sup>3</sup> *Ibid.*

<sup>4</sup> St. Louis &c. R. Co. v. Terre Haute &c. R. Co., 145 U. S. 393.

<sup>5</sup> Oregon Rail. & Nav. Co. v. Oregonian R. Co., 130 U. S. 1; Mallory v. Hanaur Oil Works, 86 Tenn. 598; Thomas v. Railroad Co., 101 U. S. 71;

Pennsylvania R. Co. v. St. Louis &c. R. Co., 118 U. S. 290; Pittsburgh &c. R. Co. v. Keokuk &c. Bridge Co., 131 U. S. 371, 389; Bowman Dairy Co. v. Mooney, 41 Mo. App. 665; Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S. 24.

<sup>6</sup> Macon &c. R. Co. v. Georgia R. Co., 63 Ga. 103. The reasoning of some of the cases cited in the preceding sections is to the effect that a performance, in whole or *in part*, by one of the parties to such contract, will

decisions with reference to what the courts *hold*, and without special reference to what the judges *say* in their opinions, will probably reconcile them upon this principle: that where, as in the case of strictly private corporations, such as mining, manufacturing, insurance, and commercial companies, no question of public policy is involved, but the question is merely one concerning the rights of stockholders and creditors not to have the corporate funds dissipated by *ultra vires* engagements, — then there will be no right of rescission after a part performance by one of the parties; but that, in the case of any species of corporation, whether public or private in its nature and objects, where a principle of public policy is involved, and where a continued execution of the contract involves a continued violation of law, — then there will always be a right of rescission by either party to the contract, upon a restoration of what he has obtained under it. In such a case, as every successive act of either party in the execution of the contract involves a fresh violation of law, there rests upon either party a *continuing duty of rescission*, which duty is not diminished by lapse of time. If this were not so, any act performed in executing such a contract would make all its parts valid, and the more that is done under a contract forbidden by law, the stronger would be the claim to its enforcement in the courts.<sup>1</sup>

estop the other from rescinding it on the ground of *ultra vires*. If the doctrine put forward by the Supreme Court of Indiana is true, that where one party has changed his position to his disadvantage on the faith of the *ultra vires* contract, the other party cannot rescind it (*post*, § 6017), then a part performance by one is just as good as a complete performance, for the purpose of raising an estoppel. In this case one railroad company, which we will call company A., had guaranteed the bonds of another such company, which we will call company B., and company B. had executed a

mortgage to indemnify company A. for its obligation of guaranty, and the contract of guaranty had been partly performed by company A. Here, it was held, on the plainest principles of justice, that company B. could not avoid the mortgage under the plea of *ultra vires*, at least to the extent of the actual payments made by company A. under its contract of guaranty.

<sup>1</sup> *Thomas v. Railroad Co.*, 101 U. S. 71, 85. The author has adopted the last statement from a remarkable passage in the opinion in this case written by Mr. Justice Miller, which is repeated by the court in *Pennsyl-*

§ 6000. Especially in the Case of Contracts Transferring Public Duties.—To illustrate this, let us recur to the principle<sup>1</sup> that where a corporation is created by the legislature to build and operate a railroad or to perform a like public service, in consideration of the grant of its franchises, it cannot, by a sale, lease, mortgage, or otherwise, exonerate itself from that *public obligation* and pass it over to another corporation or person; but in such a case it will continue liable, even to third persons, for torts committed by its grantee, lessee, or licensee in the operation of its railroad, and otherwise for failure to perform the public duties which it has attempted to transfer. Such being the case, the lease by a railroad company of its railroad to another company, without the sanction of the legislature, and the operation of the railroad under such a lease by the lessee company, is regarded as a *continuing violation of law*; and it seems that such a contract is divisible and apportionable, in such a sense that either party can withdraw from it at pleasure, upon the condition, of course, of doing justice to the other party. In such a case, where a corporation had demised its road, privileges, and franchises for ninety-six years, to another corporation, which had entered into possession and paid rent for the period of three years, this part performance did not estop the lessee from refusing to pay further rent, and from defending an action upon its covenant to pay rent, on the ground of the want of power of the lessor corporation thus to demise its property and franchises.<sup>2</sup>

vania R. Co. v. St. Louis & C. R. Co., 118 U. S. 290, 317. And see Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S. 24, where the subject is exhaustively considered by Mr. Justice Gray.

<sup>1</sup> *Ante*, §§ 5355, 5356, 5357, 5880; *post*, § 6137.

<sup>2</sup> Oregon Rail. & Nav. Co. v. Oregonian R. Co., 130 U. S. 1; reversing *s. c.* 22 Fed. Rep. 245; and 23 Fed. Rep. 232; Pittsburgh & C. R. Co. v. Keokuk & C. Bridge Co., 131 U. S.

371, 389. To the same effect, see Thomas v. Railroad Co., 101 U. S. 71; Pennsylvania R. Co. v. St. Louis & C. R. Co., 118 U. S. 290, 317. So, where a corporation had been formed under the general laws of Pennsylvania for the "transportation of passengers in railroad cars constructed and owned by it under certain patents," and its charter had been renewed for ninety-nine years by a special act of the legislature, authorizing it to double its capital stock,

## § 6001. Or Those Otherwise Opposed to Public Policy. —

So, we have seen that, according to most judicial opinion, a corporation has no implied power to *enter into a partnership* with another corporation, or with a natural person.<sup>1</sup> If two merely private manufacturing, mining, or trading corporations were to enter into such a partnership for some purpose of convenience, it may be doubted whether a court would allow either party to escape the obligations assumed, after there had been a *part execution* of the arrangement.<sup>2</sup> But where several such corporations unite their funds and properties under an arrangement called a "*trust*," the object of which is

and "to enter into contracts with corporations of this or any other State for the leasing or hiring and transfer to them, or any of them, of its railway cars and other personal property," and it immediately entered into an indenture with the Pullman Palace Car Company, created under the laws of Illinois and engaged in the same business, by which it undertook to transfer to the latter company all its cars, all its contracts with railroad companies for the running of its sleeping-cars over their roads, all the patent rights owned by it under which it constructed such cars, and all other personal property, moneys, credits, and rights of action, for the term of ninety-nine years, except so far as the contracts and patents should expire sooner; and covenanted not "to engage in the business of manufacturing, using, or hiring sleeping-cars" while the indenture should remain in force; and the lessee corporation covenanted on its part to pay all the existing debts of the lessor, and to pay to the lessor annually the sum of \$264,000, as rent, in quarterly installments, during the entire term of ninety-nine years, unless the indenture should be sooner terminated as therein provided; and the lease con-

tinued in force for sixteen years, during which time the lessee corporation remained in possession under it, paying rent to the lessor corporation; after which time, having—as may be read between the lines of the statement of facts—succeeded in totally destroying the competition of the lessor company and rendering it utterly incapable of subsequently competing with it, by occupying totally its field of operations,—repudiated the contract and refused the further payment of rent; and the lessor corporation, having brought an action of covenant to recover installments of rent which had accrued under the contract subsequent to the repudiation, was denied the right of recovery on the ground that the contract was *ultra vires*; that it was a contract by a corporation to cast off its public duties entirely, without the consent of the legislature, and to devolve them upon a foreign corporation, and was also a contract tending to create a monopoly and in restraint of trade. *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 24.

<sup>1</sup> *Ante*, § 5838.

<sup>2</sup> *Post*, §§ 6024, 6025, 6026.

to prevent competition, and to monopolize and engross an article of commerce, then the scheme is denounced by a sound *public policy*, and a court of justice will uphold any member of such a partnership in withdrawing from it at any time.<sup>1</sup>

§ 6002. Or Which Otherwise Involve a Continuing Violation of Law. — From these decisions we may safely collect the principle that there is always a right of rescission where a continuing performance involves a *continuing violation of law*. This principle has indeed been extended by some courts to cases where no question of public policy can be supposed to have been involved, but where the question was merely the right of a private corporation to withdraw, upon restoring the consideration to the other party, from a contract entered into in excess of its powers.<sup>2</sup>

<sup>1</sup> Mallory v. Hanaur Oil Works, 86 Tenn. 598. To the contrary, see St. Louis &c. R. Co. v. Terre Haute &c. R. Co., 145 U. S. 393.

<sup>2</sup> Thus, an incorporated religious society undertook to get up a steamboat excursion, with the view of raising, by the sale of tickets, funds to discharge a debt incurred in the building of their church edifice. Their charter conferred no authority upon them, express or implied, to engage in such a business for the purpose of raising money to carry out the purposes of their incorporation. The owner of the steamboat having refused to carry out the contract, it was held that the church society could not maintain an action for damages, though they might maintain an action to recover the amount paid as hire for the vessel, with interest upon it. Harriman v. First Bryan Baptist Church, 63 Ga. 186; s. c. 36 Am. Rep. 117. In another case a corporation had been organized, under the general statute of Missouri providing for the organization of manu-

facturing and business corporations (Rev. Stat. Mo. 1889, ch. 42, art. 8), for the purpose, as set forth in its articles of association, of buying and selling dairy products, especially milk, butter, cheese, and ice-cream, — and it had entered into a contract with an individual, by which he bound himself, at a stated weekly compensation, for an undetermined period, to drive an oyster wagon for it, for the sale and distribution of its oysters, and at no time while in their employ, or within two years after leaving their service, to sell oysters for himself, or for any other person or company to its customers, or to interfere with, or to enter into competition with its business in any way, directly or indirectly, etc., — the contract as to the term of service to be terminated by either party giving thirty days' notice. The person thus employed entered the service of the corporation, worked for it two days, earned six dollars, collected two dollars from the corporation, and then quit work without any assigned cause or excuse, and com-

**§ 6003. Right of Disaffirmance Predicated upon doing Justice to the Other Party.** — It must be constantly kept in mind that this right of withdrawal or rescission, at least in every case where a court of equity obtains jurisdiction to deal with it, is predicated upon an obligation upon the rescinding party to *restore what he has received* under the *ultra vires* contract, and to put the other party *in statu quo*, as nearly as may be. Where such a contract has been executed, in whole or in part, neither party will be permitted in equity to rescind it of his own mere motion, and to recover, without process of law, and by force, the consideration paid or the property acquired under it; and equity will interfere by an injunction to prevent this. Thus, if a *railroad company*, having a franchise to operate a line of *telegraph*, has assumed to sell such franchise to a telegraph company, and has received a large consideration therefor, if it attempts to disaffirm the contract and to seize the telegraph line by mere force, equity will restrain it by an injunction until an accounting and settlement can be had between it and the telegraph company.<sup>1</sup>

**§ 6004. Right of the Other Party to Recover What He has Lost after Disaffirmance.** — If the contract of a corporation is *ultra vires*, but not immoral or otherwise *malum in se*, and either party disaffirms it on the ground that it is *ultra vires*, and refuses further execution of it, then, while the other party cannot sue to recover damages or compensation in respect of the unex-

menced to sell oysters on his own account to the customers of the corporation. The corporation brought a suit in equity for an injunction to restrain him from violating the contract. It was held that, as the contract was to engage in a business outside the scope of the business for which the corporation had been organized, as stated in its articles of association, a court would not aid the corporation in executing it. *Bowman Dairy Co. v. Mooney*, 41 Mo. App. 665. The court proceeded on the ground

that all powers not granted to a corporation in express terms, or by reasonable implication, are forbidden to it by the principles of the common law, and that a court of justice will not make itself an active agent in aiding a corporation to do that which the law forbids, — in other words, in assisting it to execute an unexecuted contract which is unlawful in its very nature. To the same effect, see *Case v. Kelly*, 133 U. S. 21, 28.

<sup>1</sup> *American Union Tel. Co. v. Union Pac. R. Co.*, 1 McCrary (U. S.), 188.



ecuted portion of the contract,<sup>1</sup> yet the law will afford him remedies for procuring from the other party a restoration of what he has lost under it. The governing principle is that where money has been paid or property transferred to a corporation under a contract which is not *malum in se* but which is merely *malum prohibitum*, the party receiving may be made to refund, to the party from whom it has received, the value of that which it has actually received,<sup>2</sup> and to this end he may maintain against the corporation the equitable common-law action for *money had and received*,<sup>3</sup> or a suit in equity to compel an *accounting* and *restitution* of what the corporation has received through the transaction;<sup>4</sup> and he may be protected by an *injunction* until there has been such an accounting and restitution.<sup>5</sup>

<sup>1</sup> Thomas v. Railroad Co., 101 U. S. 71; *post*, § 6006.

<sup>2</sup> Parkersburg v. Brown, 106 U. S. 487, 503; White v. Franklin Bank, 22 Pick. (Mass.) 181; Morville v. American Tract Soc., 123 Mass. 129; *s. c.* 25 Am. Rep. 40; Davis v. Old Colony R. Co., 131 Mass. 258, 275; *s. c.* 41 Am. Rep. 221.

<sup>3</sup> Louisiana v. Wood, 102 U. S. 294; Manville v. Belden Min. Co., 17 Fed. Rep. 725; Paul v. Kenosha, 22 Wis. 266; *s. c.* 94 Am. Dec. 598; *ante*, §§ 5983, 5984.

<sup>4</sup> New Castle Northern R. Co. v. Simpson, 23 Fed. Rep. 214; Moore v. Swanton Tanning Co., 60 Vt. 459; *s. c.* 15 Atl. Rep. 114.

<sup>5</sup> *Ante*, § 6003. So, where a court of the United States, sitting in equity, set aside, as *ultra vires*, a railway construction contract, it did so on the principle of compelling the corporation to account for what it had received in partial performance, not on the basis of a bare reimbursement, but of a fair compensation, such as any other railroad contractor would receive under a similar contract, if it were within the power of the corpora-

tion, to which it was held that interest should be added. New Castle Northern R. Co. v. Simpson, 23 Fed. Rep. 214. There is a *dictum* by Mr. Justice Gray that, "according to many recent opinions of this court, a contract made by a corporation, which is unlawful and void because beyond the scope of its corporate powers, does not, by being carried into execution, become lawful and valid, but the proper remedy of the party aggrieved is by disaffirming the contract, and suing to recover, as a *quantum meruit*, the value of what the defendant has actually received the benefit of." Pittsburgh &c. R. Co. v. Keokuk &c. Bridge Co., 131 U. S. 371, 389. The cases cited by the learned justice are those examined in subsequent portions of this section. In an earlier case it was said, speaking with reference to the liability of a municipal corporation to be compelled to make restitution of money which it had acquired through the issue of bonds which were void: "The obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others

§ 6005. **Illustration in the Case of Invalid Municipal Bonds.**—Thus, if a *municipal corporation* puts upon the markets of the world, bonds which are void and not enforceable against it, yet as it has a general power to borrow, a person who has parted with his money to it by investing in the bonds may, after it repudiates them, maintain a common-law action against it for *money had and received*, to recover from it the money with which he parted, and which it acquired on the faith of the security. In such a case where the bonds had been fraudulently issued by the city, by the insertion of a false date, and the purchaser was wholly innocent, it was held that he had a right of action, on the principle of the common law<sup>1</sup> that an action lies for money paid by mistake, or upon a consideration which has failed, or for money got through imposition.<sup>2</sup> So, if a municipal corporation brings an action in equity to procure the *canceling* of certain of its bonds illegally issued, those who have parted with their money on the faith of the bonds may maintain a cross-bill or petition to compel the corporation to *account* for what they paid and it received through the illegal transaction; and the right of the corporation to a rescission will depend upon its accounting and making restitution.<sup>3</sup> A court of equity will reach the same result where the corporation has acquired *property* through the *ultra vires* contract, and then has disaffirmed the contract, by treating it as a *trustee* of the legal title of the property for the party who has parted with it, and by compelling it to reconvey to him and to account to him for rents and profits; and the relief may be varied, if, owing to subsequent changes, it would not put the parties *in statu quo*.<sup>4</sup>

§ 6006. **Ultra Vires Contract not Allowed to Stand as Security for Damages for Refusal of Further Performance.** But while the *ultra vires* contract will, in so far as it has been fully executed, thus stand as the security for or founda-

without authority, the law, independent of any statute, will compel restitution or compensation. But this is a very different thing from enforcing an obligation attempted to be created in one way, when the statute declares that it shall only be created in another and different way." *Marsh v. Fulton Co.*, 10 Wall. (U. S.) 676, 684.

<sup>1</sup> As stated in *Moses v. MacFerlan*, 2 Burr. 1005.

<sup>2</sup> *Louisiana v. Wood*, 102 U. S. 294.

<sup>3</sup> *Brown v. Atchison*, 39 Kan. 37; *s. c.* 7 Am. St. Rep. 515; 17 Pac. Rep. 465.

<sup>4</sup> See for example *Parkersburg v. Brown*, 106 U. S. 487, 503; *Chapman v. Douglas Co.*, 107 U. S. 348, 359.

tion of rights acquired by the transaction, yet it will not be allowed to stand as the foundation for damages accruing from the refusal of further performance by the party who elects to rescind. Thus, where a lease of a railroad has been made for the term of twenty years, without the authority of the legislature, and the lessor has elected to rescind and resume possession at the end of five years, and the accounts for that period were adjusted and paid, a covenant in the lease to pay the value of the unexpired term is void, and an action of covenant cannot be maintained thereon by the lessee against the lessor.<sup>1</sup>

§ 6007. **Doctrine that the Corporation is not Estopped by Receiving the Benefits of the Contract.** — We now come to a class of cases which hold that where a corporation has made a contract in excess of its granted powers, and has received or enjoyed the consideration or the benefits or fruits of it, this fact does not estop it from defending, on the ground of *ultra vires*, an action to enforce the obligation which it assumed by the contract on its part.<sup>2</sup> This doctrine would be intolerable, especially when applied to the contracts of strictly private corporations, in respect of which no question of public policy is involved, if it did not leave the road open to a remedy for a restitution, by the other party to the contract, of what he has parted with under it to the corporation;<sup>3</sup> and we find concessions of such a remedy in the language of the judges.<sup>4</sup>

<sup>1</sup> Thomas v. Railroad Co., 101 U. S. 71.

<sup>2</sup> Albert v. Savings Bank, 1 Md. Ch. 407; Chewacla Lime Works v. Dismukes, 87 Ala. 344; s. c. 6 South. Rep. 122; Sherwood v. Alvis, 83 Ala. 115; s. c. 3 Am. St. Rep. 695.

<sup>3</sup> *Ante*, § 5983, 5984, 6004.

<sup>4</sup> Thus, the settled rule of the Supreme Court of Alabama is that "a reception and retention of the fruits and benefits of the transaction do not estop the corporation from denying its power to make the contract;

though an action may be maintained, in a proper case, against a corporation, for the money or property received, the legal effect of such suit being a disaffirmance of the prohibited contract." Central R. &c. Co. v. Smith, 76 Ala. 572; s. c. 52 Am. Rep. 353, 356, *per* Clopton, J. In Alabama there is a corresponding doctrine to the effect that one who deals with an assumed corporation, in matters not falling within the purview of its delegated powers, does not thereby estop himself from setting up in defense

Other courts professedly confine the operation of the principle which denies the estoppel, to cases where the power which the corporation has usurped in making the particular contract, is prohibited or withheld from it by the statute law on grounds of *public policy*. Here, it is said that neither the act of the one party nor the other can work an estoppel against setting up the invalidity of the contract, since it will not be allowed to do directly what cannot be done indirectly; and "a corporation cannot, by a mere act of individuals, be given a power which the State, for general reasons, has withheld from it."<sup>1</sup> Decisions could be multiplied proceeding on similar lines of thought, especially among those rendered at an early day; and some modern ones proceed upon theories which are not discernible.<sup>2</sup>

**§ 6008. Doctrine that the Individual is not Estopped in Such Cases.**—Under this doctrine the right to cheat was mutual: it enabled the corporation to cheat the individual, and was equally generous in enabling the individual to cheat the corporation; so that where a person had made a contract with a corporation, which was *ultra vires*, and had received the

the want of authority of the corporation to make the contract. In such a case, it is said that the doctrine of estoppel cannot be held to apply, without clothing corporations with the ability to increase their powers indefinitely by sheer usurpation. Such contracts, it is added, are *ultra vires*, and void, and no right of action can spring out of them. *Marion Sav. Bank v. Dunkin*, 54 Ala. 471. See also *Montgomery v. Montgomery &c. Plank Road Co.*, 31 Ala. 76; *Grand Lodge v. Waddill*, 36 Ala. 313, —where the ancient and somewhat threadbare doctrine of *ultra vires* is carried to its most unjust limit.

<sup>1</sup> *Day v. Spiral Springs Buggy Co.*, 57 Mich. 146; *s. c.* 58 Am. Rep. 352.

<sup>2</sup> Thus, in one case where a corporation had made a formal contract

under seal with a contractor, for the doing of certain work upon its real property, and its superintendent of the work made an alteration of the contract as to a particular detail, —it was held that the contractor could not recover for the "extras," as it is called in building contracts, although the corporation had accepted the work. *Boynton v. Lynn Gaslight Co.*, 124 Mass. 197. But the difficulty of construing an acceptance into a ratification in such a case lies in the fact that the property-owner has no choice. If an intermeddler does work upon his land without his authority, the improvement is there, and the fact that he does not go to the labor and expense of tearing it down ought not surely to oblige him to pay for it.

full benefit of it, neither he nor those claiming under him were estopped from setting up the invalidity of the contract in defense of a suit to enforce it.<sup>1</sup>

§ 6009. No Estoppel where the Other Contracting Party Knows that the Contract is Ultra Vires.—It is a fundamental ground of an *estoppel in pais* that the person seeking to assert the estoppel must have been *misled* to his injury. This does not happen where a person enters into an *ultra vires* contract with a corporation, knowing that the contract is *ultra vires* and taking his chances of the corporation carrying it out. In such a case it cannot be justly said that he has been induced to act as he has acted by the conduct of the corporation. Accordingly, where a banking company, by its cashier, and a transportation company, by its president, became sureties for a firm of brewers, and the banking company paid the liability and called upon the transportation company for contribution, it was held that an action to enforce the contribution could not be sustained. The banking company was bound to take notice that a transportation company had not the faculty of becoming the surety of a third person, and consequently there were no grounds on which to predicate an estoppel.<sup>2</sup>

## ARTICLE II. THEORIES UNDER WHICH ITS APPLICATION IS DENIED.

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<sup>1</sup> Chambers v. Falkner, 65 Ala. 448.

<sup>2</sup> Lucas v. White Line Transfer Co., 70 Iowa, 541; s. c. 59 Am. Rep. 449.

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§ 6015. **Estoppel to Plead Ultra Vires.**—The courts reach a just result, in cases where the question is not one of public policy, and where there has been no violation of law, and in many cases where there has been,—by holding that the corporation itself on the one hand, and the party contracting with it on the other hand, are estopped by their own contract or conduct from setting up, as a defense to an action to enforce the contract, that it was beyond the power of the corporation to make it; and it is a general principle of law that no party will be permitted to set up this defense while *retaining the fruits or the benefits* of the contract.<sup>1</sup> This doctrine is strictly analogous to the rule which prevents either party to a contract, made in an artificial name which implies a corporation, from setting up that the party contracting in such name was not in fact a corporation.<sup>2</sup> It rests upon the unsailable ground thus stated in Pennsylvania by Mr. Justice Porter: “A man who has enjoyed a privilege has no right to say that, because he ought not to have enjoyed it, he will not

<sup>1</sup> *Ante*, §§ 5258, 5303; *Manchester &c. R. v. Concord Railroad* (N. H.), 20 Atl. Rep. 383; 9 L. R. A. 689; 8

*Interstate Com. Rep.* 319; 8 Rail. & Corp. L. J. 443.

<sup>2</sup> *Ante*, § 518.

pay for it. However unlawful the act, it would be unsound policy to give him this immunity.”<sup>1</sup> We may therefore conclude that “the plea of *ultra vires* cannot, as a general rule, prevail, whether interposed for or against a corporation, when it will not advance justice, but on the contrary will accomplish a legal wrong.”<sup>2</sup>

**§ 6016. Corporation Estopped when It has Received the Benefit.** — The great mass of judicial authority seems to be to the effect that where a private corporation has entered into a contract in excess of its granted powers, and has *received the fruits or benefits* of the contract, and an action is brought against it to enforce the obligation on its part, it is estopped from setting up the defense that it had no power to make it.<sup>3</sup>

<sup>1</sup> Northampton County's Appeal, 30 Pa. St. 305.

<sup>2</sup> Whitney Arms Co. v. Barlow, 63 N. Y. 62; s. c. 20 Am. Rep. 504; Carson City Sav. Bank v. Carson City Elev. Co., 90 Mich. 550; s. c. 30 Am. St. Rep. 454. See also Day v. Spiral Springs Buggy Co., 57 Mich. 146, 151; s. c. 58 Am. Rep. 352; Eureka Iron & Works v. Bresnahan, 60 Mich. 332, 337; Steam Nav. Co. v. Weed, 17 Barb. (N. Y.) 378; Bradley v. Ballard, 55 Ill. 413; s. c. 8 Am. Rep. 656; Gold Min. Co. v. National Bank, 96 U. S. 640; McCarthy v. Lavasche, 89 Ill. 270; s. c. 31 Am. Rep. 83.

<sup>3</sup> Connecticut River Sav. Bank v. Fiske, 60 N. H. 363; Wood v. Corry Water Works Co., 44 Fed. Rep. 146; s. c. 12 L. R. A. 168; Pittsburgh & R. Co. v. Shaw (Pa. St.), 14 Atl. Rep. 323; Schurr v. New York & Invest. Co., 18 N. Y. Supp. 454; Peck v. Doran & Co., 32 N. Y. St. Rep. 405; s. c. 10 N. Y. Supp. 401; Colorado Loan & Co. v. Grand Valley Canal Co. (Colo.), 32 Pac. Rep. 178; Manchester & C. R. v. Concord Railroad (N. H.), 20 Atl. Rep. 383; s. c. 9 L. R. A. 689; 8 Rail. & Corp. L. J. 443; 8 4666

Interstate Com. Rep. 319; Dewey v. Toledo & C. R. Co., 91 Mich. 351; s. c. 51 N. W. Rep. 1063; Union Hardware Co. v. Plume & C. Man. Co., 58 Conn. 219; s. c. 20 Atl. Rep. 455; West v. Madison County Agric. Board, 82 Ill. 205; Natchez v. Mallery, 54 Miss. 499; Darst v. Gale, 83 Ill. 136; Carson City Sav. Bank v. Carson City Elev. Co., 90 Mich. 550; s. c. 30 Am. St. Rep. 454; 51 N. W. Rep. 641; Main v. Casserly, 67 Cal. 127; State Board & C. v. Citizens' Street R. Co., 47 Ind. 407; s. c. 17 Am. Rep. 702; Chicago & C. R. Co. v. Derkes, 103 Ind. 520; Louisville & C. R. Co. v. Flanagan, 113 Ind. 488; s. c. 3 Am. St. Rep. 674; Humphrey v. Patrons' Mercantile Asso., 50 Iowa, 607; Wright v. Hughes, 119 Ind. 324; s. c. 12 Am. St. Rep. 412; 21 N. E. Rep. 907; Wright v. Pipe Line Co., 101 Pa. St. 204; s. c. 47 Am. Rep. 701; Oil Creek & C. R. Co. v. Pennsylvania Transp. Co., 83 Pa. St. 160; Milliard v. St. Francis Xavier Female Academy, 8 Ill. App. 341; Camden & C. R. Co. v. May's Landing & C. R. Co., 48 N. J. L. 530; s. c. 7 Atl. Rep. 523; People's Gaslight & C. Co. v. Chicago Gaslight & C. Co., 20 Ill. App.

**§ 6017. Or where the Other Party has Acted to his Disadvantage.**—The principle, properly understood and applied, extends to every case where the *consideration* of the contract has passed to the corporation from the other contracting party, which consideration may, on well-understood principles, consist either of a benefit to the corporation or of a prejudice or disadvantage to the other contracting party. It is, therefore, not strictly necessary to the proper application of the principle that the corporation has received a benefit from the contract, but it is sufficient that the other party has acted on the faith of it to his disadvantage,—as where he has expended money on the faith of it.<sup>1</sup> The reason of the rule is that honesty and fair dealing are the highest public policy, and that a private corporation, which is a mere collection of individuals, is no more privileged to repudiate its engagements and act dishonestly than a single individual is. “The rule requiring the observance of good faith and fair dealing is as applicable to corporations as to individuals. Neither can involve others in onerous engagements, and, with the consideration of the contract in their possession, disavow their acts, to the damage and discomfiture of others, unless it clearly appears that there was an absolute want of capacity to make the contract.”<sup>2</sup>

**§ 6018. Illustrations of This Doctrine.**—The simplest illustration of this doctrine will be found in cases where the corporation

473; *Tyler v. Tualatin Academy*, 14 Or. 485; *Memphis &c. R. Co. v. Dow*, 19 Fed. Rep. 388; *Bradley v. Ballard*, 55 Ill. 413; *s. c.* 8 Am. Rep. 656; *Madison Ave. Baptist Church v. Baptist Church*, 30 How. Pr. (N.Y.) 471; *s. c.* 1 Abb. Pr. (N. S.) (N. Y.) 227; 3 Rob. (N. Y.) 595; *Vernon v. Peckham*, 66 Barb. (N. Y.) 113; *Indiana v. Woram*, 6 Hill (N. Y.), 33; *s. c.* 40 Am. Dec. 378; *ante*, §§ 5258, 5303.

<sup>1</sup> Thus, where a street railway company subscribed a certain amount to the establishment of an agricultural

fair, on the faith of which subscription the State Board of Agriculture expended a large sum of money, it was held, in an action by the State Board of Agriculture against the railway company, that the contract of subscription was enforceable, and that the defense of *ultra vires* was not good. *State Board v. Citizens' Street R. Co.*, 47 Ind. 407; *s. c.* 17 Am. Rep. 702.

<sup>2</sup> *Louisville &c. R. Co. v. Flanagan*, 113 Ind. 488; *s. c.* 3 Am. St. Rep. 674, 680, opinion by Mitchell, C. J.



has *acquired money*,<sup>1</sup> or *property*,<sup>2</sup> by means of a contract in excess of its powers, and then, when the other party contracting seeks to enforce against the corporation the obligation which it has assumed therein, pleads that it had no power to enter into the contract, and at the same time *keeps the money or the property*. Thus, if a corporation has executed a promissory note for a consideration which it has received and retained, it is bound to pay the note, although it may have been executed in furtherance of a contract which was *ultra vires*.<sup>3</sup> So, a corporation cannot avoid its obligation to pay money which has been loaned to it, and used by it, under the plea that in borrowing the money it exceeded its statutory power to contract debts, or that its officers by whom the loan was negotiated were not properly authorized in the premises.<sup>4</sup> Neither can it avoid its obligation on the ground that it was given for property which the corporation was not empowered by its charter to take.<sup>5</sup> It is merely giving a new turn to an expression to say that a corporation cannot, where it has purchased property contrary to a prohibition or without an authorization in its charter, *retain both the property and its price*; that it cannot retain the property and refuse to pay the price, or set up the defense of *ultra vires* when sued for the same. Said Mr. Justice Paxson: "It would be difficult to imagine a defense with less merit, and the law would be exceedingly impotent were it to allow it to succeed."<sup>6</sup> So, where a corporation has purchased land and received a deed therefor, which reserves a *vendor's lien* for the purchase-money, and has taken possession thereunder, it will not be

<sup>1</sup> *Milliard v. St. Francis Xavier Female Academy*, 8 Ill. App. 341.

<sup>2</sup> *Memphis &c. R. Co. v. Dow*, 19 Fed. Rep. 388; *s. c.* affirmed, 120 U. S. 287; *Indiana v. Woram*, 6 Hill (N. Y.), 33; *s. c.* 40 Am. Dec. 378; *Dewey v. Toledo &c. R. Co.*, 91 Mich. 351; *s. c.* 51 N. W. Rep. 1063.

<sup>3</sup> *Main v. Casserly*, 67 Cal. 127; *Dewey v. Toledo &c. R. Co.*, 91 Mich. 351; *s. c.* 51 N. W. Rep. 1063.

<sup>4</sup> *Connecticut River Sav. Bank v. Fiske*, 60 N. H. 363.

<sup>5</sup> *Indiana v. Woram*, 6 Hill (N. Y.), 33; *s. c.* 40 Am. Dec. 378.] In this remarkable case the State of Indiana exchanged its credit with a *whaling company* (not a teachers' institute!) to

the extent of \$60,000, backed up by the undertakings of certain individuals. The whaling company got the bonds of the State, and of course failed, and the individuals, when sued by the State upon the undertakings made by the whaling company and themselves, defended on the ground that the whaling company had no power to acquire the property of the State, having been chartered only for the purpose of catching whales and making spermaceti candles. This defense was overruled, and the State of Indiana had judgment.

<sup>6</sup> *Wright v. Pipe Line Co.*, 101 Pa. St. 204; *s. c.* 47 Am. Rep. 701.

heard to defend a proceeding to enforce the lien, on the ground that it had not corporate power to contract for payment in money, but only in corporate warrants, unless it offers to surrender the land.<sup>1</sup>

§ 6019. **Further Illustrations.**—This estoppel has several ramifications. It prevents the corporation from setting up the defense that the contract is void by reason of not having been entered into with the requisite *formality*. Thus, if an educational corporation is sued for services rendered by the plaintiff as a military instructor therein, it cannot defend the action on the ground that it had never passed an ordinance authorizing the employment of such an instructor.<sup>2</sup> So, a railroad company, which, under a contract, has used the roadbed, rolling stock, and equipments of another, cannot set up, as a defense to a bill in equity by the latter for an *accounting* and a return of the property, that the contract was *ultra vires*.<sup>3</sup> So, although it may be *ultra vires* for a railroad company to maintain and operate a *telegraph line*, yet this will be no defense to an action by its contractor for compensation under a contract for building the line.<sup>4</sup> So, although a corporation cannot enlarge its powers beyond those granted in the applicatory enabling statute, by merely taking to itself larger powers in its articles of association,<sup>5</sup>—yet if it does this, and, in the exercise of such powers, incurs obligations, it will be no defense against an action, that the business in which it was engaged was not authorized by its governing statute.<sup>6</sup> Nor can a corporation escape the obligation of a contract which is within the scope of its amended articles of incorporation, by setting up its own *failure to record* those articles.<sup>7</sup> And generally, a corporation will be estopped from defending against an action to recover on a contract which it has entered into, on the ground that, in making the contract, it has not conformed to the statutory limitations and requirements, where it has received the fruits or benefits of the contract.<sup>8</sup> Finally, a curious turn to the doctrine of *ultra vires* will be

<sup>1</sup> *Natchez v. Mallery*, 54 Miss. 499.

<sup>2</sup> *Tyler v. Tualatin Academy*, 14 Or. 485. See also *Schurr v. New York &c. Invest. Co.*, 18 N. Y. Supp. 454.

<sup>3</sup> *Manchester &c. R. Co. v. Concord R. Co.* (N. H.), 20 Atl. Rep. 383.

<sup>4</sup> *Pittsburgh &c. R. Co. v. Shaw* (Pa. St.), 14 Atl. Rep. 323.

<sup>5</sup> *Ante*, §§ 229, 5991, 5996.

<sup>6</sup> *Carson City Sav. Bank v. Carson*

*City Elev. Co.*, 90 Mich. 550; *s. c.* 30 Am. St. Rep. 454; 51 N. W. Rep. 641.

<sup>7</sup> *Humphrey v. Patrons' Mercantile Asso.*, 50 Iowa, 607.

<sup>8</sup> *Wood v. Corry Water Works Co.*, 44 Fed. Rep. 146; *s. c.* 12 L. R. A. 168; *Colorado Loan &c. Co. v. Grand Valley Canal Co.* (Colo.), 32 Pac. Rep. 178.

found in an elaborately considered but doubtful case, where the Cornell University, of the State of New York, had been placed in possession of property under a statute of that State,<sup>1</sup> which directed the Comptroller of the State to transfer to it a certain endowment fund, and where the university had claimed to be the owner of it, and a devise was made to it which, when added to this property, was in excess of the amount which it was empowered by the legislature to acquire and hold, — and it was held that it could not, while enjoying the full control of this endowment property, there being no hostile claimant, allege, as a reason for taking under the devise, that it might thereafter be claimed that the fund was a portion of a trust fund created by an act of Congress.<sup>2</sup>

§ 6020. **Estoppel Extends to Privies of Corporation.** — This, like other estoppels, extends to the *privies* of the corporation; so that, where the corporation has received the benefit of an *ultra vires* contract and has thereby precluded itself from avoiding it, it cannot be avoided by one *succeeding to its rights with notice*. For instance, the purchaser of the real estate of a private corporation, at a judicial sale, who is neither a stockholder nor a creditor, cannot question the power of the corporation to make a prior deed of trust upon the property and have the deed of trust set aside in his favor, when he purchases with notice of it, and when the owner of the indebtedness thereby secured has been guilty of no fraud.<sup>3</sup> So, the principle already referred to,<sup>4</sup> which prevents either party to a contract, which is beyond the power of the corporate party, from disaffirming it without *restoring what he has received under it*, operates not only against the corporation, but against its *stockholders*; so that, when they sue in its right to set aside and cancel an *ultra vires* mortgage of its property, made for money lent to it, they must, in order to succeed, offer to return the money.<sup>5</sup> So, where the president of a corporation, together with other officers, bought for the corpora-

<sup>1</sup> N. Y. Act 1880, ch. 317.

<sup>2</sup> Re McGraw's Estate, 111 N. Y. 66; s. c. 19 N. E. Rep. 233. Compare *ante*, § 5787.

<sup>3</sup> Darst v. Gale, 83 Ill. 136.

<sup>4</sup> *Ante*, § 6003.

<sup>5</sup> Wright v. Hughes, 119 Ind. 324; s. c. 12 Am. St. Rep. 412; 21 N. E. Rep. 907.

tion shares of stock of another corporation, and his own corporation brought an action against him for the unlawful conversion of it, it was held that he could not be heard to set up, in defense of his unlawful action, that his own corporation had no power to acquire the shares of another corporation.<sup>1</sup>

**§ 6021. The Other Party Estopped when He has Received the Benefit.**—Modern decisions make the *estoppel reciprocal*, and hold that, where the corporation is plaintiff in the action and is seeking to enforce a contract into which it had no power to enter, if the defendant has *received the benefit* of the contract, he will not be allowed to defend on the ground that it was *ultra vires*; at least, until he restore the benefits which he received thereunder.<sup>2</sup> The simplest illustration of this is to suppose that a corporation has exceeded its powers in *lending* its money upon a promissory note, but nevertheless seeks to get its money back by bringing an action upon the note. Here the maker of the note will not be heard to defend on the ground that the corporation had no power to lend him the money.<sup>3</sup> In like manner, where the charter of a corporation restricts its power to invest its surplus funds, to a certain class of securities, one who has obtained a loan from it upon another security will not be heard to set up the defense, when the corporation proceeds to enforce the loan, that it had no

<sup>1</sup> St. Louis Stoneware Co. v. Partridge, 8 Mo. App. 217.

<sup>2</sup> Steam Navigation Co. v. Weed, 17 Barb. (N. Y.) 378, 381; s. c. 53 How. Pr. (N. Y.) 510; Whitney Arms Co. v. Barlow, 38 N. Y. Super. 554; s. c. affirmed, 63 N. Y. 62; 20 Am. Rep. 504; Poock v. Lafayette Building Asso., 71 Ind. 357; New York Mut. Life Ins. Co. v. Wilcox, 8 Biss. (U. S.) 203; Pancoast v. Travelers' Ins. Co., 79 Ind. 172; Argenti v. San Francisco, 16 Cal. 255; Germantown Ins. Co. v. Dhein, 43 Wis. 420; s. c. 28 Am. Rep. 549; Chicago &c. R. Co. v. Derkes, 103 Ind. 520. See, as

strongly illustrating the principle, National Bank v. Matthews, 98 U. S. 621.

<sup>3</sup> Poock v. Lafayette Building Asso., 71 Ind. 357. The early and discarded doctrine was that there could be no recovery upon the *security* (*ante*, § 5712); and some of the courts held that there could be no recovery on a *common count* for money had and received,—in other words, that the corporation, by lending its money unlawfully, lost it, and the scamp who borrowed would be upheld in retaining it.

power to make it.<sup>1</sup> Where the invalidity of the contract of loan consists in an informality, as the want of a vote at a trustees' meeting, the mere bringing of the action by the corporation to recover the money lent, is a *ratification* of the act of its officers in making the loan, and the borrower will not be heard to object that the loan was made to him without a formal vote.<sup>2</sup>

§ 6022. Or where the Corporation has Acted to its Disadvantage. — As in the case where the corporation has made the promise and the other party has acted to his disadvantage on the faith of it,<sup>3</sup> so where the promise is made by another to a corporation, and it has acted to its disadvantage on the faith of it, an estoppel *in pais* will arise against the promisor, which will prevent him from setting up the *defense of ultra vires* when the corporation sues to enforce his promise. Thus, where certain residents of a county bound themselves to raise enough money to purchase a right of way for a railway company, and the company constructed its road on the faith of the promise, it was held that the promisors, when sued thereon, could not plead that the corporation had no power to enter into such a contract.<sup>4</sup>

§ 6023. Rule where the Contract is Fully Executed on Both Sides. — It is a principle of universal application that whenever an *illegal, immoral, or prohibited contract* has been *fully executed on both sides*, the law will not lend its aid to either of the parties for the purpose of unraveling it and enabling him to recover what he may have lost through it. In such cases the governing maxim is, *in pari delicto, potior est conditio defendentis*. When, therefore, a contract with a corporation, the making of which is beyond its granted powers, has

<sup>1</sup> New York Mut. Life Ins. Co. v. Dhein, 43 Wis. 420; s. c. 28 Am. Rep. 549.  
Wilcox, 8 Biss. (U. S.) 203. Similarly  
see Pancoast v. Travelers' Ins. Co.,  
79 Ind. 172.

<sup>2</sup> Germantown &c. Ins. Co. v. s. c. 17 Am. Rep. 702.

<sup>3</sup> Chicago &c. R. Co. v. Derkes, 103 Ind. 520.

been fully executed by both parties, neither of them can assert its invalidity as a ground of relief against it.<sup>1</sup> This may be illustrated by taking a case where a corporation, through an executed contract, acquired title to the stock of another corporation, and sold it on a credit, and afterwards brought an action against the vendee to recover the purchase price. Here it was held that the vendee could not set up the defense that the vendor corporation had no power to acquire the stock, even if such were the fact.<sup>2</sup> Another good illustration of it may be found in a case where one banking corporation, in consideration of all the deposits of another bank being transferred to it, assumed the liabilities of the latter, and afterwards became insolvent itself. Here, in an action by one of the depositors of the bank whose deposits had been turned over to the bank afterwards becoming insolvent, to enforce the individual liability of its stockholders, they were not permitted, especially after having received dividends out of the deposits thus transferred to their bank, to set up the defense that it had no power to enter into such an arrangement.<sup>3</sup>

**§ 6024. Rule where the Contract has been Fully Executed on either Side.** — As a general rule, where the contract has been *fully executed on either side*, and the party so executing on his part is suing to recover the agreed consideration for executing it, the other party will be estopped from setting up

<sup>1</sup> Long v. Georgia &c. R. Co., 91 Ala. 519; s. c. 24 Am. St. Rep. 931. "The executed dealings of corporations must be allowed to stand for and against both the parties, when the plainest rules of good faith so require." Comstock, C. J., in Parish v. Wheeler, 22 N. Y. 494, 508; quoted with approval by Cooley, C. J., in Day v. Spiral Springs Buggy Co., 57 Mich. 146; s. c. 58 Am. Rep. 352, 355. In like manner it was said by Mr. Chief Justice Gibson: "True it is that an illegal contract will not be executed; but when it has been exe-

cuted by the parties themselves, and the illegal object of it has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties, for a promise, express or implied; and the court will not unravel the transaction to discover its origin." Lestapies v. Ingraham, 5 Pa. St. 71, 81. See also Hipple v. Rice, 28 Pa. St. 406.

<sup>2</sup> Holmes &c. Man. Co. v. Holmes &c. Metal Co., 127 N. Y. 252; s. c. 24 Am. St. Rep. 448.

<sup>3</sup> Mitchell v. Beckman, 64 Cal. 117; s. c. 24 Pac. Rep. 110.

the defense that the corporation had no power to enter into it; and for the purposes of this rule it is immaterial whether the plaintiff or the defendant is the corporation. On this subject it has been said that parties may "be estopped in some cases from disputing the validity of a corporate contract, when it has been fully performed on one side, and when nothing short of enforcement will do justice."<sup>1</sup> Great care must be observed in respect of the reasons and limitations of this doctrine. A reading of nearly all the modern decisions in which it is announced,<sup>2</sup> will show that it rests upon the principle of justice and morality, that a party to such a contract, who has received the consideration, benefits, or fruits of it,—all that the other party agreed to do, to refrain from, or to give up,—becomes estopped from setting up the defense that the contract was in excess of the powers of the corporation which was a party to it. But it seems that this principle is not enough for all cases. If the contract, the performance of which is demanded by the plaintiff in the action, consists in itself of something beyond the powers of the corporation, or otherwise unlawful,—so that in order for the action to succeed *something further unlawful* must be done,—then it seems that the action cannot be maintained. To be more definite, let us take the case where a corporation is sued upon a contract which is *ultra vires* on its part, but which has been wholly executed on the part of the plaintiff. Here, the right of the plaintiff to recover will, under this principle, depend upon what he is suing for, that is to say, upon what the corporation promises to him as the consideration of his executing the contract on his part. In such a case it has been said that if the contract has been so executed that the plaintiff *does not require the aid of the illegal contract to make out his case*, he is entitled to recover, and the defendant cannot set up the illegality of the original transaction, and hence his own turpitude, in order to defeat the plaintiff's right.<sup>3</sup> If this

<sup>1</sup> Cooley, C. J., in *Day v. Spiral Springs Buggy Co.*, 57 Mich. 146; *s. c.* 58 Am. Rep. 352, 355.

<sup>2</sup> See especially those cited in the two following sections.

<sup>3</sup> In *Swan v. Scott*, 11 Serg. & R.

is a sound and intelligent principle, and not mere judicial casuistry, then the rule would prevent the obligee, in a contract made by a corporation, from maintaining a bill in equity against the corporation to compel a specific enforcement of what it had promised to do, on its part, as the consideration of the plaintiff's promise to it when such performance would in itself involve the exercise of a power not granted or prohibited to it. Suppose, for instance, a corporation created only for the business of banking should, in consideration of a public subscription, agree to build and put in operation a railroad, and the subscription should be made and the money paid over, — yet it is conceived that, under the operation of this principle, a bill in equity could not be maintained by the subscribers to compel it to build and put in operation the railroad, because that would be wholly outside of the scope of its granted powers; and the rule would be stronger where, as in many cases, an express statute should be interposed prohibiting it from engaging in any business outside of that permitted by its incorporating act or by other statutes. In such cases the remedy of the other party to the contract could extend no further than rescission and restitution.

**§ 6025. Rule where the Contract has been Executed by the Party Contracting with the Corporation.** — Where a party has made a contract with a corporation and has fully performed what he agreed to do on his part, and is suing the corporation for the compensation which it agreed to pay or to render as the consideration of the contract, then the corporation will be estopped from setting up the defense that it had no power to enter into the contract, or that it was prohibited by statute from so doing. Here, the fact that the plaintiff has performed the obligation of the contract on his part necessarily implies that the corporation has received the benefits or fruits of it; and the case is, therefore, one governed

(Pa.) 155, 164, it was said by Mr. Justice Duncan: "The test whether a demand connected with an illegal transaction is capable of being en-

forced at law is, whether the plaintiff requires the aid of the illegal transaction to establish his case."



by the principle already stated,<sup>1</sup> that the corporation will not be allowed to receive the fruits of a contract, and then, when sued for performance on its part, while keeping the fruits, set up the defense that it had no power to make the contract.<sup>2</sup> The most frequent application of this doctrine is that where a corporation has entered into a contract which has been fully executed by the other contracting party, so that nothing remains for the corporation to do but to *pay the consideration money*, it will not be allowed to set up that the contract was *ultra vires*.<sup>3</sup> To illustrate this, let us suppose the case where an *insurance company* is authorized by its charter to insure against losses by *fire* only, but it nevertheless issues to the plaintiff a policy in which it insures against a loss by *hail*, and the plaintiff pays the premium thereon, and a loss takes place by hail. Here, it has been held that the company will be liable to pay the indemnity, although the premium was settled partly in cash and partly in a promissory note.<sup>4</sup> So where a corporation is prohibited by its charter from *purchasing the stock of another corporation*, but nevertheless does make such a purchase, and gives its note for the stock, and the stock is delivered to it, it cannot, when sued on the note by a *bona fide purchaser* (and it is supposed by a party to the original trans-

<sup>1</sup> *Ante*, § 6016.

<sup>2</sup> *Camden &c. R. Co. v. May's Landing &c. R. Co.*, 48 N. J. L. 530; *s. c.* 7 Atl. Rep. 523; *Argenti v. San Francisco*, 16 Cal. 255; *Sherman Center Town Co. v. Morris*, 43 Kan. 282; *s. c.* 19 Am. St. Rep. 134; 23 Pac. Rep. 569; *Denver Fire Ins. Co. v. McClelland*, 9 Colo. 11; *s. c.* 59 Am. Rep. 134; *State Board &c. v. Citizens' Street R. Co.*, 47 Ind. 407; *s. c.* 17 Am. Rep. 702; *Chicago &c. R. Co. v. Derkes*, 103 Ind. 520; *Louisville &c. R. Co. v. Flanagan*, 113 Ind. 488; *s. c.* 3 Am. St. Rep. 674; *Cunningham v. Massena Springs &c. R. Co.*, 63 Hun (N. Y.), 439; *s. c.* 44 N. Y. St. Rep. 723; 18 N. Y. Supp. 606; *Dewey v. Toledo &c.*

*R. Co.*, 91 Mich. 351; *s. c.* 51 N. W. Rep. 1063; *Palmer v. Cypress Hill Cemetery*, 14 N. Y. St. Rep. 591; *Schurr v. New York &c. Invest. Co.*, 41 N. Y. St. Rep. 90; *s. c.* 16 N. Y. Supp. 210; *Wood v. Corry Water Works Co.*, 44 Fed. Rep. 146; *s. c.* 12 L. R. A. 168; *Manhattan Hardware Co. v. Phalen*, 128 Pa. St. 110; *s. c.* 18 Atl. Rep. 428; *Reed's Appeal*, 122 Pa. St. 565; *s. c.* 16 Atl. Rep. 1.

<sup>3</sup> *Oil Creek &c. R. Co. v. Pennsylvania Transp. Co.*, 83 Pa. St. 160; *Wright v. Pipe Line Co.*, 101 Pa. St. 204; *s. c.* 47 Am. Rep. 701.

<sup>4</sup> *Denver Fire Ins. Co. v. McClelland*, 9 Colo. 11; *s. c.* 59 Am. Rep. 134.

action), defend on the ground that it did not have power to purchase its own stock.<sup>1</sup>

§ 6026. **Rule where the Contract has been Executed by the Corporation.**—The rule works both ways; so that, where the *ultra vires* contract has been fully executed by the corporation, and the other party has been placed in possession of the fruits of it, such other party will not be heard to set up, as a defense to an action by the corporation for the agreed consideration of the contract, that the contract was *ultra vires*.<sup>2</sup> Thus, one who purchases from a corporation cannot, in an action for the purchase price, where the contract has been performed by the corporation, object that the corporation was prohibited by law from trading in the specific article sold.<sup>3</sup> Accordingly, if a corporation has been organized for the purpose of *manufacturing arms*, but nevertheless enters into a contract with another corporation to *manufacture* and deliver to it a quantity of *rail-road locks*, to be paid for within a stated period after delivery, and does so manufacture and deliver the locks, it can enforce the contract against the purchasing corporation; and if the purchasing corporation is insolvent, and the circumstances are such that the selling corporation could charge the directors if the contract were *intra vires*, it can charge them as it is; for they cannot set up a defense to escape their personal liability which it would be inequitable to allow their corporation to set up.<sup>4</sup> So, although a corporation cannot, according to most holdings, *enter into a partnership* with a natural person

<sup>1</sup> Mr. Justice Paxton, reverting to a doctrine already expressed (*ante*, § 6024), gave the reason of the court for his conclusion, as follows: 'When the plaintiffs offered the note in evidence, they had a perfect *prima facie* case, and did not need the aid of any illegal transaction to entitle them to a verdict. They required no aid from the contract for the sale of the stock. That, as before observed, had been fully executed, and was a matter with which the plaintiffs had nothing

whatever to do." *Wright v. Pipe Line Co.*, 101 Pa. St. 204; *s. c.* 47 Am. Rep. 701.

<sup>2</sup> *Ex parte Chippendale*, 4 De Gex, M. & G. 19; *Fishmongers' Co. v. Robertson*, 5 Macn. & G. 131; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; *s. c.* 20 Am. Rep. 504.

<sup>3</sup> *Chester Glass Co. v. Dewey*, 16 Mass. 94; *s. c.* 8 Am. Dec. 128.

<sup>4</sup> *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; *s. c.* 20 Am. Rep. 504.

or with another corporation,<sup>1</sup> yet where it has done so, it may maintain an action for an *accounting* from the other partner, and he will be estopped to set up that the partnership arrangement was *ultra vires*.<sup>2</sup>

§ 6027. **Estoppel in Favor of the Bona Fide Holder of Commercial Paper.** — On the question whether the estoppel already referred to is operative against the corporation in favor of the holders of *bona fide commercial paper*, the rule in respect of *municipal bonds*, already referred to,<sup>3</sup> is that where there is an *entire want of power* on the part of the municipal corporation to issue securities of the kind in controversy, that power cannot be created by the mere fact of transferring void securities to an innocent purchaser; but such securities stand on no better footing than a mere *forgery*. But if the corporation had the power to emit such securities under any circumstances, the fact that the power was not lawfully or properly exercised in the particular instance, cannot be set up by it against a *bona fide* holder for value, though it might be against the original purchaser of the bonds. Applying the same doctrine to a private corporation, it has been held that if the corporation has power to make a *note* for any purpose, it cannot, as against a *bona fide holder*, set up that it had no power to make the particular note in question.<sup>4</sup> So, a person who, in good faith, lends money to a corporation, and takes a transfer of its *subscription notes* as collateral security, without notice of any fraud affecting the origin of such notes, or that they were transferred without any previous resolution of the board of directors of such company, is entitled to recover upon them, although they may have been acquired from the maker by fraud, and although there may have been no such resolution authorizing the transfer.<sup>5</sup>

<sup>1</sup> *Ante*, § 5838; *post*, § 6403.

<sup>2</sup> *Standard Oil Co. v. Scofield*, 16 Abb. N. Cas. (N. Y.) 372.

<sup>3</sup> *Ante*, § 5262.

<sup>4</sup> *Lehigh Valley Coal Co. v. West Depere Agric. Works*, 63 Wis. 45.

<sup>5</sup> *Ogden v. Andre*, 4 Bosw. (N. Y.) 583; *s. c.* affirmed, see 1 Keyes (N. Y.), 43; 3 Abb. App. Dec. (N. Y.) 396.

**§ 6028. Doctrine that Violation of Charter or Want of Power cannot be Set up Collaterally.**—We now come to a class of holdings which, going beyond any presumption of right-acting, and beyond any theory of estoppel, place themselves on the higher ground that the fact that, in making the contract which is the subject of the action, the corporation has proceeded in direct violation of its charter, or has usurped a power not conferred by the legislature, cannot be set up by way of defense, because to do so would allow a private party to set up *collaterally*—such is the expression—an act of the corporation which is wrongful only as against the State, and which the State alone can impeach in a direct proceeding to forfeit its charter or otherwise subject it to punishment.<sup>1</sup> The principle is no doubt a sound one, where the corporation whose charter has been violated attempts to set up its own violation of its charter and thus derive an advantage from its own wrong; but its application in a case where the corporation itself is seeking to recover in respect of a contract which it had no power to make, is not perceived, and in such a case, it would seem, the maxim *ex turpi contractu non oritur actio* applies.

**§ 6029. Cases where This Doctrine has been Applied.**—It was said in one case in Missouri, where the Merchants' Bank of Baltimore was suing the Bank of Missouri, that the defendant could not set up, by way of defense, that the contract out of which the cause of action arose, by which the Bank of Missouri agreed to collect the debts of the Bank of Baltimore in depreciated paper, was a violation of the charter of the plaintiff bank; that "a violation of the charter of the bank cannot be taken advantage of collaterally or incidentally, but must be brought up and enforced by a direct proceeding instituted for that purpose against the corporation"; and moreover that a contract between the Bank of Missouri and the Merchants' Bank of Baltimore to collect the debts of the latter in depreciated bank paper, even if admitted to be illegal and

<sup>1</sup> Bank of Missouri v. Merchants' Bank, 10 Mo. 123, 130; National Bank v. Matthews, 98 U. S. 621; reversing s. c. *sub. nom.* Matthews v.

Skinker, 62 Mo. 329; s. c. 21 Am. Rep. 425; St. Louis Stoneware Co. v. Partridge, 8 Mo. App. 217.

in violation of the charter of the former bank, would not render it liable to pay in specie the amount collected under such contract.<sup>1</sup> A leading modern case, affirming this doctrine, holds that, although a national bank cannot under its governing statute<sup>2</sup> *lend money on the security of a mortgage of land*, but can only take such a mortgage in good faith by way of security for debts previously contracted, — yet if it has made a present loan of money, by discounting a note secured by a mortgage deed of trust, it can maintain an action to enforce the security, so long as the government does not interfere; and the mortgagor cannot set up its want of power as a defense, since “a private person cannot, directly or indirectly, usurp this function of the government.”<sup>3</sup> In another case a manufacturing company acquired shares of stock in a national banking association. The president of the manufacturing company converted the shares of stock to his own use. In an action brought by the company against him for such conversion, he set up as a defense that the company had no power to acquire the shares. It was held that the defense could not be set up in this collateral proceeding, — the court, at the same time, denying the rule that the question whether a corporation has exceeded its powers can only be litigated between the State and the corporation.<sup>4</sup> The Supreme Court of Pennsylvania reach a similar result upon a different theory already alluded to.<sup>5</sup>

<sup>1</sup> Bank of Missouri v. Merchants' Bank, 10 Mo. 123, 130 *per* Napton, J.

<sup>2</sup> Rev. Stats. U. S., §§ 5136, 5137.

<sup>3</sup> National Bank v. Matthews, 98 U. S. 621, 629, Mr. Justice Miller dissenting; reversing *s. c. sub. nom.* Matthews v. Skinner, 62 Mo. 329; *s. c.* 21 Am. Rep. 425.

<sup>4</sup> St. Louis Stoneware Co. v. Partidge, 8 Mo. App. 217. The court denied the authority of National Bank v. Matthews, 98 U. S. 621; reversing *s. c. sub. nom.* Matthews v. Skinner, 62 Mo. 329; *s. c.* 21 Am. Rep. 425, on the ground that the question involved was not a Federal question; that the authority was hence not binding upon the court, and that the great weight of authority was otherwise.

<sup>5</sup> *Ante*, § 6024. A case arose where the indorsee of a note, discounted by

a national bank, defended in an action on the note upon the ground that the loan was in contravention of the twenty-ninth section of the act of Congress of June 3, 1864, commonly called the National Bank Act, which provides that, “the actual liabilities to any association, of any person or of any company, corporation, or firm, for money borrowed . . . shall at no time exceed one-tenth part of the amount of the capital stock of such association actually paid in.” The court below, speaking through Trunkley, J., in an opinion which was adopted by the Supreme Court of Pennsylvania, held this defense insufficient, and said: “The plaintiff needs no aid from the original transaction to make out his case. Garfield is no party to the note. The

§ 6030. **Who may not Set up Such Violations or Want of Power.**—Outside of the foregoing principle, where a contract of a corporation has been *executed* by the parties to it, it is not competent for a *mere stranger* to the contract to assail it, and deprive the corporation of the advantage from it, upon the ground that it was interdicted by the charter.<sup>1</sup> And in general it may be said that *one whose rights are not injuriously affected* by reason of the fact that a corporation is acting in excess of its powers, or beyond the warrant of law, has no standing in court to complain of the same.<sup>2</sup>

§ 6031. **Illustrations of the Foregoing.**—Thus, where the city of St. Louis condemned, for the purposes of a wharf, certain land belonging to a sugar refining company, paying them compensation therefor, and afterwards leased the land to a corporation created to build and operate grain elevators,—it was held that the original land-owner had no standing in court to enjoin the elevator company from erecting a warehouse upon the land, although the city had condemned only an easement, and the refining company remained the owner of the fee.<sup>3</sup> So, where the city of New Orleans was authorized by its charter to erect and maintain wharves and to collect wharfage within its limits, but the legislature granted to a railroad the authority to inclose and occupy for its purposes a described portion of the levee and batture within the city, and maintain a wharf thereon which it had previously erected, and exempting it from municipal supervision and control in respect of such wharf; and still later the city assumed to grant to an individual, for a term of years, the right to build and repair wharves and levees within the

defendant attempts its defeat, not by showing anything done at the time it was given, but because of the turpitude of the borrower and lender when Garfield borrowed money of the bank in excess of the amount the latter was permitted to loan to one person." *Bly v. Second Nat. Bank*, 79 Pa. St. 453.

<sup>1</sup> *Albert v. Savings Bank*, 1 Md. Ch. 407.

<sup>2</sup> *Railroad Co. v. Ellerman*, 105 U. S. 166; *Georgetown v. Alexandria Canal Co.*, 12 Pet. (U. S.) 91; *Belcher*

*Sugar Refining Co. v. St. Louis Grain Elev. Co.*, 101 Mo. 192; *Liverpool v. Chorley Water Works*, 2 De Gex, M. & G. 852; *Stockport District Water Works v. Manchester*, 9 Jur. (N. S.) 266; *Pudsey Coal Gas Co. v. Bradford*, L. R. 15 Eq. 167; *Starin v. Edson*, 112 N. Y. 206; *s. c.* 20 N. Y. St. Rep. 898; 19 N. E. Rep. 670; reversing *s. c.* 42 Hun (N. Y.), 549.

<sup>3</sup> *Belcher Sugar Refining Co. v. St. Louis Grain Elev. Co.*, 101 Mo. 192, 209.

city, and to transfer to him the revenues of the same for the term; and he brought a bill in equity to enjoin certain persons, to whom the railroad company had made a lease of their wharfage privilege; — it was held that he had no standing in court to set up the want of power in the railroad company to build the wharf and collect wharfage.<sup>1</sup> So, where a so-called Waterworks Act of Parliament empowered a company to divert the water of a stream, without limit as to quantity, by means of an *open channel* filled with loose stones, and they were diverting it by means of a *culvert*, — it was held that another company, who were entitled to the water of a stream into which the diverted water had flowed, were not entitled to an injunction to restrain a violation of the terms of the act as to the mode of diversion: the court taking the view that such an injunction could be had only at the instance of the attorney-general.<sup>2</sup> So, a private person, proceeding in right of being a tax-payer, has no standing to demand that the commissioners of the public *sinking fund* be enjoined from leasing at public auction certain ferries and wharfage property to a private corporation, on the ground that the corporation has no power to take such a lease.<sup>3</sup> So, it has been held that the *use*, by the citizens of a municipal corporation, of a certain *thoroughfare*, gives it the character of a *street*, although it is occupied by the turnpike or plank road of a private corporation, to the extent that *abutting property-owners* cannot be heard to question its character as a street, as a reason for vacating an assessment for its improvement, but that such question can only be raised by the turnpike or plank-road company.<sup>4</sup> So, the validity of a transfer by a corporation of its property, which has not been authorized by a resolution of the board of directors as required by statute,<sup>5</sup> cannot be impeached on that ground, except by the corporation itself, or its stockholders or creditors.<sup>6</sup> So, where there are two factions in an educational corporation struggling for the possession of its college building, one of them cannot set up, as a reason for holding possession against the other, that a conveyance of the property, which had been made to

<sup>1</sup> Railroad Co. v. Ellerman, 105 U. S. 166.

<sup>2</sup> Liverpool v. Chorley Water Works Co., 2 De Gex, M. & G. 852.

<sup>3</sup> Starin v. Edson, 112 N. Y. 206; s. c. 20 N. Y. St. Rep. 898; 19 N. E. Rep. 670; reversing s. c. 42 Hun (N. Y.), 549.

<sup>4</sup> State v. Passaic, 42 N. J. L. 524. To the same effect, see State v. Fuller, 34 N. J. L. 227.

<sup>5</sup> 1 Rev. Stat. N. Y. 591, § 8.

<sup>6</sup> Eno v. Crooke, 10 N. Y. 60. See also Belden v. Meeker, 2 Lans. (N. Y.) 470.

the educational corporation by a municipal corporation, had not been made *under seal*, wherefore the title was still in the municipal corporation; since it could not deny the title under which alone it could hold.<sup>1</sup>

§ 6032. When Stockholders may and may not.—On principles already considered,<sup>2</sup> the stockholders of a corporation have a standing in equity to set aside *ultra vires* acts done in the name of the corporation by its managing directors and officers, when they have exhausted their means of redress within the corporation itself;<sup>3</sup> but the stockholders may be *estopped* by their own conduct<sup>4</sup> from having relief in equity against *ultra vires* transactions. For instance, if they have participated with knowledge in the advantages derived from the misapplication of funds which have been borrowed by the corporation, they will not be permitted afterwards to set up such misapplication as a defense in an action by the lender against the corporation for his money. They should have taken steps to prevent the misapplication when they first knew of it.<sup>5</sup> On like grounds, it has been held that a stockholder cannot, in a suit in equity which he is permitted to prosecute in behalf of the corporation, question its right to exercise all the powers which it has taken to itself in its certificate of incorporation,—for instance, its power to become the owner of the stock of another corporation,—although such power may be larger than is authorized by its enabling statute; but that such question can be raised only in proceedings by the attorney-general in behalf of the State.<sup>6</sup>

<sup>1</sup> State v. Senft, 2 Hill (S. C.), 367.

<sup>2</sup> Ante, § 4471, et seq.

<sup>3</sup> See Railroad Co. v. Ellerman, 105 U. S. 166; Belcher Sugar Refining Co. v. St. Louis Grain Elev. Co., 101 Mo. 192, in both of which cases this right is conceded to a *stockholder*, while denied to a *stranger*.

<sup>4</sup> Ante, § 4497.

<sup>5</sup> Thompson v. Lambert, 44 Iowa, 239.

<sup>6</sup> Willoughby v. Chicago Junction R. & C. Co., 50 N. J. Eq. 656; s. c. 25 Atl. Rep. 277. That a contract by a corporation to buy off the competition of a rival company cannot be assailed by a stockholder as *ultra vires*, but is within the discretionary power of the directors,—see Leslie v. Lorillard, 110 N. Y. 519; s. c. 18 N. E. Rep. 363; 1 L. R. A. 456.



§ 6033. **Doctrine that the Question whether a Corporation has Acted Ultra Vires can only be Raised by State.**—These considerations bring us to the somewhat new and growing doctrine, that whether a corporation has acted in excess of its granted powers, or in the face of an expressed or implied statutory prohibition, is one which cannot be raised in litigation between it and a private party, or between private parties, but can only be raised by the State, in a direct proceeding either to forfeit the franchises of the corporation, or to subject it to punishment for doing the unlawful act.<sup>1</sup>

§ 6034. **Limitations of This Doctrine and Exceptions to It.**—It cannot escape attention that this doctrine, if allowed to prevail to the full extent implied in the foregoing expression of it, stands in direct contradiction to the earlier decisions,<sup>2</sup> still adhered to in many modern holdings,<sup>3</sup> to the effect that no action can be sustained upon the contract of a corporation made in excess of its powers, or in the face of a prohibitory statute, and that there is no estoppel upon the defendant against setting up his want of power or the statutory prohibition, by way of defense; in other words, that it

<sup>1</sup> *National Bank v. Matthews*, 98 U. S. 621; reversing *s. c. sub. nom. Matthews v. Skinner*, 62 Mo. 329; *s. c.* 21 Am. Rep. 425; *St. Louis Drug Co. v. Robinson*, 81 Mo. 18; affirming *s. c.* 10 Mo. App. 588; *State v. Minnesota Thresher Man. Co.*, 40 Minn. 213; *s. c.* 8 L. R. A. 510; 41 N. W. Rep. 1020; *Fritts v. Palmer*, 132 U. S. 282; *Baker v. Northwestern Guaranty & Co. Co.*, 36 Minn. 185; *s. c.* 30 N. W. Rep. 464; *Prescott Nat. Bank v. Butler*, 157 Mass. 548; *s. c.* 32 N. E. Rep. 909; *Bank v. Hammond*, 1 Rich. L. (S. C.) 281; *Grant v. Henry Clay Coal Co.*, 80 Pa. St. 208; *Southern Life & Co. v. Lanier*, 5 Fla. 110; *s. c.* 58 Am. Dec. 448; *Bushnell v. Consolidated Ice Machine Co.*, 138 Ill. 67; *s. c.* 27 N. E. Rep. 596; *Wood v. Corry Water Works Co.*, 44 Fed. Rep.

146; *s. c.* 12 L. R. A. 168; *Wherry v. Hale*, 77 Mo. 20; *Franklin & Co. Inst. v. Board of Education*, 75 Mo. 408, 412; *Thornton v. National Exch. Bank*, 71 Mo. 221, 228; *Hovelman v. Kansas City Horse R. Co.*, 79 Mo. 632. The doctrine that the State alone can challenge *ultra vires* acts of corporations is enunciated with more or less distinctness in the following cases: *Leazure v. Hillegas*, 7 Serg. & R. (Pa.) 313, 320; *Goundie v. Northampton Water Co.*, 7 Pa. St. 233; *Silver Lake Bank v. North*, 4 Johns. Ch. (N. Y.) 370; *McIndoe v. St. Louis*, 10 Mo. 575, 577; *Chambers v. St. Louis*, 29 Mo. 543; *Land v. Coffman*, 50 Mo. 243; *Runyan v. Coster*, 14 Pet. (U. S.) 122.

<sup>2</sup> *Ante*, § 5969.

<sup>3</sup> *Ante*, §§ 5968, 6007.

practically obliterates the so-called doctrine of *ultra vires*. Moreover, it should be observed that extreme caution will be necessary on the part of courts that take up and follow this doctrine, to observe its boundaries and limitations. In the first place, the doctrine does not exist in the broad proposition by which it is formulated in many judicial decisions and in the foregoing text. It is not and never has been true, except under the facts of particular cases, that the State is the only party which can challenge an *ultra vires* or prohibited contract made by a corporation. In many cases such a contract will have been made by the directors of the corporation in fraud of its rights and in violation of their trust,—in which cases, there is no principle which will estop *the corporation itself*, upon a new board of directors being elected, from undoing it, upon restoring to the other party to the contract, he being innocent, what he has lost, if anything, and what the corporation has gained, under it.<sup>1</sup> Moreover, we have seen that where the unfaithful directors, wielding the power of the corporation, refuse to bring such an action in the corporate name, a court of equity will open its doors to *the stockholders*, and allow them to prosecute the action in the name and for the benefit of the corporation, and incidentally for the benefit of all the stockholders.<sup>2</sup> We shall also see that, according to many judicial holdings, if the corporation becomes insolvent, a *receiver or other judicial assignee*, standing in right of its creditors and stockholders, may prosecute such an action;<sup>3</sup> and decisions will be referred to which concede the same right of action to *creditors*, suing for themselves and for all other creditors,<sup>4</sup> and in some cases, suing for themselves alone.<sup>5</sup> Thus far there is a right of action in the corporation itself and in a successive class of persons in privity with it. But the right of action does not stop here: it extends in particular cases to persons who are not in privity with it, but

<sup>1</sup> *Ante*, §§ 5099, 6004.

<sup>3</sup> *Ante*, § 5795; *post*, ch. 194.

<sup>2</sup> *Ante*, § 4471, *et seq.*; § 4517, *et seq.*

<sup>4</sup> *Post*, § 6547.

<sup>5</sup> *Post*, § 6567.

who are *strangers* to it; for, as we have already had occasion to note and explain, the doctrine is that an *injunction* will be granted to restrain the *ultra vires* acts of corporations, *injurious to private right*, at the suit of the person injuriously affected, and that in such cases the Attorney-General representing the State need not interpose to bring the action.<sup>1</sup> Nor will the State interpose *where no public question is involved*, even where the irregularities in the corporate management affect merely the rights of the stockholders, and are capable of being redressed by proceedings in equity instituted by them. It is said that, to justify a *forfeiture of the franchises* in a proceeding instituted by the State, the *ultra vires* acts must be so substantial and continued as to derange or destroy the business of the corporation to such an extent that it no longer fulfills the ends for which it was created. In short, if the unauthorized acts affect merely the stockholders and creditors, and they have adequate legal or equitable remedies, the State will not interfere.<sup>2</sup>

**§ 6035. Expressions and Applications of This Principle.—**

It is doubtful whether any consistent theory can be deduced from the adjudications which proceed upon this principle, as to the cases in which it is to be applied and those which are excluded from its operation, other than the mere notion of the judge or court for the time being, that the legislature intended that the only penalty for the usurpation of a power not granted, or for the doing of a prohibited act, should be a forfeiture of the franchises of the corporation, or other punishment visited upon it in a criminal proceeding. To illustrate this, we recur again, at the risk of repetition, to what may now be regarded as the leading case upon this doctrine. This case holds that, although a national bank has no power, under the National Banking Act, to lend money upon the present security of a mortgage of real estate, but is impliedly prohibited from doing so, yet when the bank proceeds to enforce such a security, it does not lie in the mouth of the borrower to set up this want of power. That is a question between the government and the corporation, in

<sup>1</sup> *Post*, ch. 187. This was conceded in *Liverpool v. Chorley Water Works, Co.*, 2 De Gex, M. & G. 852.

<sup>2</sup> *State v. Minnesota Thresher Man. Co.*, 40 Minn. 213; s. c. 41 N. W. Rep. 1020; 3 L. R. A. 510.

a proceeding by the former against the latter for a forfeiture of its charter. "A private person cannot, directly or indirectly, usurp the functions of the government."<sup>1</sup> The Supreme Court of Missouri, after an attentive consideration of the question, endeavored to generalize the doctrine of the preceding case, and to state it in broad terms, by saying "that the question of *ultra vires* can only be raised in a direct proceeding, by the State against the corporation, and not in a collateral proceeding by another, except when the charter of the corporation not only specifies, and therefore limits it to the business in which it may engage, or by express terms, or by a fair implication from its terms, invalidates transactions outside of its legitimate corporate business."<sup>2</sup>

**§ 6036. Whether it can be Harmonized with the Doctrine of Ultra Vires.**—It may be that the principle thus formulated can be made to harmonize with what is stated in a preceding section,<sup>3</sup> to the effect that remedies exist on the part of the corporation itself, on the part of its stockholders, its creditors, or their representatives, to undo the *ultra vires* and unfaithful acts of its directors, and recover the money or property thereby dissipated; since in all such cases the proceeding may be regarded, not as a *collateral proceeding*, but as a *direct proceeding*, to arrest the wrong when threatened, or to undo it after it has been accomplished. The leading decision first above alluded to,<sup>4</sup> followed, as it has been, by other cases,<sup>5</sup> lays the ghost of those ridiculous decisions which take a

<sup>1</sup> National Bank v. Matthews, 98 U. S. 621; reversing *s. c. sub. nom.* Matthews v. Skinker, 62 Mo. 329; *s. c.* 21 Am. Rep. 425; followed in Thornton v. National Exch. Bank, 71 Mo. 221.

<sup>2</sup> St. Louis Drug Co. v. Robinson, 81 Mo. 18, 26; affirming *s. c.* 10 Mo. App. 588. The following cases were referred to by the court as supporting the doctrine, and they do support it more or less directly: McIndoe v. St. Louis, 10 Mo. 575, 577; Chambers v. St. Louis, 29 Mo. 543; Pacific R. Co. v. Seely, 45 Mo. 212; *s. c.* 100 Am. Dec.

369; Land v. Coffman, 50 Mo. 243; Atlantic &c. R. Co. v. St. Louis, 66 Mo. 228; St. Joseph Fire &c. Ins. Co. v. Hauck, 71 Mo. 466; Thornton v. National Exch. Bank, 71 Mo. 221; Union Nat. Bank v. Hunt, 76 Mo. 439.

<sup>3</sup> *Ante*, § 6034.

<sup>4</sup> National Bank v. Matthews, 98 U. S. 621.

<sup>5</sup> National Bank v. Whitney, 103 U. S. 99; Merchants' Nat. Bank v. Hanson, 33 Minn. 40; *s. c.* 53 Am. Rep. 5; Prescott Nat. Bank v. Butler, 157 Mass. 548; *s. c.* 32 N. E. Rep. 909; 8 Bank. L. J. 145.

distinction between *discounting* and *purchasing* commercial paper by a national bank,<sup>1</sup> by preventing an obligor upon such paper from questioning the manner in which the national bank acquired it, when it brings an action upon it.<sup>2</sup>

§ 6037. **Further Applications of This Principle.**—Applying this principle, it has been held that, in a suit in equity to set aside a conveyance of real estate made in trust for the receiver of a national bank, on the ground that it was made without consideration and with intent to hinder, delay, and defraud creditors, — the plaintiff cannot challenge the conveyance, on the ground of its being unauthorized or inhibited by the National Banking Act.<sup>3</sup> The Supreme Court of Missouri, to whom this doctrine was taught by the Supreme Court of the United States,<sup>4</sup> have gone far beyond its teachings, and has made a gross misapplication of it, in a case where the proceeding was not a *collateral* but a *direct* proceeding to prevent the doing of an *ultra vires* act against common right, and specially injurious to the plaintiff. The court held that if a corporation, which is created for the purpose of constructing a horse railway, and which, by the terms of its charter, has power to construct such a railway upon certain streets of a city, nevertheless

<sup>1</sup> Such as *Lazear v. National Union Bank*, 52 Md. 78, 124; *s. c.* 36 Am. Rep. 355; *Farmers' &c. Bank v. Baldwin*, 23 Minn. 198; *s. c.* 23 Am. Rep. 683; *First Nat. Bank v. Pierson*, 24 Minn. 140; *s. c.* 31 Am. Rep. 341; *Niagara County Bank v. Baker*, 15 Ohio St. 68. Other courts, it is to be observed, have had the sense to repudiate this distinction. *Smith v. Exchange Bank*, 26 Ohio St. 141; *Pape v. Capitol Bank*, 20 Kan. 440; *s. c.* 27 Am. Rep. 183; *National Pemberton Bank v. Porter*, 125 Mass. 333; *s. c.* 28 Am. Rep. 235; *Atlas Nat. Bank v. Savery*, 127 Mass. 75, 77. For a transaction held to be a *discounting*, see *Prescott Nat. Bank v. Butler*, 157 Mass. 548. And see further, as to this distinction between discounting and purchasing, *ante*, § 5751.

<sup>2</sup> *Prescott Nat. Bank v. Butler*, 157

Mass. 548; *s. c.* 32 N. E. Rep. 909; 8 Bank. L. J. 145.

<sup>3</sup> *Wherry v. Hale*, 77 Mo. 20. But such a conveyance, if made to secure a debt due to the bank, is not prohibited by the National Banking Act, but is authorized by it, and is hence, in the absence of fraud or want of consideration, valid and enforceable. If made to a trustee for the bank, it creates a trust in favor of the bank, and a subsequent conveyance by the grantee, to a trustee for a receiver of the bank, is not only no fraud upon the individual creditors of such grantee, but is an execution of his trust, which, if it had been refused, a court of equity would have compelled. *Ibid.*

<sup>4</sup> *National Bank v. Matthews*, 98 U. S. 621; reversing *s. c. sub. nom. Matthews v. Skinner*, 62 Mo. 329; *s. c.* 21 Am. Rep. 425.

proceeds, without authority from the State, to construct a railway upon other streets of the city, and the State does not interfere to prevent this, it cannot be enjoined in an action by a private citizen whose interests were injuriously affected thereby.<sup>1</sup> This was a plain violation of the principle elsewhere stated, that an injunction will lie at the suit of an individual against the doing of an *ultra vires* act by a corporation, specially injurious to the complainant.<sup>2</sup>

§ 6038. **Further Applications of It.** — Under the principle of the preceding text, it has also been ruled that, where a corporation indorses notes for another and is compelled to pay them, the party for whose benefit the indorsement was made cannot, in the absence of an express prohibition in the governing statute against such indorsements, invoke the doctrine of *ultra vires* as a defense against the enforcement of a chattel mortgage given to secure the corporation against its liability upon the notes.<sup>3</sup> Under the same principle it has been held that, in an action by an alleged banking corporation, the defendant will not be permitted to show that the plaintiff did not possess the legal capacity to purchase and maintain an action on the bonds which are the subject-matter of the suit. The State alone is the proper party to institute such an inquiry.<sup>4</sup> So, in an action against a corporation by the possessor of certain lands which were claimed by the corporation, to quiet the title of the plaintiff, where it appeared in the answer that the corporation had acquired its adverse claim by becoming the purchaser of certain notes secured by a mortgage of the lands, it was held that the answer was not demurrable in that it did not state that the corporation had capacity to acquire the notes and mortgage. It was sufficient for it to allege that it was "a corporation, organized, existing, and acting under and pursuant to the laws of Minnesota," and that it was such at the time of the transactions in question; and whether it had power to acquire the mortgage was a question which would not be litigated in the particular proceeding, but was one which concerned only the State and the stockholders in the corporation.<sup>5</sup> Under the same principle, it was held that, although a bank in

<sup>1</sup> *Hovelman v. Kansas City Horse R. Co.*, 79 Mo. 632.

<sup>2</sup> *Post*, ch. 187.

<sup>3</sup> *St. Louis Drug Co. v. Robinson*, 10 Mo. App. 588; *s. c.* affirmed, 81 Mo. 18.

<sup>4</sup> *Franklin Ave. &c. Inst. v. Board of Education*, 75 Mo. 408, 412.

<sup>5</sup> *Baker v. Northwestern Guaranty Loan Co.*, 26 Minn. 185; *s. c.* 30 N. W. Rep. 464.

which the *State was the sole stockholder*, may have acted contrary to the directions of the legislature in lending money on a bond secured by a mortgage, yet the obligor in the bond would not be heard to set up this irregularity as a defense to an action upon it; but that the contract was good as between him and the bank, although the officers of the bank might be personally responsible to the State for a breach of their official duties in lending the moneys of the bank on this species of security.<sup>1</sup>

§ 6039. **Further Applications.** — Although there are statutory restrictions upon the *power of foreign corporations to hold land* in Pennsylvania,<sup>2</sup> yet it has been held that, where a corporation created under the laws of Massachusetts, which owned and operated *mining leases* in Pennsylvania, brought an action for coal sold to the defendant in Pennsylvania, through an agent of the corporation, — the defendant could not raise the question of the plaintiff's right to hold the mining leases, but that such an inquiry could only be made by the Commonwealth.<sup>3</sup> Under the same principle, where a banking corporation had, under its charter, the power to sell for cash its own stock, which had been surrendered to it, and invest the amount in bonds and mortgages, but instead of taking this course, it received the bond and mortgage of an individual as a consideration for shares of its stock issued to him, it was held that the stockholder could not avail himself of this irregularity as a defense to an action to foreclose the mortgage.<sup>4</sup> A frequent application of the same principle, denied in some jurisdictions, is found in those cases which hold that, although a *foreign corporation* performs an act in violation of the laws of the domestic State, the validity of the act cannot be impeached in a collateral proceeding.<sup>5</sup> Thus, where a foreign corporation had *purchased land* and taken a conveyance of it in direct violation of the laws of the State in which the land was situated, it was nevertheless held that it took title as against its grantor and his subsequent grantee, and that the validity of the conveyance to it could be questioned by the State alone.<sup>6</sup> Finally, we may recur to a somewhat unusual application of the principle, in a case where a stockholder of a corporation, who had been excluded by his fellow-

<sup>1</sup> *Bank v. Hammond*, 1 Rich. L. (S. C.) 281.

<sup>2</sup> *Ante*, § 5771; *post*, ch. 194.

<sup>3</sup> *Grant v. Henry Clay Coal Co.*, 80 Pa. St. 208.

<sup>4</sup> *Southern Life &c. Co. v. Lanier*, 5 Fla. 110; *s. c.* 58 Am. Dec. 448.

<sup>5</sup> *Ante*, § 6028, *et seq.*

<sup>6</sup> *Fritts v. Palmer*, 132 U. S. 282.

stockholders from his rights therein, brought a *bill in equity to have the corporation declared a partnership*, and to have its affairs wound up, on the ground that it had not been organized in compliance with the laws of the State. The court held that, although it may not have been regularly organized in compliance with the governing statute, yet so long as it existed and did business in the face of the State and without any proceeding on the part of the State to dissolve it as a *de facto* corporation, a stockholder, who had participated in its irregular organization and thereby drawn on himself an estoppel,<sup>1</sup> had no standing in court to have it declared a partnership, and dissolved and wound up as such.<sup>2</sup>

**§ 6040. Borrowers cannot Keep the Money and Plead Ultra Vires.** — We can readily understand why a court should not be willing to permit a debtor of a bank to urge that the debt was created in contravention of this statute, in order to avoid its payment. The *mischief of the statute* was the danger which would flow to the bank from the giving of credit in large sums to single individuals. It would be a shameful thing if any person could acquire the money of a bank in violation of such a statute, and then keep it because he had obtained it unlawfully. Instead of holding, as the Supreme Court of Alabama did, that this statute was merely directory, a modern court would probably hold that the debtor of the bank would not be heard to urge its provisions in order to escape the payment of a just debt.<sup>3</sup> Instead of taking a position so essentially knavish, the debtor could prevent the mischiefs which would flow to the bank from this particular violation of law, by restoring to it what he had thus illegally obtained from it. In such cases the principle to which the stress of justice drove the earlier courts was, that where the corporation is prohibited from lending money on a particular security, it may, notwithstanding the prohibition, *recover the money loaned, although the security may be void*.<sup>4</sup> That is to

<sup>1</sup> *Ante*, § 1862.

<sup>2</sup> *Bushnell v. Consolidated Ice Machine Co.*, 138 Ill. 67; *s. c.* 27 N. E. Rep. 596.

<sup>3</sup> *Ante*, § 6015, *et seq.*

<sup>4</sup> *Philadelphia Loan Co. v. Towner*, 13 Conn. 249, 262; *Utica Ins. Co. v. Scott*, 19 Johns. (N. Y.) 1; *Utica Ins. Co. v. Kip*, 8 Cow. (N. Y.) 20.



say, if an action is brought upon the instrument alone, there can be no recovery. If the declaration counts on the instrument, and contains also the common counts for money had and received, the count upon the instrument will be bad on demurrer, but a recovery will be had on the common counts.<sup>1</sup> If, ignoring the void security, an action is brought for the money loaned,—which we suppose, at common law, would be an action of *assumpsit* for *money had and received*,—the plaintiff will recover. But this doctrine was predicated of acts where the corporation, though prohibited from taking the particular security, yet had a general power to lend money, and consequently power to make such a loan as the loan in question without taking the security. If the corporation had no power whatever to lend money, not only the security but the contract itself was void, and no recovery could be had upon either.<sup>2</sup> If, therefore, according to this doctrine, an insurance company usurps the business of banking and discounts notes, as did the Utica Insurance Company,<sup>3</sup> it will not be able to maintain an action upon the notes; but if, as an insurance company, it has a general power to lend money, it may maintain an action for the money loaned.<sup>4</sup> With reference to this subject, a distinction has been taken between cases where the making of the loan and the taking of the illegal security form one entire transaction, and cases where a valid loan is

<sup>1</sup> *Utica Ins. Co. v. Kip*, *supra*; *Philadelphia Loan Co. v. Towner*, 13 Conn. 249.

<sup>2</sup> *Life & Fire Ins. Co. v. Mechanics' Fire Ins. Co.*, 7 Wend. (N. Y.) 31, 34; *Beach v. Fulton Bank*, 3 Wend. (N. Y.) 573, 583.

<sup>3</sup> *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358; *s. c.* 8 Am. Dec. 243.

<sup>4</sup> *Utica Ins. Co. v. Scott*, 19 Johns. (N. Y.) 1; *Utica Ins. Co. v. Kip*, 8 Cow. (N. Y.) 20. In *Parker v. Rochester*, 4 Johns. Ch. (N. Y.) 332, Chancellor Kent, in speaking of the notes discounted by this company, said: "There can be no doubt that

the makers and indorsers are holders in equity and good conscience to pay them; for they were given for a fair and valuable consideration." Upon similar grounds, it was decided by Lord Kenyon and Mr. Justice Buller, in 1792, that although a bottomry bond, taken in violation of a statute, was void, as a security for a debt, yet this would not prevent the lender from maintaining an action for the money lent. Accordingly, where an executor of the borrower had paid such a debt, he could not maintain an action to recover it back as money paid under a mistake: *Munt v. Stokes*, 4 T. R. 561.

made within the powers of the corporation, and *afterwards* an illegal security is taken for it. Here, although no recovery can be had on the security, yet a recovery can be had on common counts for the money lent.<sup>1</sup> Such were the distinctions in the American courts fifty years ago; but, ignoring these subtleties, and taking the direct road to justice, the doctrine now is, that the corporation thus making the loan in good faith may recover upon or enforce the security, and that the borrower will be estopped, by his act of receiving the loan and keeping the money, from setting up that the corporation had no power to make it.<sup>2</sup>

§ 6041. **Persons Advancing Money to Corporations not Bound to See to its Proper Application.** — If an attorney in fact has authority to assign a note and mortgage, his principal cannot repudiate the transaction because he fails to account for the proceeds.<sup>3</sup> The same principle operates to protect persons dealing with trustees, so that they are bound to look no further than to see that the trustee has the power to vary the securities belonging to the trust.<sup>4</sup> Necessarily, it operates to protect persons dealing in good faith with corporations, through their officers or agents. If a contract made by a corporation is within the general scope of its powers, but if the real purpose of its officers in making the contract is unlawful, — as where it has a general power to borrow money, but borrows it in the particular case for unlawful purposes, — then if the party contracting with the corporation has *no knowledge of the unlawful purpose*, he will not be affected thereby, and the defense of *ultra vires* will not be available to the corporation, or to those claiming through it, when he brings an action to enforce the contract.<sup>5</sup> Thus, one who purchases property of a corporation is not bound to follow the

<sup>1</sup> Philadelphia Loan Co. v. Towner, 13 Conn. 249.

<sup>2</sup> *Ante*, § 6021.

<sup>3</sup> Wendell v. Chrysler, 73 Mich. 424; s. c. 41 N. W. Rep. 321.

<sup>4</sup> *Ante*, §§ 4930, 5707.

<sup>5</sup> See the reasoning of Comstock, C. J., in Bissell v. Michigan Southern & C. R. Co., 22 N. Y. 258, 273; quoted in Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 579; s. c. 99 Am. Dec. 300; Thompson v. Lambert, 44 Iowa, 239.

price into its treasury, and to see to its proper distribution among its stockholders, there being no fraudulent connivance on his part with its officers to wrong its stockholders.<sup>1</sup> It has even been held that if a corporation has power to borrow money and to execute mortgages to secure the loan, the fact that its purpose in borrowing the money is to use it in a transaction which is *ultra vires*, will be no defense to the enforcement of the mortgage, *although the lender knew* that such was its purpose, provided he had no further complicity in the unlawful transaction than that arising from such mere knowledge.<sup>2</sup>

§ 6042. Other Cases in Which the Courts have Refused to Admit the Defense. — A mining corporation, being unsuccessful and under expense, transferred its properties for stock in a new corporation, and in so doing incurred expenses, to pay which it borrowed money from one of its stockholders. It afterwards *levied an assessment* upon its shares to raise money to repay the money thus borrowed. It was held that a delinquent stockholder, whose shares had been sold under the assessment, could not, in an action to set aside the assessment, set up that the assessment was rendered necessary by the purchase of shares in the other corporation, which was *ultra vires*.<sup>3</sup>

<sup>1</sup> *Leathers v. Janney*, 41 La. An. 1120; s. c. 6 South. Rep. 884.

<sup>2</sup> *Wright v. Hughes*, 119 Ind. 324; s. c. 12 Am. St. Rep. 412; 21 N. E. Rep. 907. For another illustration of

the doctrine, see *Lippincott v. Shaw Carriage Co.*, 25 Fed. Rep. 577.

<sup>3</sup> *Taylor v. North Star Gold Min. Co.*, 79 Cal. 285; s. c. 21 Pac. Rep. 753.

# **TITLE THIRTEEN.**

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**CORPORATE BONDS AND MORTGAGES.**



# TITLE THIRTEEN.

## CORPORATE BONDS AND MORTGAGES.

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### CHAPTER CXXI.

#### CORPORATE BONDS AND COUPONS.

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- 6092. Suits in equity for surrender and cancellation.
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- 6094. Right of holders of mortgage bonds of land grant railroad to exchange bonds for land.
- 6095. Sinking fund arrangements.
- 6096. Effect of consolidation.
- 6097. Bonds guaranteed or indorsed by the State.
- 6098. Further of such bonds.
- 6099. Subscriptions to bonds on condition that a certain number of bonds shall be subscribed for.
- 6100. Non-liability of subscribers to creditors.
- 6101. Taxation of bonded indebtedness assessed upon payment of interest.

§ 6050. **Power to Issue Bonds.**—We have already seen<sup>1</sup> that power is ascribed to corporations, without any express grant, but as matter of law, to *contract debts* for the purpose of carrying out the objects of their creation, and to *issue the usual securities therefor*. If it be a sound principle that a corporation may, in order to carry out the legitimate objects of its creation, deal precisely as an individual may, except in so far as it is restrained by its charter or governing statute,<sup>2</sup>—then the conclusion follows that it may borrow money and issue negotiable bonds as security therefor, the same as an indi-

<sup>1</sup> *Ante*, § 5697.

<sup>2</sup> This doctrine is beyond question : *Dana v. Bank of United States*, 5

Watts & S. (Pa.) 223; *Philadelphia &c. R. Co. v. Lewis*, 33 Pa. St. 33, 37; *s. c.* 75 Am. Dec. 574.

vidual may do.<sup>1</sup> A *railway* or *canal company* may, therefore, issue its negotiable coupon bonds for the purpose of raising money for building and equipping its road or canal.<sup>2</sup> A charter provision conferring upon a railroad company the *power to mortgage* its property is construed as conferring upon it, by necessary implication, the power to borrow money and to *issue its bonds* therefor.<sup>3</sup> A *cemetery association* having power "to hold, purchase, and convey such real estate as the offices of the corporation may require," has been held to have the power to issue its bonds and deliver them in payment for *lands* used as a cemetery and for *improvements* thereon.<sup>4</sup>

§ 6051. **Further of This Power.**—The power to *borrow money* to effectuate the purposes of their creation is almost universally ascribed to corporations as one of their inherent powers;<sup>5</sup> and where a corporation possesses this power, it cannot be material by what kind of instrument it acknowledges its indebtedness and promises payment. Such a power, given to a railway company, has been justly held to carry with it the power to *issue bonds*.<sup>6</sup> And where a corporation had power under its charter to hold and convey such, and so much real estate, and to erect such edifices or buildings as it might deem necessary or proper for the purposes of a *public exchange*, it was held that it had, by implication, the power to borrow money for such purpose and to secure its payment by issuing its bonds, and *mortgaging its real estate* as a security for the same.<sup>7</sup> Bonds issued to carry into effect the legitimate

<sup>1</sup> Philadelphia &c. R. Co. v. Lewis, 33 Pa. St. 33; s. c. 75 Am. Dec. 574; Com. v. Smith, 10 Allen (Mass.), 448, 455; s. c. 87 Am. Dec. 672; citing Treadwell v. Salisbury Man. Co., 7 Gray (Mass.), 393, 404; s. c. 66 Am. Dec. 490; Braud v. Donaldsonville, 28 La. An. 558; Commissioners v. Atlantic &c. R. Co., 77 N. C. 289.

<sup>2</sup> Philadelphia &c. R. Co. v. Lewis, 33 Pa. St. 33; s. c. 75 Am. Dec. 574; McMasters v. Reed, 1 Grant Cas. (Pa.) 36; Commissioners v. Atlantic

&c. R. Co., 77 N. C. 289, 292, and cases cited in the preceding note.

<sup>3</sup> Gloninger v. Pittsburgh &c. R. Co., 139 Pa. St. 13; s. c. 21 Atl. Rep. 211.

<sup>4</sup> Seymour v. Spring Forest Cemetery Asso., 19 N. Y. Supp. 94.

<sup>5</sup> Ante, § 5697.

<sup>6</sup> Miller v. New York &c. R. Co., 8 Abb. Pr. (N. Y.) 431; s. c. 18 How. Pr. (N. Y.) 374.

<sup>7</sup> Barry v. Merchants' Exch. Co., 1 Sandf. Ch. (N. Y.) 280.



ends of a corporation are not a *loan of money* within the prohibition of a charter;<sup>1</sup> nor are they within the prohibition of a charter respecting the exercise of *banking privileges*.<sup>2</sup> Neither are they rendered void by the fact that they are secured by a *mortgage* which the company had no power to issue; since the illegality of the mortgage does not vitiate the bond:<sup>3</sup> the principle being the same as that elsewhere discussed, that the taking of an *illegal security for a valid loan* will not vitiate the loan, though no recovery can be had on the instrument.<sup>4</sup>

§ 6052. **Power to Issue Corporate Bonds never Maturing.**—Under a general power to borrow conferred by its charter, a railway company cannot issue bonds secured by mortgages which are *never to mature*; because, such bonds are not shares in such sense as entitles their holders to participate in corporate elections, yet they are in the nature of shares of its capital in all other respects. They are analogous to *debenture* shares, which are authorized by statute in England, though not in this country. A corporation cannot thus increase its capital stock and change the relative rights of its existing stockholders, by issuing this species of share in the professed exercise of its power to borrow, and such an issue will be enjoined.<sup>5</sup>

§ 6053. **Power in Respect of Interest thereon and Usury.** Authority in the charter of a railroad company to borrow money at interest, and to give bonds or notes therefor, payable at such times and places as may be agreed upon, includes authority to contract for the payment of interest *semi-annually*.<sup>6</sup> An authority in such a charter to borrow money upon

<sup>1</sup> *McMasters v. Reed*, 1 Grant Cas. (Pa.) 36, 49.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Philadelphia &c. R. Co. v. Lewis*, 33 Pa. St. 33; s. c. 75 Am. Dec. 574.

<sup>4</sup> *Ante*, § 5714. Construction of the statute of Georgia of Feb. 28, 1876, requiring all corporations issuing bonds for circulation to furnish a *certified statement* of the same to the Secretary

of State under a *penalty*,—with reference to the right of action for the penalty and the defenses thereto: *McDaniel v. Gate City Gaslight Co.*, 79 Ga. 58.

<sup>5</sup> *Taylor v. Philadelphia &c. R. Co.*, 7 Fed. Rep. 386.

<sup>6</sup> *Coe v. Columbus &c. R. Co.*, 10 Ohio St. 372; s. c. 75 Am. Dec. 518.

*such terms as may be agreed upon* between the parties, includes an authority to pay *interest* beyond the rate fixed by the statutes of the State.<sup>1</sup> So, where the charter of a corporation authorizes it to borrow money on such terms as its directors may determine, and to issue bonds, a loan to it is *not usurious* because the bonds are sold for *less than their face value*.<sup>2</sup> The effect of a clause *on the face of a negotiable bond* which a corporation has the power to issue, providing for the payment by the corporation of interest in excess of the rate allowed by law, is, in the absence of special applicatory statutes, to be determined by the law with respect to usurious contracts in the particular jurisdiction. If, by the law of the State, the holder of an obligation tainted with usury is entitled to recover the principal sum and lawful interest, rejecting the usurious excess,<sup>3</sup> the same rule of recovery will be applied in an action upon a negotiable corporate bond.<sup>4</sup>

**§ 6054. Power to Guarantee the Bonds of Another Corporation.**—If a *railroad company* may issue its own bonds for the purpose of raising money to complete its road, it may obviously *guarantee* the bonds of municipal corporations, issued and donated or otherwise transferred to it, to enable it to complete and equip its road.<sup>5</sup> And if bonds of one company guaranteed by another have passed into the hands of *bona fide* holders for value, the latter company will be holden on its guaranty, although it may have been in excess of its powers.<sup>6</sup>

**§ 6055. Power to Lend its Credit by Issuing Bonds.**—The power of a corporation to lend its credit by issuing its bonds rests upon a different footing; and, by analogy to the principle that a corporation cannot bind itself by indorsing for

<sup>1</sup> *Morrison v. Eaton & Co. R. Co.*, 14 Ind. 110.

<sup>2</sup> *Traders' & Co. Bank v. Lawrence Man. Co.*, 96 N. C. 298.

<sup>3</sup> As in Pennsylvania; *Wycoff v. Longhead*, 2 Dall. (U. S.) 92; *Turner v. Calvert*, 12 Serg. & R. (Pa.) 46.

<sup>4</sup> *Philadelphia & Co. R. Co. v. Lewis*, 33 Pa. St. 33; *s. c.* 75 Am. Dec. 574.

<sup>5</sup> *Railroad Co. v. Howard*, 7 Wall. (U. S.) 392, 411.

<sup>6</sup> *Madison & Co. R. Co. v. Norwich Sav. Soc.*, 24 Ind. 457. Compare *ante*, § 5867.

*accommodation*,<sup>1</sup> it may be concluded that no such power exists, unless conferred in express terms or by necessary implication. This may be illustrated by a case where the charter of an insurance and trust company provided, in substance, that the capital was to be only a million dollars, which was required to be paid in *in cash*, and such other moneys as it might receive in trust. One half of its capital was to be invested in bonds and notes, and at an interest not exceeding seven per cent per annum, secured by unincumbered real estate within the State; the remaining half, together with the premiums and profits received by the company, and the moneys it might receive in trust, might in the discretion of the company be invested in stocks, loaned to any city, county, or company, or invested *in such real or personal property* as it might deem proper, at any rate of interest not exceeding the legal rate. It had in terms power "to grant and purchase annuities" and "make any other contracts involving the interest or use of money and the duration of life." This did not confer upon the corporation power to issue its own bond in exchange for the mortgage-bond of a natural person; and, having done so, it could not maintain a bill in equity to foreclose the mortgage.<sup>2</sup>

§ 6056. **Power to Sell its Bonds at a Discount.**—In the absence of restraining constitutional provisions or statutes, private corporations have the same power to sell their bonds at less than their par value, which natural persons would have. This follows from the principle already stated that, in the absence of statutory restraints, corporations may resort to the same means for the purpose of raising money to prosecute the objects of their creation which would be permissible in the case of natural persons.<sup>3</sup>

<sup>1</sup> *Ante*, § 5739. See also *ante*, § 5721, *et seq.*

<sup>2</sup> *Smith v. Alabama Life Ins. Co.*, 4 Ala. 558.

<sup>3</sup> *Ante*, § 5731; *Coe v. Columbus &c. R. Co.*, 10 Ohio St. 372; *s. c.* 75 Am. Dec. 518, 537; *Gamble v. Queens County Water Co.*, 123 N. Y. 91; *s. c.*

33 N. Y. St. Rep. 88; 25 N. E. Rep. 201; 9 L. R. A. 527; 8 Rail. & Corp. L. J. 484; reversing *s. c.* 52 Hun (N. Y.), 166, and 5 N. Y. Supp. 124; *Traders' &c. Bank v. Lawrence Man. Co.*, 96 N. C. 298; *ante*, § 6053. Corporations organized under Laws N. Y. 1873, ch. 737, relating to the

**§ 6057. Power to Exchange its Bonds for Property in Kind.**—We have seen that a corporation ordinarily has the power to exchange the unissued shares of its stock for property in kind, provided the property is such as it has the power to purchase and hold for the purpose of carrying out the objects of its creation, and that the law does not require it to go through the vain process of receiving money for its shares, issued to one from whom it buys property, and paying the same money back to the share-taker for the property which it purchases of him, or of accomplishing the same objects by an exchange of checks.<sup>1</sup> By parity of reasoning, a corporation which has power to issue bonds to raise money for the construction of its works, may issue them in payment for works *already constructed*, which are suitable for its purposes, and which it has power to purchase and hold.<sup>2</sup> But it is a sound conclusion, though somewhat shaken by one or two

organization of water companies, as amended by Laws 1881, ch. 213, have power to issue bonds at their actual value, though this be less than the par value. *Gamble v. Queens County Water Co.*, *supra*. Where, by a statute, railroad corporations are empowered to borrow money for their corporate purposes, to issue evidences of indebtedness therefor and to secure the same by mortgages and pledges of their property and income, and where, by subsequent statute, such corporations are authorized to sell such evidences of indebtedness at a discount, the authority thus given *extends to any mortgage* given to secure such evidence of indebtedness. Accordingly, where railroad bonds, under the operation of such statutes, were sold at a large discount, it was held that the holders were entitled to foreclose the mortgage given to secure the same upon the basis of the par value of the bonds and accrued interest, in like manner as though the bonds had been originally sold at par.

Indeed, the fact that a court of justice was called upon to make such a ruling is an illustration of the frivolous ingenuity with which counsel frequently trouble the courts. *Coe v. Columbus &c. R. Co.*, 10 Ohio St. 372; *s. c.* 75 Am. Dec. 518.

<sup>1</sup> *Ante*, §§ 1604, 1608.

<sup>2</sup> *Gamble v. Queens County Water Co.*, 123 N. Y. 91; *s. c.* 33 N. Y. St. Rep. 88; 25 N. E. Rep. 201; 9 L. R. A. 527; 8 Rail. & Corp. L. J. 484; reversing *s. c.* 52 Hun (N. Y.), 166; *Coe v. Columbus &c. R. Co.*, 10 Ohio St. 372; *s. c.* 75 Am. Dec. 518, 533; *ante*, § 5879. For instance, it is no objection to the validity of railway bonds or of the mortgage securing the same, that the company, acting under a statute authorizing it to issue its bonds and negotiate them at less than their par value, had exchanged the bonds for *iron rails* instead of disposing of them for *cash* and with the cash buying the rails. *Coe v. Columbus &c. R. Co.*, 10 Ohio St. 372, 399; *s. c.* 75 Am. Dec. 518, 538.

unfortunate decisions,<sup>1</sup> that a corporation can neither *give away* its bonds as a *bonus* to its stockholders, nor give away its stock as a *bonus* to its bondholders, but that such donations are diversions of its assets, in *breach of the trust* under which its directors and officers hold those assets, both as against creditors and stockholders.<sup>2</sup>

§ 6058. **Prohibited Bonds or Mortgages.**—Constitutional prohibitions exist in many of the States against the issuing by corporations of stock or bonds, except for *money, labor, or property* actually received and applied to the purposes for which the corporation was created, and providing that all fictitious indebtedness of corporations shall be void.<sup>3</sup> Such a constitutional provision is construed as intended to prevent reckless and unscrupulous speculators, under the guise or pretense of building a railroad or of accomplishing some other legitimate corporate purpose, from fraudulently issuing and putting upon the market, bonds or stocks that do not, and are not intended to, represent money or property of any kind, either in possession or in expectancy, but which represent values entirely fictitious; but not to interfere with the usual and customary methods of raising funds by corporations, by the issue of stocks or bonds for accomplishing legitimate corporate purposes.<sup>4</sup> Such a provision, in the constitution of California,

<sup>1</sup> *Ante*, §§ 1587, 1665, *et seq.*

<sup>2</sup> This may be illustrated by a case where the directors of a corporation gave to A., for property sold by him to the corporation, mortgage bonds representing its full value, and also stock issued as full paid, but for which the corporation received no consideration, except as aforesaid, although the stock then had a considerable market value. It was held that the contract and the bonds were voidable at the election of the corporation, except so far as against purchasers for value without notice, although the parties to the contract believed the transaction to be lawful, and acted

under legal advice; that the defense of illegality could be set up in a suit to foreclose the mortgage; that A. could not be required, on the rescission of the transaction, to pay in the par value of the stock; and that the corporation should pay to A. the value of the property conveyed by him, and that he should be required to surrender the stock. *Central Trust Co. v. New York City & C. R. Co.*, 18 Abb. N. Cas. (N. Y.) 381.

<sup>3</sup> *Ante*, § 6050.

<sup>4</sup> *Peoria & C. R. Co. v. Thompson*, 103 Ill. 187; approved in *Memphis & C. R. v. Dow*, 120 U. S. 287, 298.

was held, by a learned and able Federal judge, to prohibit the issuing of bonds by a corporation as collateral security for any sort of *pre-existing indebtedness*. In his view, the constitutional provision had but one meaning, which was that the money paid, the labor done, or property actually received, must be paid, performed, or received, as the case may be, on account of the issuance of the bonds.<sup>1</sup> Such a constitutional provision does not, in the opinion of the Supreme Court of the United States, necessarily indicate a purpose to make the validity of every issue of stock or bonds by a private corporation depend upon the inquiry whether the money, property, or labor actually received therefor was of *equal value in the market* with the stock or bonds so issued. It was not clear to the court, from the words employed, that the framers of the instrument intended to restrict private corporations,—at least when acting with the approval of their stockholders,—in the exchange of their stock or bonds for money, property, or labor, upon such terms as they might deem proper,—provided always the transaction was a real one, based upon a present consideration, and having reference to legitimate corporate purposes, and was not a mere device to evade the law and accomplish that which was forbidden.<sup>2</sup> Another court has pointed out that a constitutional provision, in the frame of language employed at the head of this section,<sup>3</sup> does not, standing by itself, require that the amount of money, or the value of the labor or property for which stock or bonds are issued, shall correspond with the *face value* of the stock or bonds for which it is issued; though the statute law of that State went further, as held in a previous decision.<sup>4</sup> In the opinion of the court, in the absence of such statutory provisions, the constitutional provision would be complied with in

<sup>1</sup> Farmers' Loan &c. Co. v. San Diego Street Car Co., 45 Fed. Rep. 518, 528, *per* Ross, J.

<sup>2</sup> Memphis &c. R. v. Dow, 120 U. S. 287, 299. Similarly, see Brown v. Duluth &c. R. Co., 53 Fed. Rep. 889, 893, 894.

<sup>3</sup> Const. Ala., art. 14, § 6.

<sup>4</sup> Referring to Ala. Code, §§ 1560-1663; Elyton Land Co. v. Birmingham Warehouse &c. Co., 92 Ala. 407; s. c. 25 Am. St. Rep. 65; 9 South. Rep. 129.

the case of stock, which was not a fictitious increase, but was issued for money, labor done, or money or property actually received, and in case of bonds, issued for money, labor done, or money or property actually received, where there was in fact a debt which was real, and not fictitious. "The constitutional provision in question," said Walker, J., "operates to invalidate evidences of indebtedness when there *is in fact no debt*; to require every issue of stocks or bonds of private corporations to represent substantial values received by the corporations; to impose upon those charged with the disposition of corporate securities the duty to procure therefor a fair and reasonable equivalent in money, labor, or property actually contributed to the corporation. Courts of the highest authority, which have considered the effect of such provisions, have not construed them, when not fortified by more stringent statutory requirements, as invalidating issues of stocks and bonds in exchange for money, property, or labor, upon such terms as the corporate authorities, in the fair exercise of their judgment and discretion, may deem proper, though the amount received therefor was less than the face value of securities. The negotiation of bonds must be a *real transaction*, carried through to promote legitimate corporate purposes, and not a mere trick or device to evade the law, and impose greater obligations upon the corporation than there is any occasion for it to assume in order to obtain the consideration received therefor."<sup>1</sup> A statute prohibiting corporations organized under it from mortgaging their property, or giving any lien thereon, has been construed as not intended to prevent corporations from giving a mortgage or lien upon property which they may purchase, to secure the unpaid purchase-money.<sup>2</sup>

**§ 6059. Further of This Subject.** — Similar views, it will be recalled, have been put forth by some of the courts upon the question of the valuation at which specific property, other than

<sup>1</sup> Nelson v. Hubbard, 96 Ala. 238;  
s. c. 11 South. Rep. 428, 432.

<sup>2</sup> McMurray v. St. Louis &c. Co.,  
33 Mo. 377.

money, may be received by a corporation in the payment of its shares,<sup>1</sup>—those courts adopting what the author has ventured to designate as the “*good faith rule*,” which is, that whatever the parties to the transaction, that is to say, the officers of the corporation issuing the shares and the other contracting party receiving them, agree, in good faith, to be the value of the property delivered or conveyed to the corporation in payment of them, *is* such value. The latitude of construction and the opportunity thus left open of frittering away the salutary constitutional provision, point to the propriety of legislation fixing more definitely the deviation between the par value of the stock or bonds and the real or market value of the property which may be permitted. The Legislature of Wisconsin has fixed the limit of deviation at *seventy-five per cent* of the par value.<sup>2</sup> This statute restrains a corporation from *hypothecating its bonds* as a security for loans,—in other words, from issuing them *as collateral security*, without stipulating that they shall be accounted for at not less than seventy-five cents on the dollar of their par value, and all bonds otherwise issued are void.<sup>3</sup> But where there was no such statutory limit, the conclusion was that a corporation might *pledge its own mortgage bonds as collateral security* for a debt, without any such restriction as to the value at which they should be accounted for to the company in case of a sale to foreclose the pledge, and that such a pledge, if made without fraud, but with the *bona fide* purpose of securing the payment of corporate debts, could not properly be regarded as a *fictitious increase* of the indebtedness of the corporation, or as an issuing of its bonds except for money, labor done, or money or property actually received, within the meaning of the constitutional inhibition,—although the amount of the bonds thus pledged might exceed the amount of the indebtedness to be secured.<sup>4</sup> It has been held that an *indebtedness* of a corporation is not “*fictitious*,” within the meaning of such a provision, where it consists of notes

<sup>1</sup> *Ante*, § 1618, *et seq.*

<sup>2</sup> Rev. Stat. Wis., § 1753.

<sup>3</sup> *Pfister v. Milwaukee &c. R. Co.*,

83 Wis. 86; *s. c.* 53 N. W. Rep. 27.

<sup>4</sup> *Nelson v. Hubbard*, 96 Ala. 238; *s. c.* 11 South. Rep. 428, 433.



and mortgages issued by the corporation in consideration of money advanced to and paid for the corporation, and of property sold and delivered to it by the mortgagee, though but a part of the consideration for each note executed by the corporation had been received by it at the date of the execution of the note, if the full consideration was afterwards received by it, and there was no fraud on the part of the mortgagee.<sup>1</sup> The constitution of California, in a provision of the kind under consideration, used the expression "*bonded indebtedness*." It was held by the Supreme Court of that State that this did not embrace the issue of *non-negotiable promissory notes* secured by a mortgage;<sup>2</sup> but this interpretation of the provision does not seem to deserve commendation, since it leaves the road open to an evasion of the prohibition in every case, by the mere device of issuing non-negotiable notes payable to a particular person instead of negotiable bonds, payable to the bearer. Some of these statutes declare that all bonds otherwise issued shall be *void*. Where the statute contains such a declaration, the courts have nothing to do, in the absence of circumstances of an *estoppel*, except to enforce the mandate of the statute, and to hold that bonds issued in contravention of its terms are void.<sup>3</sup>

<sup>1</sup> Underhill v. Santa Barbara Land & Co., 93 Cal. 300; s. c. 28 Pac. Rep. 1049.

<sup>2</sup> *Ibid.* 308.

<sup>3</sup> National Foundry & Works v. Oconto Water Co., 52 Fed. Rep. 29; Pfister v. Milwaukee & C. R. Co., 83 Wis. 86; s. c. 53 N. W. Rep. 27. A statute of Washington Territory prohibited corporations from issuing bills and other evidences of debt for circulation as money, "except bonds by railroad companies, which shall at no time exceed double the amount of paid-up stock issued by said company"; and made stockholders liable to creditors of the corporation to the amount of their unpaid subscriptions only. Wash.

Code, § 2434. This statute was amended in 1888, by excluding from its operation debentures or bonds, "the payment of which shall be secured by an actual transfer of real estate securities for the benefit and protection of purchasers of said debentures or bonds." Wash. Laws 1888, ch. 32, p. 65. The Legislature of Pennsylvania enacted in 1887 a statute to the effect that corporate bonds or other certificates of indebtedness, shall not be issued by any railroad corporation until the full amount of its subscribed capital stock shall have been paid for; and limiting the issue of bonds by such companies to an amount not to exceed the amount of their capital stock

**§ 6060. Prohibition against Increasing Bonded Indebtedness without Consent of Stockholders.**—A constitutional provision to the effect that the stock and bonded indebtedness of corporations shall not be increased except in pursuance of general laws, nor without consent of the persons holding the larger amount in value of stock, first obtained at a meeting held after thirty days' notice given in pursuance of law,<sup>1</sup> followed by a statute providing for notice in such cases for four consecutive weeks in the newspaper published nearest to the place of business of the corporation,—merely establishes requirements for the *benefit of the stockholders*, which may be *waived* by them.<sup>2</sup> This decision conforms to a numerous class of holdings, to the effect that, the stockholders being the real parties in interest, so to speak, in respect of the contracts made by the corporation, can *wave* any informalities in making them, and especially those intended for their benefit and protection.<sup>3</sup> A prohibition against increasing the indebtedness of any corporation without the consent of its stockholders,<sup>4</sup> is not infringed by the execution of a mortgage to secure the payment of money, in a transaction which merely changes the form of an existing corporate indebtedness.<sup>5</sup>

**§ 6061. Power of a Corporation to Pledge its Own Bonds.** In a former title we have considered the question of the power of a corporation to deal with its own unissued *shares* as property, and to pledge them as collateral security for the payment of its debts.<sup>6</sup> Although there is a solecism in conceding the power of a man to issue his own promissory note,

actually paid for, and providing that they shall not be sold except for their fair market value. Pa. Laws 1887, No. 44, p. 94, § 3. A statute, enacted in 1889, prescribed the amount of the stock and bonds which might be issued by railroad companies theretofore or thereafter consolidated and merged: Pa. Laws 1889, No. 223, p. 205. Manner of giving notice of special elections for voting bonds, for irrigating districts under Cal. Stat.:

Modesto Irrig. Dist. v. Tregea, 88 Cal. 334; s. c. 26 Pac. Rep. 237.

<sup>1</sup> Const. Ala., art. 14, § 6.

<sup>2</sup> Nelson v. Hubbard, 96 Ala. 238; s. c. 11 South. Rep. 428.

<sup>3</sup> Ante, § 5314, et seq., § 6027.

<sup>4</sup> In this case, Const. Pa., art. 16, § 7.

<sup>5</sup> Powell v. Blair, 133 Pa. St. 550; s. c. 19 Atl. Rep. 559; Ahl v. Rhoads, 84 Pa. St. 319.

<sup>6</sup> Ante, § 2051, et seq.

or other evidence of debt, and then to treat it as *his own property*, yet it seems to be established that a corporation, which has the power to issue bonds secured by a mortgage, may execute such bonds and a mortgage to secure them, and then transfer the bonds and the mortgage, as *collateral security* for an indebtedness of a less value than the sum for which the bonds are issued, and which is secured by the mortgage.<sup>1</sup> It may be observed that this doctrine, if established, will open a convenient road to the avoidance of *usury laws*, and to the avoidance of any constitutional or statutory provisions restraining corporations from issuing their bonds, except at their par value, or at a prescribed limit less than par.<sup>2</sup>

**§ 6062. Bonds Valid though Mortgage Void.**—A corporation organized for a purpose the accomplishing of which requires money, having, by necessary implication, the power to borrow money and to issue negotiable bonds therefor,<sup>3</sup> it is quite too obvious for discussion that the bonds of such a company will be valid, although the company may have attempted to secure them by a mortgage of its properties which it had no power to execute, and which is hence void. The mortgage is merely collateral to the principal undertaking, is but an additional security for it, and its invalidity cannot, of course, affect the primary obligation to pay the debt.<sup>4</sup> It follows that a memorandum upon such bonds, that they have been issued by the company in accordance with its charter, in a given amount, and that the mortgage therein recited has been duly executed and delivered to the trustee, is quite immaterial, in so far as it affects the right of a *bona fide* holder of such a bond to recover a judgment against the corporation in an action thereon.<sup>5</sup>

<sup>1</sup> *Lehman v. Tallassee Man. Co.*, 64 Ala. 567; *Duncomb v. New York &c. R. Co.*, 84 N. Y. 190; *Nelson v. Hubbard*, 96 Ala. 238; *s. c.* 11 South. Rep. 428, 433.

<sup>2</sup> See, in this aspect of the question, the discussion in *Nelson v. Hubbard*,

96 Ala. 238; *s. c.* 11 South. Rep. 428, 433; with which compare *Pfister v. Milwaukee &c. R. Co.*, 83 Wis. 86; *s. c.* 53 N. W. Rep. 27.

<sup>3</sup> *Ante*, §§ 5097, 5731, 6050, 6051.

<sup>4</sup> *Philadelphia &c. R. Co. v. Lewis*, 33 Pa. St. 33; *s. c.* 75 Am. Dec. 574.

<sup>5</sup> *Ibid.*

**§ 6063. Bonds Which are Mortgages by Force of Statute.**

A statute of Florida, authorizing a railroad company to issue "first mortgage bonds," has been held to authorize it to issue a *bond which should operate as a first mortgage* upon its properties, without the additional formality of executing a mortgage.<sup>1</sup> This is plain, if it is a proper construction of the statute; since the enabling act under which corporate bonds are issued must, on principles hereafter stated, be regarded as a part of the contract, when referred to on the face of the bonds.<sup>2</sup>

**§ 6064. Coupon Bonds Negotiable, although Sealed.—**

In this country coupon bonds issued by governments, or by public or private corporations, *under the governmental or the corporate seal, and payable to bearer*, are now generally held to be negotiable, and to possess the usual qualities of negotiable paper,<sup>3</sup> although *indorsed by the State*,<sup>4</sup> except that neither such bonds nor the coupons attached thereto are entitled to *grace*.<sup>5</sup> These instruments are a modern financial invention. They are, as is well known, issued by the United States government,<sup>6</sup> by the governments of the several States,<sup>7</sup> by the

<sup>1</sup> *State v. Florida &c. R. Co.*, 15 Fla. 690, 706.

<sup>2</sup> *Post*, § 6072.

<sup>3</sup> *Morris Canal &c. Co. v. Fisher*, 9 N. J. Eq. 667; *s. c.* 64 Am. Dec. 423; *Morris Canal &c. Co. v. Lewis*, 12 N. J. Eq. 323, 329; *Winfield v. City of Hudson*, 28 N. J. L. 255; *Memphis v. Brown*, 1 Flip. (U. S.) 217; *Vreeland v. Van Horn*, 17 N. J. Eq. 137, 140; *Reid v. Bank*, 70 Ala. 199; *Evertson v. National Bank*, 66 N. Y. 14; *s. c.* 23 Am. Rep. 9; *Thomson v. Lee County*, 3 Wall. (U. S.) 327; *Knox County v. Aspinwall*, 21 How. (U. S.) 539; *McClelland v. Norfolk &c. R. Co.*, 110 N. Y. 469, 475; *s. c.* 6 Am. St. Rep. 397; *Connor v. Fifth Nat. Bank*, (Pa.), 14 Pitts. L. J. (N. s.) 370.

<sup>4</sup> *Reid v. Bank*, 70 Ala. 199.

<sup>5</sup> *Chaffee v. Middlesex R. Co.*, 146 Mass. 224.

<sup>6</sup> The United States 5-20 bonds were negotiable, and title thereto passed by delivery. One who took them in good faith for value acquired a good title to them. If one deposited them for safe-keeping with a banking institution, and the cashier of the institution pledged them in violation of his duty, the pledgee, acting in good faith, acquired a good title to them; and a recovery of them from him, effected through the fraud and bad faith of the cashier, did not divest the title out of the pledgee and revest it in the depositor. *Ringling v. Kohn*, 4 Mo. App. 59.

<sup>7</sup> 1 Dan. Neg. Inst., §§ 440, 446; *Walker v. State*, 12 S. C. 200.

governments of the Territories,<sup>1</sup> as well as by municipal corporations, and railway, canal, steamboat, mining, manufacturing, and other incorporated companies. Such bonds, whether the coupons are attached or detached, are, when they employ *negotiable words*, as when they are made payable to the *bearer*, the *holder*, or to *order*, are almost universally held to be negotiable instruments, possessing the ordinary incidents of such instruments, although they may be issued *under seal*.<sup>2</sup>

<sup>1</sup> *National Bank v. Yankton County*, 101 U. S. 130, 133, *per Waite*, C. J.

<sup>2</sup> *White v. Vermont &c. R. Co.*, 21 How. (U. S.) 575; *Knox County v. Aspinwall*, 21 How. (U. S.) 539; *Zabriskie v. Cleveland &c. R. Co.*, 23 How. (U. S.) 381; *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175; *Mercer County v. Hackett*, 1 Wall. (U. S.) 83; *Meyer v. Muscatine*, 1 Wall. (U. S.) 384; *Murray v. Lardner*, 2 Wall. (U. S.) 110; *Thomson v. Lee County*, 3 Wall. (U. S.) 327; *Supervisors v. Schenck*, 5 Wall. (U. S.) 772; *Aurora City v. West*, 7 Wall. (U. S.) 82; *Clark v. Iowa City*, 20 Wall. (U. S.) 583; *Moran v. Commissioners*, 2 Black (U. S.), 722; *Durant v. Iowa County*, 1 Woolw. (U. S.) 72; *Commissioners v. Clark*, 94 U. S. 278; *Blackman v. Lehman*, 63 Ala. 547; *s. c.* 35 Am. Rep. 57; *State v. Cobb*, 64 Ala. 127; *Society for Savings v. New London*, 29 Conn. 174; *Johnson v. Stark County*, 24 Ill. 75; *Junction R. Co. v. Cleneay*, 13 Ind. 161; *Clapp v. Cedar County*, 5 Iowa, 15; *s. c.* 68 Am. Dec. 678; *Consolidated Asso. v. Avegno*, 28 La. An. 552; *Virginia v. Chesapeake &c. Canal Co.*, 32 Md. 501; *Chapin v. Vermont &c. R. Co.*, 8 Gray (Mass.), 575; *Spooner v. Holmes*, 102 Mass. 503; *s. c.* 3 Am. Rep. 491; *Haven v. Grand Junction &c. Co.*, 109 Mass. 88; *Craig v. Vicksburg*, 31 Miss. 216; *Barrett v. County Court*, 44 Mo. 197;

*Ringling v. Kohn*, 4 Mo. App. 59, 63; *Lafayette &c. Bank v. St. Louis Stone-ware Co.*, 4 Mo. App. 276; *City of Elizabeth v. Force*, 29 N. J. Eq. 587; *Connecticut &c. Ins. Co. v. Cleveland &c. R. Co.*, 41 Barb. (N. Y.) 9; *Hubbard v. New York &c. R. Co.*, 36 Barb. (N. Y.) 286; *Blake v. Livingston Co.*, 61 Barb. (N. Y.) 149; *Wickes v. Adirondack Co.*, 2 Hun (N. Y.), 112; *Evertsen v. National Bank*, 4 Hun (N. Y.), 695; *s. c.* 66 N. Y. 14; 23 Am. Rep. 9; *Bank of Rome v. Rome*, 19 N. Y. 20, 24; *Hodges v. Shuler*, 22 N. Y. 114; *Brainerd v. New York &c. R. Co.*, 25 N. Y. 496; *Seybel v. National Currency Bank*, 54 N. Y. 288; *s. c.* 13 Am. Rep. 583; *Dinsmore v. Duncan*, 57 N. Y. 573; *s. c.* 15 Am. Rep. 534; *Weith v. Wilmington*, 68 N. C. 24; *Carr v. Le Fevre*, 27 Pa. St. 413, 418; *Beaver County v. Armstrong*, 44 Pa. St. 63, 68 (but see *Diamond v. Lawrence County*, 37 Pa. St. 353; *s. c.* 78 Am. Dec. 429); *National &c. Bank v. Hartford &c. R. Co.*, 8 R. I. 375, 379; *s. c.* 91 Am. Dec. 237; *Langston v. South Carolina R. Co.*, 2 S. C. 248; *San Antonio v. Lane*, 32 Tex. 405; *First Nat. Bank v. Mount Tabor*, 52 Vt. 87; *s. c.* 36 Am. Rep. 734; *Arents v. Com.*, 18 Gratt. (Va.) 750, 773; *Clark v. Janesville*, 10 Wis. 136; *Mills v. Jefferson*, 20 Wis. 50. That *coupons* are not negotiable, see *Clarke v. Janesville*, 1 Biss. (U. S.) 98; *Jackson v. York &c. R. Co.*, 48 Me.

The doctrine of the preceding text is absolutely clear in those States whose legislation has *abolished the use of private seals*; because such legislation has had the effect, which it was intended to have, of abolishing the distinction between specialties and simple contracts.<sup>1</sup>

147; *Myers v. York & c. R. Co.*, 43 Me. 232; *Diamond v. Lawrence County*, 37 Pa. St. 353; *s. c.* 78 Am. Dec. 429. "There has been a manifest disposition in the courts and in legislatures to extend the operation of the rules applicable to commercial paper to other securities which, by common usage and for the accommodation of business, pass from hand to hand, representing money values." *Morrow v. Vernon*, 35 N. J. L. 490, 493, *per* Scudder, J. In this case it was held that a "*bounty note*" given by a township, payable to J., or bearer, "provided the township be relieved of one man in the *draft* that has just fallen upon the township, in the call for three hundred thousand men," etc., was not negotiable, but rather for the reason that it was not payable unconditionally. The *courts of England* have ascribed the negotiable quality to *exchequer bills* (*Wookey v. Pole*, 4 Barn. & Ald. 1), and to *bonds of the King of Prussia* which were shown to be ordinarily passed from hand to hand by delivery. *Gorgier v. Mievill*, 3 Barn. & C. 45. But certain instruments issued by the government of Naples were held to be not negotiable, because it was found that they did not usually circulate without a *certificate*, which did not accompany them. *Lang v. Smyth*, 7 Bing. 284. The prevailing view is believed to be that *county warrants* are distinguishable from bonds issued by counties in aid of railways and for other objects, in this, that such warrants are not negotiable. *Clark v. Des Moines*, 19

Iowa, 199, 213; *s. c.* 87 Am. Dec. 423; *Clark v. Polk County*, 19 Iowa, 248, 256. But a decision is found where it is held that an *order* drawn by the auditor of a county upon the treasurer of the county, for the payment of money to the person named therein, "or bearer," is in effect the *negotiable promissory note* of the county, the same being in that State a corporation (*Floyd County v. Day*, 19 Ind. 450),—just as a similar order drawn by the authorized agent of a private corporation, upon its treasurer or other fiscal officer, would be a negotiable promissory note of the corporation. *Ante*, § 5763.

<sup>1</sup> Such is the case in the State of Iowa. In that State the use of private seals, except by corporations, has been abrogated; and it has been there held that a seal upon a county bond, issued in aid of a railway company, does not deprive the bond of its negotiable character, since sealed promissory notes, payable to order or bearer, have in that State always been negotiable. The court further said: "Besides this, sealed instruments, simply as such, are abolished with us. That is, the use of private seals, except by corporations, is abrogated. So that the use of one, in such an instance as the present, is but the mode of expression by a corporation, and that a public one. The technical idea of a specialty did not exist among us at the time this instrument was made." *Clapp v. Cedar County*, 5 Iowa, 15, 52; *s. c.* 68 Am. Dec. 678, 687.

§ 6065. **Non-payment of Interest does not Render Bonds Non-negotiable.** — The non-payment of an installment of interest, when due, does not affect the negotiability of corporate bonds, or of the subsequent coupons, until the maturity of the bonds themselves, or of the coupons; and a purchaser for value, without notice of their invalidity as between antecedent parties, will take them discharged from all infirmities.<sup>1</sup>

§ 6066. **When Bonds Issued in Blank, Holder may Fill up Blank.** — Again, if the bonds of a corporation are issued to a payee not named, or in other words are payable in blank, and have, in this condition, passed from hand to hand, it is competent for the holder to *fill the blank*, so as to make the bond payable to him or to his order, and he can then maintain suit upon it in his own name.<sup>2</sup>

§ 6067. **Whether the Negotiable Quality of the Bonds Extends to the Mortgage.** — Although a mortgage may be given to secure a debt evidenced by a promissory note or other negotiable security, yet *the mortgage itself is not a negotiable security*, unless there is a statute making it so, and it is doubtful whether any such statutes have been enacted. A mortgage *cannot*, in the absence of a statute authorizing it, be *assigned at law*: it *can be assigned in equity*, but only in equity; and a court of equity, in giving effect to an assignment of it, will be careful not to sacrifice the superior equities of others. An assignment of a note, bond, or other evidence of debt which is secured by a mortgage, carries with it, in equity, *an assignment of the mortgage*; and if the *security* is negotiable, a *bona fide* purchaser of *that* will take it free from any equities, that is to say, free from any defenses which might have been set up by the maker or those claiming under him; but he will take the *mortgage* subject to such equities or defenses.<sup>3</sup> An

<sup>1</sup> Cromwell v. Sac Co., 96 U. S. 51. To the same effect, see National Bank v. Kirby, 108 Mass. 497; Boss v. Hewitt, 15 Wis. 260; Railway Co. v. Sprague, 103 U. S. 756.

<sup>2</sup> White v. Vermont &c. R. Co., 21

How. (U. S.) 575, 577; Chapin v. Vermont &c. R. Co., 8 Gray (Mass.), 575.

<sup>3</sup> Olds v. Cummings, 31 Ill. 188; Murray v. Lylburn, 2 Johns. Ch. (N. Y.) 441; Westfall v. Jones, 23

*exception* to this principle is said to be that a court of equity will protect the assignee of the mortgage against the *latent equities of third persons*.<sup>1</sup> Another exception is said to be that if the intending assignee applies to the mortgagor, and the *mortgagor consents to the assignment*, this will *estop* him from setting up any equities against the assignee.<sup>2</sup> The Supreme Court of Illinois have applied this principle to a mortgage issued by a railroad company to secure its negotiable bonds.<sup>3</sup> But subsequently the same court held that the principle had no application to mortgage deeds of trust of railroad companies, to secure their coupon bonds which are intended to be placed on the market and circulated as commercial paper, and to be issued as securities for permanent investments. When, therefore, such railroad bonds, so secured, had been issued and delivered to contractors engaged in the construction of the road, and by them disposed of on the market to innocent purchasers, it was held, on a bill by the trustee to foreclose it, that the unsettled equities and matters of account could not be interposed as a defense to the bill.<sup>4</sup>

### § 6068. Rights of Bona Fide Purchasers for Value.—

Corporate bonds payable to the bearer, being *negotiable securities*,<sup>5</sup> are good in the hands of *bona fide purchasers for value*, notwithstanding the circumstances under which they have been issued may be such as to render them voidable in the hands of the original taker.<sup>6</sup> Every transfer of such bonds before maturity to a new holder for value, and without notice of any equities or infirmities attaching to them, will give the latter a good title to them as against the former holder.<sup>7</sup> Moreover, the transferee of such a bond is presumed, in the absence

Barb. (N. Y.) 9; Melendy v. Keen, 89 Ill. 395; Mott v. Clark, 9 Pa. St. 399; s. c. 49 Am. Dec. 566.

<sup>1</sup> Murray v. Lylburn, 2 Johns. Ch. (N. Y.) 441, 443; Mott v. Clark, 9 Pa. St. 399; s. c. 49 Am. Dec. 566; Pryor v. Wood, 31 Pa. St. 142.

<sup>2</sup> Melendy v. Keen, 89 Ill. 395, 404; Matthews v. Wallwyn, 4 Ves. 118.

<sup>3</sup> Chicago &c. R. Co. v. Loewenthal, 93 Ill. 433.

<sup>4</sup> Peoria &c. R. Co. v. Thompson, 103 Ill. 187.

<sup>5</sup> Ante, § 6064.

<sup>6</sup> Peoria &c. R. Co. v. Thompson, 103 Ill. 187; Gibson v. Lenhart, 101 Pa. St. 522.

<sup>7</sup> Gibson v. Lenhart, 101 Pa. St. 522.



of evidence to the contrary, to be a *bona fide* holder for value.<sup>1</sup> Where there is evidence tending to rebut this presumption, the question whether the holder is a *bona fide* purchaser for value is a *question of fact for a jury*.<sup>2</sup>

§ 6069. **Defense of Ultra Vires Unavailing against Such Purchaser.** — We have already seen that private corporations have an *implied or incidental power to issue bonds* for the purpose of raising money to carry out the objects of their creation;<sup>3</sup> and that this power does not depend upon any express grant in their charters, and is consequently to be regarded as a power existing under the principles of the common law. We have already had occasion to note the principle that where a corporation has the power to do an act or to execute an instrument, the fact that it had no power to do the act *in the particular instance*, or the fact that it executed the instrument in the particular instance without the requisite *formality*, — will not invalidate the act or the instrument in so far as it affects innocent third persons.<sup>4</sup> These principles apply to the subject under consideration, so as to validate bonds issued by private corporations in the hands of *bona fide* purchasers for value, although the bonds were issued in violation of a restriction in the charter.<sup>5</sup> Thus, where a corporation was empowered to issue mortgage bonds to the amount of two-thirds of its *capital paid in*, and it issued such bonds to an amount less than two-thirds of its authorized capital, but to an amount much more than its capital then *paid in*, — it was held that the bonds were enforceable in the hands of *bona fide* purchasers for value.<sup>6</sup> In this case the principle of estoppel, elsewhere alluded to,<sup>7</sup> operates to protect the rights of such purchasers. For the purpose of applying this principle, it is necessary to consider *for whose benefit* the statutory restriction was imposed, and it will generally be found that it was

<sup>1</sup> Gibson v. Lenhart, 101 Pa. St. 522.

<sup>2</sup> Ibid.

<sup>3</sup> Ante, § 6051.

<sup>4</sup> Ante, § 5975, et seq.

<sup>5</sup> Ellsworth v. St. Louis &c. R. Co., 98 N. Y. 553; s. c. 33 Hun (N. Y.), 7.

<sup>6</sup> Hackensack Water Co. v. De Kay, 36 N. J. Eq. 548.

<sup>7</sup> Ante, §§ 5258, 5303, 5740, 6027.

imposed for the benefit of the *stockholders*. The right to have it enforced is therefore a right which they may *wave*. When, therefore, in violation of such a restriction, the stockholders, and the corporation for them, *stand by* and allow the bonds of the corporation to be issued and sold, and see the corporation avail itself of the *benefits* arising therefrom, they are *concluded* from setting up the defense of *ultra vires* against *bona fide* purchasers for value.<sup>1</sup> The same principle applies to *municipal bonds* issued in aid of a railroad company, which the company has *put in circulation*, and which have come into the hands of a *bona fide* purchaser for value. If in such a case the railroad company has given a *deed of trust* to the municipal corporation issuing the bonds, to secure the performance of the conditions on which the bonds were issued, such purchaser will be *subrogated* in equity to the rights of the municipal corporation, and will have the deed of trust enforced for his benefit; and it will not lie in the mouth of the railroad company to set up the defense that the bonds were not valid bonds of the municipality.<sup>2</sup>

§ 6070. **Doctrine Illustrated in the Case of Fraudulent Over-issues.**—We have already seen that, in the case where the authorized agents or officers of a corporation make a fraudulent over-issue of its *shares*, and they pass into the hands of innocent purchasers for value, they are good in the hands of such purchasers, at least to the extent of *indemnity* from the corporation by way of *damages* for what they have lost through the *tortious acts* of its agents.<sup>3</sup> If this principle is a sound one in its relation to the fraudulent over-issue of share certificates, which are only *quasi-negotiable*, it applies, for stronger reasons, in the case of a fraudulent over-issue of *bonds*, which are *negotiable*. Thus, it has been held that where negotiable railroad bonds, indorsed by the State, are regular

<sup>1</sup> Tyrell v. Cairo &c. R. Co., 7 Mo. App. 294. The defense in this case was that the bonds were issued by the directors without the consent or au-

thorization of the stockholders. See also *post*, § 6072, *et seq.*

<sup>2</sup> Washington &c. Co. v. Cazenove, 83 Va. 744; s. c. 3 S. E. Rep. 433.

<sup>3</sup> *Ante*, §§ 1493, 2596.

on their face, and recite in the indorsement a compliance by the company with the conditions of the statute under which they are issued, — an innocent purchaser for value takes them unaffected by any *fraud* or *mistake* in their *over-issue*; nor will the fact that *unpaid interest coupons* are attached to them charge him with *notice* of any defect in them.<sup>1</sup>

§ 6071. **Bona Fide Purchaser of Bonds Indorsed by the State.** — From what has just preceded, it may be concluded that, although railroad bonds are indorsed by the State for the purpose of giving them circulation and credit, yet if they are *fraudulently issued*, or issued in violation of the terms of the statute authorizing the officers of the State to indorse them for the State, and nevertheless pass into the hands of a *bona fide* purchaser for value, he will acquire a good title to them, not only as against the corporation issuing them, but as against the State indorsing them.<sup>2</sup> Where the declared purpose of a statute authorizing an indorsement by the State of the bonds of a railroad company was “to furnish the aid and credit of the State to expedite the construction of railroads,” it was held that the *status* of the State was that of an *accommodation indorser*, and that in respect of the question of the rights of purchasers of such bonds, the principle applied that whoever takes accommodation paper, with knowledge that the terms and conditions upon which the accommodation was given are being violated, or participates in the diversion of such paper to other objects or uses than was intended when the paper was made, must be understood to relieve the party from the liability, whatever liability the party with whom he deals may incur.<sup>3</sup> When, therefore, a railroad contractor received *bonds indorsed by the State* under condition not warranted by the statute under which the indorsement had been made, of which statute the contractor had notice from the recitals on the face of the bonds, it was held

<sup>1</sup> State v. Cobb, 64 Ala. 127.

<sup>2</sup> State v. Cobb, 64 Ala. 127; Gilman v. New Orleans &c. R. Co., 72 Ala. 566, 582; reaffirmed in Morton v.

New Orleans &c. R. Co., 79 Ala. 590, 607.

<sup>3</sup> Gilman v. New Orleans &c. R. Co., 72 Ala. 566, 581.

that he was not a *bona fide* purchaser for value, and could claim no rights as against the State, by way of *subrogation* or otherwise; and a party who had taken the bonds from him with knowledge of the manner in which he had applied them, stood in the same position, if that application was a violation of the statute. But subsequent *bona fide* purchasers, without knowledge of the misapplication, would be protected as against the State.<sup>1</sup> Properly understood, these holdings are not a violation of the principle that one who advances money on the security of railway mortgage bonds is not bound to follow it into the hands of the officers of the corporation, and see that it is properly applied.<sup>2</sup>

**§ 6072. When Purchaser Bound to Take Notice of Governing Statute.**—Where the negotiable bonds of a corporation are issued or indorsed under authority conferred by a statute, and the statute is *referred to on the face of the bonds*, every purchaser of such bonds is thereby put upon inquiry as to the terms of the statute, and is bound at his peril to take notice of them.<sup>3</sup> If, therefore, a man purchases such bonds, with knowledge of facts which, under the terms of the governing statute, referred to on the face of the bonds, render the bonds invalid, he will not be an innocent purchaser of them, although he does not know what the terms of the statute are; because the law makes it his duty to know, and will not, under such circumstances, excuse him from inquiry.<sup>4</sup> Ac-

<sup>1</sup> *Gilman v. New Orleans &c. R. Co.*, 72 Ala. 579; reaffirmed in *Morton v. New Orleans &c. R. Co.*, 79 Ala. 590. Where a railroad company made a deed of trust to secure the State on its indorsement of the bonds of the company, and the State repudiated the indorsement as illegal, and the bondholders, purchasing the bonds on the faith of the indorsement, were *subrogated* to the rights the State would have had under the deed of trust,—it was held that only such bonds as had been indorsed by the State offi-

cials ought to be so subrogated; and that bonds of the company not indorsed, but issued to the treasurer of the company as *collateral security* for advances by him, were not within the equity which allowed the subrogation. *Clews v. First Mortgage Bondholders &c.*, 54 Ga. 315.

<sup>2</sup> *Ante*, § 6041.

<sup>3</sup> *McClure v. Oxford*, 94 U. S. 429, 432; *Gilman v. New Orleans &c. R. Co.*, 72 Ala. 566, 580; *Morton v. New Orleans &c. R. Co.*, 79 Ala. 590, 608.

<sup>4</sup> Thus, in *McClure v. Oxford*, 94

cordingly, one who took railroad bonds, indorsed by the State, from a contractor, on payment for iron sold by him to the contractor to be used in the construction of the twenty miles of road in respect of which the bonds were issued, could not occupy the *status* of an innocent purchaser as against the State, where the bonds referred on their face to the statute under which the indorsement of the State had been made, and where the very circumstances under which he took the bonds were unauthorized or prohibited by such statute;<sup>1</sup> but otherwise as against the company, and as against a creditor of the company whose lien was *junior* to the mortgage securing the bonds.<sup>2</sup> But where certain mortgage bonds were issued under a statute, by a railroad corporation which had been formed by the *consolidation* of two other such corporations, which bonds, on their face, purported to be first mortgage bonds, and referred to the statute under which they were indorsed and issued by the State, but neither the statute nor the bonds contained any reference to any *outstanding indebtedness* of one of the precedent corporations,—it was held that an intending purchaser of the bonds was not chargeable with notice of such outstanding indebtedness, and took them free from the equities of such creditors.<sup>3</sup>

### § 6073. Circumstances Putting Purchasers upon Inquiry.

With reference to what circumstances will put an intending purchaser of negotiable corporate bonds upon inquiry as to any infirmities attending their issue, or the title of any preceding holder through whom he must claim, it is to be observed, first, that intending purchasers are bound to take

U. S. 429, 432, it is said in the opinion of the court by Mr. Chief Justice Waite: "Every man is chargeable with notice of that which the law requires him to know, and of that which, after being put upon inquiry, he might have ascertained by the exercise of reasonable diligence." See, for illustration of the principle, with the conclusion that certain purchasers of railroad bonds, indorsed by the

State, were innocent purchasers, and that others were not,—*Gilman v. New Orleans &c. R. Co.*, 72 Ala. 566, 581, 582; and *Morton v. New Orleans &c. R. Co.*, 79 Ala. 590, 608, 609.

<sup>1</sup> *Morton v. New Orleans &c. R. Co.*, 79 Ala. 590.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Spence v. Mobile &c. R. Co.*, 79 Ala. 576.

notice of whatever appears *upon the face of the bonds* themselves;<sup>1</sup> and if, on the face of the bonds, reference is made to the *statute* under which they are issued, this reference will charge an intending purchaser with notice of the terms of that statute, as fully as if it had been set out in full on the face of the bonds.<sup>2</sup> But if, on the other hand, the recitals of the bonds and the mortgage are such as to *lull inquiry*, he is not bound to look further. Here, as in the case of an intending purchaser of corporate shares,<sup>3</sup> he is not bound to suspect fraud or to make inquiries where everything appears to be fair, honest, and conformable to law.<sup>4</sup>

**§ 6074. Whether put on Inquiry by the Numbers on the Bonds.**—It is believed to be the universal practice, in issuing corporate bonds, to *number* all bonds of the same series in an ascending scale. But the presence of an ascending scale of numbers does not imply that all the bonds of the series are not issued *simultaneously*; nor does it imply that they are sold or negotiated by the company in any particular order; nor does it indicate anything as to the time when they were issued or negotiated;<sup>5</sup> or imply that those bearing the lower numbers are entitled to any preference over those bearing the higher numbers; but, on the contrary, the presumption is that all are of equal right, and that upon a foreclosure of a mortgage securing them, the holders of all are entitled to share *pro rata*.<sup>6</sup> If the *maximum number* of bonds to be included in the series has been determined upon, and if such number is stated on the face of each bond, then, obviously, a bond bearing a *higher number* would put a purchaser upon inquiry upon the question whether it had been lawfully issued. But where the *maximum number* has not been definitely fixed, as, for instance, where bonds are issued to aid in the building of a railroad, and the limit is fixed at not to exceed sixteen bonds, of \$1,000 each, to each mile of the road, — then, it has been

<sup>1</sup> *Stanton v. Alabama &c. R. Co.*,

<sup>2</sup> *Woods (U. S.)*, 523.

<sup>3</sup> *Ante*, § 6072.

<sup>4</sup> *Ante*, § 1680, *et seq.*

<sup>4</sup> *Stanton v. Alabama &c. R. Co.*,

<sup>2</sup> *Woods (U. S.)*, 523.

<sup>5</sup> *State v. Cobb*, 64 Ala. 127.

<sup>6</sup> *Ibid.*

held, that bonds issued in excess of that limit, purporting to be secured by the mortgage, are good in the hands of *bona fide* purchasers for value, and stand on an equal footing with those issued within the limit, and that the numbers of the bonds are not sufficient to deprive such purchasers of the *status* of innocent holders.<sup>1</sup>

**§ 6075. Put upon Inquiry by a Reference in the Bonds to the Mortgage.** — If such bonds, on their face, contain a reference to the *mortgage*, such reference will *affect intending purchasers with the terms of the mortgage*, so that it will have to be read, in determining their rights, together with the bond, as *one contract*.<sup>2</sup> If, in such a case, the mortgage provides that the whole debt shall become due ninety days after a refusal, on demand, to pay a semi-annual installment of interest, — then an intending purchaser of the bonds, knowing that such a demand and refusal has taken place, cannot claim the status of an innocent purchaser.<sup>3</sup>

**§ 6076. Whether put upon Inquiry by the Presence of Past-due Coupons.** — The interest payable under a corporate bond is generally represented by a series of tickets, called *coupons*, printed together beneath the bond and upon the same sheet. Each of these coupons generally represents the interest accruing under the bond for the period of *six months*. The coupon at the bottom of the sheet and at the extreme right hand represents the interest accruing at the end of the *first* six months; the one immediately to the left, that accruing at the end of the *next* six months; and so on in inverse order

<sup>1</sup> *Stanton v. Alabama &c. R. Co.*, 2 Woods (U. S.), 523.

<sup>2</sup> *McClelland v. Norfolk Southern R. Co.*, 110 N. Y. 469; s. c. 6 Am. St. Rep. 397.

<sup>3</sup> *Morton v. New Orleans &c. R. Co.*, 79 Ala. 590. There is a holding which seems opposed to the principle that where the bond refers to the terms and condition of the mortgage, the purchaser of the bond is

bound to look into those terms and conditions, and is affected by them. That holding is to the effect that a bond with that recital does not affect the purchaser with notice of a condition in the mortgage that the bondholder shall have *no recourse to the private liability of the stockholder*. *Raymond v. Spring Grove R. Co.*, 21 Week. L. Bul. (Ohio) 103. The decision is believed to be unsound.

and upward; so that the one last detached from the bond will represent the interest accruing at the end of the six months immediately preceding the maturity of the bond.<sup>1</sup> These interest tickets, so to speak, are intended to be *cut*<sup>2</sup> by the holder of the bond from the sheet and presented separately for payment, as each installment of interest accrues. They are, as already seen, *negotiable* when cut off, but it is not settled whether they are entitled to *grace*.<sup>3</sup> Undoubtedly these coupons may contain recitals which will put an intending purchaser of the bonds and coupons upon inquiry as to infirmities connected with their issue. But, as long delays frequently supervene between the printing and signing of corporate bonds and the date of their issue, the mere fact that a corporate bond, at the time of its issue, contains interest coupons which are *past due*, does not, *alone*, put an intending purchaser upon inquiry as to the validity of the bonds.<sup>4</sup> But the presence of unpaid interest coupons is a material fact, which, together with other facts, may make up an aggregate of suspicious circumstances sufficient to put an intending purchaser upon inquiry.<sup>5</sup>

§ 6077. **Put on Inquiry by What Circumstances where Bonds have been Stolen.**—Where the bonds of a railroad company had *never been issued*, but had been *stolen* from its office, and those bonds were made payable either in New Orleans, New York, or London, as the president of the company might, by his *indorsement* thereon, determine, but they did not contain his indorsement designating any place of payment, and in this condition were offered in the New York market and sold for a very small consideration, when coupons due and unpaid for several years were still attached to them,—it was held that all these circumstances were sufficient to affect a purchaser with notice of their invalidity.<sup>6</sup>

<sup>1</sup> *State v. Cobb*, 64 Ala. 127.

<sup>2</sup> The word "*coupon*" is derived from the French word *couper*, to cut, to cut off. *Post*, § 6107.

<sup>3</sup> *Post*, § 6107.

<sup>4</sup> *State v. Cobb*, 64 Ala. 127, 158.

<sup>5</sup> *Morton v. New Orleans &c. R. Co.*, 79 Ala. 590.

<sup>6</sup> *Parsons v. Jackson*, 99 U. S. 434. In so far as the court said, in its opinion, that the *presence of the past-due and unpaid coupons* was of itself an



**§ 6078. Other Circumstances putting Purchasers upon Inquiry.**—The trustee in a railway mortgage is generally clothed with certain powers with reference to the enforcement of the security in case of default by the railroad company, and is not, in general, the person nominated to *issue the bonds* and put them on the market. If, therefore, railroad mortgage bonds are put upon the market by the trustee named in the mortgage and are sold at a very small per cent of their face value, these circumstances will put an intending purchaser upon inquiry with regard to their regularity and validity.<sup>1</sup> Where the majority of the shares of a business corporation are owned by its *president*, and these shares are *pledged* to a banking corporation to secure a loan, and the relation of the pledgee corporation to the other corporation is such that it has full power to oversee and control its affairs, — if it fails to do so, and if a *fraudulent issue* of bonds takes place, these, it has been held, will be protected, as against the pledgee corporation, in the hands of *bona fide* purchasers for value.<sup>2</sup>

**§ 6079. Stipulations Detached from Such Bonds.**—If a negotiable instrument is *fraudulently altered* subsequently to its issue, this fraudulent alteration will not put the maker of it in a worse position, or increase the rights of an innocent purchaser of it, as against him,<sup>3</sup> unless, through negligence, he has executed it in such a way as to hold out a temptation to dishonest persons fraudulently to alter it, by rendering such fraudulent alteration easy;<sup>4</sup> and not then, according to some judicial opinion. This principle applies, of course, to a *mutation* or *cutting off* of an essential part of a negotiable instrument; for such a fraudulent alteration is in the nature of

evidence of dishonor sufficient to put the purchaser on inquiry, the decision is opposed to a prior holding (*Cromwell v. Sac County*, 96 U. S. 51), and is qualified by a subsequent decision: *Railway Co. v. Sprague*, 103 U. S. 756, 762.

<sup>1</sup> *Riggs v. Pennsylvania &c. R. Co.*, 16 Fed. Rep. 804.

<sup>2</sup> This is about as much as the author can get out of the case of *Des Moines Gas Co. v. West*, 50 Iowa, 16.

<sup>3</sup> Compare *ante*, § 2557, *et seq.*

<sup>4</sup> See, for illustration, *ante*, § 2583.

*forgery*.<sup>1</sup> But here a distinction is to be taken upon the question whether the part detached was an *essential part* of the instrument, or whether, the instrument being absolute on its face, the part detached was a *stipulation conferring a mere privilege* upon the holder, which he was at liberty to *waive* at his pleasure. It has been held that an instrument in the form of an ordinary corporate bond, with interest coupons attached, is a *promissory note*, notwithstanding it contains the added stipulation that, upon its surrender, the holder will be *entitled to shares* of capital stock of the company.<sup>2</sup> Reaffirming this decision, the same court has held that if such an additional stipulation is detached from such a bond at the time when it is negotiated by one holder to a new purchaser, the circumstance will not be evidence of such *bad faith* as will deprive the new purchaser of the *status* of an innocent purchaser, although the absent stipulation is referred to in the body of the bond at the time when he takes it.<sup>3</sup>

**§ 6080. Distinction between Redeemability and Payability in Respect of the Question whether Bonds are Past Due.**—In respect of the question whether bonds are past due, a distinction was formerly taken by the Supreme Court of the United States between redeemability and payability, with the

<sup>1</sup> 2 Bish. Crim. Law (8th ed.), § 573.

<sup>2</sup> *Hodges v. Shuler*, 22 N. Y. 114.

<sup>3</sup> *Welch v. Sage*, 47 N. Y. 143; *s. c.* 7 Am. Rep. 423. Where a series of negotiable bonds had been issued by a railroad company in the usual form, except that, immediately following the acknowledgment of indebtedness and promise of payment, there was a *further agreement* of the company to issue "*scrip preferred stock*" to the holder, upon a surrender of the bond with the unmatured interest warrants, and to each of the bonds there was also *attached by a pin* the certificate of the "*scrip preferred stock*" referred to in the body of the instru-

ment, and the bonds were stolen and transferred as collateral security to a note, but, when negotiated, these last certificates of *scrip preferred stock* were detached from them,—it was held that the bonds were not rendered non-negotiable by reason of the *privilege* of exchanging them for the *scrip preferred stock*, and that the circumstance of the certificate being detached at the time of their negotiation did not affect the purchaser with notice of any infirmity in the title of his transferrer, so as to render them void in his hands. *Hotchkiss v. National Banks*, 21 Wall. (U. S.) 354; affirming *s. c.* 10 Blatchf. (U. S.) 384.

conclusion that, after the period at which certain bonds of the United States were, by their terms, *redeemable* by the United States, they occupied the *status* of *past due negotiable paper*, so that anyone acquiring them after that time took them subject to any infirmity of title in any of the holders through whom his title had been transmitted. In the particular case, the infirmity of title inhered in an act of the State of Texas, which had held the bonds, and which had, during the period of the Rebellion, marketed them under a statute enacted to enable it so to do in aid of the insurrection; and it was held that the purchasers were not protected as *bona fide* purchasers of negotiable paper for value before maturity.<sup>1</sup> But this doctrine must be regarded as *overruled* by subsequent decisions of the same court, and upon the obvious ground that a bond of the United States is in no sense *dishonored* by the United States, in such a manner as to put an intending purchaser upon *inquiry* of any infirmity in the title of his vendor, or of any equity in the United States against the payment of the bond, merely because the government, with the view of refunding its debt at a lower rate of interest, has reserved to itself the *option of redeeming* it on and after a prescribed date.<sup>2</sup>

§ 6081. Who is a "Bona Fide" Holder.—"To be a *bona fide* holder, one must be himself a purchaser for value without notice, or the successor of one who was."<sup>3</sup> Upon the question who is a *bona fide* purchaser of corporate bonds, the rule is the same as that applicable to purchasers of other commercial paper. That rule has been thus expressed: "A suspicion that there is a defect of title in the holder, or a knowledge of circumstances that might excite such suspicion in the mind of a cautious person, or even gross negligence at the time, will not defeat the title of the purchaser. That result can be produced only by *bad faith*, which implies *guilty knowledge* or

<sup>1</sup> *Texas v. White*, 7 Wall. (U. S.) 700; reaffirmed in *Texas v. Hardenberg*, 10 Wall. (U. S.) 68; and in *Huntington v. Texas*, 16 Wall. (U. S.) 402.

<sup>2</sup> *National Bank v. Texas*, 20 Wall. (U. S.) 72; *Morgan v. United States*, 113 U. S. 476.

<sup>3</sup> *McClure v. Oxford*, 94 U. S. 429, 432, *per Waite*, C. J.

*willful ignorance*; and the *burden of proof* lies on the assailant of the title.”<sup>1</sup> This has been the doctrine of the Supreme Court of the United States with regard to *ordinary commercial paper*, since the leading case of *Swift v. Tyson*;<sup>2</sup> it is unquestionably the doctrine of most of the State courts; and it equally applies to the negotiable *bonds* of corporations.<sup>3</sup>

**§ 6082. Purchaser not Bound to See to Application of Purchase-money.** — The corporation having the power to issue negotiable securities, the purchaser, in the absence of fraud, is not bound, when he accepts its bond payable to bearer and parts with his money therefor, to see that the money with which he has thus parted is applied to the lawful purposes of the corporation. He may rightfully presume that the corporation has sufficiently provided for its own safety in the matter, and all he has to do is to pay his money and take his bond. It is therefore no defense to an action on such a bond that the books of the company do not show value received for the same, or that a former president of the company did not make a return of the proceeds of the same to the company.<sup>4</sup> But where the purchaser has *notice* that the agent is disposing of the bonds to him for an unauthorized purpose, he takes them at his peril and shoulders the risk of the corporation ratifying the unauthorized act.<sup>5</sup> This principle does not extend so far as to deprive the lender of his remedy against

<sup>1</sup> *Hotchkiss v. National Banks*, 21 Wall. (U. S.) 324, 359.

<sup>2</sup> 16 Pet. (U. S.) 51. See also *Goodman v. Simonds*, 20 How. (U. S.) 343; *Bank of Pittsburgh v. Neal*, 22 How. (U. S.) 96.

<sup>3</sup> *Hotchkiss v. National Banks*, 21 Wall. (U. S.) 354; *Murray v. Lardner*, 2 Wall. (U. S.) 110.

<sup>4</sup> *Philadelphia &c. R. Co. v. Lewis*, 33 Pa. St. 33; *s. c.* 75 Am. Dec. 574; *s. p.* *Justice v. Stroup*, 4 Phila. (Pa.) 348; *Borland v. Haven*, 37 Fed. Rep. 394; *Thompson v. Lambert*, 44 Iowa, 239, 244; *Bradley v. Ballard*, 55 Ill. 413; *s. c.* 8 Am. Rep. 656; *Martin v. Niagara*

*Falls Paper Man. Co.*, 122 N. Y. 165; *s. c.* 25 N. E. Rep. 303; affirming *s. c.* 44 Hun (N. Y.), 130; *Chicago v. Cameron*, 120 Ill. 447; *ante*, §§ 5707, 6041.

<sup>5</sup> *Chew v. Henrietta &c. Co.*, 2 Fed. Rep. 5; *Chicago v. Cameron*, 120 Ill. 447. It has been held that, if the president of a corporation uses its bonds to pay the debts of third persons, the corporation deriving no benefit from the transaction, the bonds are void in the hands of those acquiring them with notice; and that equity will so declare at the instance of *stockholders*, when it is reasonably

the corporation, where the money is borrowed, to the knowledge of the lender, for the purpose of carrying out a transaction which, though not prohibited by statute, is *ultra vires* the corporation. Here, the corporation cannot be allowed to get the benefit of the loan, and then escape the payment of it, by setting up the defense that it borrowed the money for the purpose of carrying out a transaction in which it had no power to engage, and that the lender knew that such was its purpose.<sup>1</sup>

§ 6083. Who is a Purchaser "for Value."—This question may first be considered with reference to constitutional and statutory restraints, if any, imposed on the corporation in respect of its power to issue its bonds at less than their face or par value.<sup>2</sup> It has been held that the fact that a railroad company delivered its bonds in *payment for goods* will not deprive the holders of the rights of purchasers in good faith and for value, if the goods were of value to the company in the construction or operation of its road.<sup>3</sup> One who has acquired corporate bonds by *exchanging* for them the bonds of another corporation, in the usual course of business, is a holder for value, independently of the question of the market value of the bonds given or received.<sup>4</sup> In all such cases, in the absence of statutory restraints or of fraud, it is not necessary that the purchaser, in order to be protected under the law merchant, should be a purchaser at *full value*; but that

certain that a demand on the corporation to bring suit for the purpose would have been nugatory. *Chicago v. Cameron*, 120 Ill. 447.

<sup>1</sup> *Wright v. Hughes*, 119 Ind. 324; *s. c.* 12 Am. St. Rep. 412; 21 N. E. Rep. 907. That an *injunction* will be granted to *restrain the sale of corporate property*, under a mortgage given to secure bonds which the president of the corporation took and converted to his own use, under the alleged authority of a resolution which he procured the directors to pass without

the assent of the stockholders, distributing the bonds *pro rata* among the stockholders, where the issue and distribution were never ratified by the stockholders and no consideration passed to the corporation,—see *Virginia Tidewater Coal Co. v. Mercantile Trust Co.*, 35 N. Y. St. Rep. 141; *s. c.* 12 N. Y. Supp. 529.

<sup>2</sup> *Ante*, § 6058, *et seq.*

<sup>3</sup> *Kennicot v. Wayne Co.*, 6 Biss. (U. S.) 138.

<sup>4</sup> *Gilman v. New Orleans &c. R. Co.*, 72 Ala. 566.

whatever the parties have agreed should be a reasonable value, or a fair consideration for the transfer, will be accepted by the judicial courts as such. "If it be said, there must be a fair and reasonable consideration, the inquiry at once arises, what is to be deemed such a consideration; an inquiry it would be as difficult to determine as it would be to determine the inadequacy of consideration which would justify the rescission of a contract."<sup>1</sup> Laying out of view the effect of constitutional or statutory restraints as to the value at which corporations can issue their bonds, the true view seems to be that the purchaser of them occupies, in respect of the question of the value at which he may lawfully purchase them, the same position as that occupied by the purchaser of any other species of commercial paper: he will be protected as a *bona fide* purchaser where he purchased for *any value*, subject to the principle that an offer of sale at a grossly inadequate value is always a circumstance putting an intending purchaser upon inquiry.<sup>2</sup>

**§ 6084. Liability of Railroad Company for Negotiating Void Municipal Bonds.** — It has been held that if the officers of a municipal corporation, without authority, or in violation of law and in breach of their trust, issue to a railroad company the bonds of such corporation, and the company negotiates them, and they are upheld against the municipal corporation in the hands of *bona fide* holders in a court of the United States, so that the municipal corporation is obliged to pay them, — it may maintain an action over against the railroad company for the amounts which it is so obliged to pay under the judgments of the court of the United States.<sup>3</sup>

**§ 6085. Liability of Railroad Company as Indorser of Municipal Bonds.** — Where a city issued its bonds to a railway company by name, under the authorization of a statute, and

<sup>1</sup> *Gilman v. New Orleans &c. R. Co.*, 72 Ala. 566.

<sup>2</sup> *Ibid.* See *Gould v. Segee*, 5 Duer (N. Y.), 260; *Phelan v. Moss*, 67 Pa. St. 59; *s. c.* 5 Am. Rep. 402, — both

cited in the preceding case to this doctrine.

<sup>3</sup> *Plainview v. Winona &c. R. Co.*, 36 Minn. 505.

the company, in order to negotiate them, indorsed them with the following words, "The New Orleans, Jackson & Great Northern Railroad Company, for value received, hereby transfers the within bond to the New Orleans Savings Institution, or assigns," — this indorsement was not treated merely as an indorsement without recourse, intended by the railroad company merely to transfer the bonds; but the railroad company stood liable, like any other indorser of commercial paper, upon the failure of the municipal corporation to pay the bonds, upon demand being made at maturity, and upon steps being taken to charge the indorser according to the law merchant.<sup>1</sup>

§ 6086. **Rights of the Heir of the Trustee.**— Suppose that the mortgage deed of trust, instead of being drawn, as it should be, in the form of a conveyance to the trustee and his successor in the trust, is drawn in the form of a conveyance to the trustee by name "and his *heirs* and *assigns*," — will the *heir at law* of the trustee be entitled to claim any rights or interest under the conveyance, or to be made a *party* in a proceeding in equity to execute the trust? This question has been properly answered in the negative, upon the ground that the conveyance to the original trustee makes him the depositary of a personal confidence in the nature of a passive trust; that upon his death no beneficial interest, in respect of the trust, passes to his heir; but that it is competent for the court, as was done in the particular case, to appoint a trustee or successor to the deceased trustee, which being done, the heir of the deceased trustee will not be made a party on his own petition to a proceeding in equity affecting the trust.<sup>2</sup>

§ 6087. **Lien of New Bonds Exchanged for Old Ones.** — Suppose a statute is passed authorizing a railroad company to refund its existing mortgage debt, under a scheme by which the old bonds are *exchanged* for new ones guaranteed by the State, and in the mean time a *second mortgage* has been placed

<sup>1</sup> Bonner v. New Orleans, 2 Woods (U. S.), 135.

<sup>2</sup> Gibbes v. Greenville &c. R. Co., 13 S. C. 228.

on the property, unaffected by the terms of the statute. In such a case those who have exchanged their old bonds for new ones will, in respect of the new ones, be advanced to the security of the original mortgage, and will be entitled to priority over the second mortgage, although earlier in date than the statute under which they made the exchange.<sup>1</sup> The governing principle is that the lien is not released by a mere change in the form of the debt not intended to operate as a payment or release. It has been held, in substance, that where an act of the legislature provided that all the property of the railroad company should stand pledged and mortgaged to the State for the payment of certain bonds issued by such company and guaranteed by the State, the provision constituted a statutory lien for the benefit of the bondholders as well as the State, which no subsequent statute could postpone.<sup>2</sup> But where a second statute is passed to assist an insolvent railroad company out of its difficulties, providing for a refunding of its outstanding first mortgage bonds, and remitting the bondholders to a lien in the nature of a second mortgage, those who come in under the refunding act and surrender their bonds and receive new ones, even before it has been declared unconstitutional, are held to *estop* themselves from asserting their right to their original lien.<sup>3</sup>

**§ 6088. Interpretation of Bonds and Mortgage with Reference to Date of Maturity.** — In case of a discrepancy between the recitals in the bonds and those in the mortgage, as to the date in which the debt, evidenced by the bonds and secured by the mortgage, matures, *the bonds will govern*, because the bonds are the instruments which constitute the *evidence of the debt*, and the mortgage is a mere *security*. When, therefore, a railway mortgage recited that, in case of default

<sup>1</sup> *Gibbes v. Greenville &c. R. Co.*, 13 S. C. 228.

<sup>2</sup> *Hand v. Savannah &c. R. Co.*, 12 S. C. 314; explaining *s. c.* 5 S. C. 182; and *State v. Spartanburg &c. R. Co.*, 8 S. C. 129; *Gibbes v. Greenville &c. R. Co.*, 13 S. C. 228.

<sup>3</sup> *Hand v. Savannah &c. R. Co.*, 12 S. C. 314. Compare *Hand v. Savannah &c. R. Co.*, 17 S. C. 219, where the previous decision is further explained. The same case on former appeals is reported in 6 S. C. 307; 8 S. C. 207; and 10 S. C. 406.



for six months in the payment of interest upon the bonds (or any of them), the entire amount of the debt secured should "forthwith become due and payable, and that the lien of the mortgage might be at once enforced," but the bonds themselves declared that "in case of the non-payment of any half-yearly installment of interest which shall have become due and been demanded, and such default shall have continued six months *after demand*," the principal of the bond should become due, with the effect provided in the mortgage, — it was held that the recitals in the bond must control in determining when the principal of the debt was payable.<sup>1</sup>

§ 6089. **Payment or Purchase of Bonds.** — As in the case of coupons,<sup>2</sup> it will sometimes become a question, where a corporation or its legal representatives have taken up its outstanding bonds, whether the transaction will be a *payment* of them, such as will prevent them from being *reissued*, or whether it will be a *purchase* in the nature of an *investment*. The writer is of opinion that there is a fundamental fallacy in all the judicial holdings which rule that a corporation can become the purchaser either of its own *shares*<sup>3</sup> or of its own *bonds*, except where it receives them as security for debts. The fallacy consists in the conception that a man can be *the owner of his own debt*, — that he can be at once his own debtor and his own creditor in respect of the same debt. There are, however, holdings to the effect that here, as in other cases, the question whether the corporation, or its legal representative, in taking up its bonds, intends to pay them, or merely to take them up as an investment so as to be able to reissue them, is a *question of fact and intent*. Where the intent of the corporation, or its representative, concurs with that of

<sup>1</sup> *Railway Co. v. Sprague*, 103 U. S. 756. For an agreement between two railroad companies, indorsed on the bonds of one of them, which was construed as not giving the company issuing the bonds the right to pay them off as soon as a fund sufficient

for that purpose had accrued, and without waiting for the expiration of the thirty years during which they were to run, — see *Chicago & C. R. Co. v. Pyne*, 30 Fed. Rep. 86.

<sup>2</sup> *Post*, § 6116.

<sup>3</sup> *Ante*, § 2054, *et seq.*

the bondholders, and the mere object of the transaction is to surrender all the bonds and to *substitute new ones* under the same mortgage, then, of course, there is no payment, but a mere substitution, and the lien continues.<sup>1</sup> But where the intent of the bondholders does not concur with that of the corporation or its representative, but it becomes a mere question of the intent of the corporation, then there is more difficulty. Nevertheless, one court has held, where the receivers of a corporation purchased its outstanding bonds with its money and entered them on the books of the corporation as investments, and for years reported them as outstanding, and then *reissued* them for value, — that the bonds had not been *paid*, but that the holders of the reissued bonds were entitled to the benefits of the original lien, and to share *pari passu* with other bondholders secured thereby.<sup>2</sup>

§ 6090. **Demand of Payment where Made.** — Although the bonds of a corporation are on their face made payable at the office of the corporation, in a particular way, yet if, when they fall due, the corporation has no office at that place, a *demand elsewhere* may be sufficient.<sup>3</sup>

§ 6091. **Rights in Respect of Lost or Destroyed Bonds.** — Statutes exist, it is believed, in most of the States, pointing out the mode of procedure to be taken where negotiable instruments are lost or destroyed by fire, with the view of recovering upon the instruments in the hands of their lawful holders, and at the same time of protecting the obligees therein against loss in case the original instruments turn out not to have been lost or destroyed. These statutes probably apply to the bonds of corporations, such as those under consideration. It has been held that where registered railroad bonds, with coupons, have been accidentally destroyed in a fire, the company may be compelled to pay the interest in arrears

<sup>1</sup> *Gibbes v. Greenville &c. R. Co.*,  
13 S. C. 228, 253.

<sup>2</sup> *Gibbes v. Greenville &c. R. Co.*,  
15 S. C. 304, Simpson, J., dissenting.

<sup>3</sup> *Alexander v. Atlantic &c. R. Co.*, 67 N. C. 198.

and issue duplicate bonds, on receiving an indemnity bond with sureties.<sup>1</sup>

§ 6092. **Suits in Equity for Surrender and Cancellation.** — We shall have occasion to note a difference of judicial theory on the question whether the bondholders are necessary parties to a suit in equity to cancel a mortgage on the property of the corporation and the bonds issued under it,<sup>2</sup> or whether they are *bound by representation* where the trustee in the mortgage is made a party. Next, let us briefly advert to the circumstances under which the *corporation* may maintain a bill in equity to *cancel a fraudulent issue of bonds*. It is not, and never was, a rule in equity, as laid down in one badly reasoned decision at circuit,<sup>3</sup> that a corporation is bound by the acts of its unfaithful directors, proceeding in fraud of its rights and in breach of their trust. The rule is that it is only so bound as against *innocent third persons* who have parted with their money or property, or otherwise acted to their disadvantage, upon the faith of what its directors have done. On that principle it was correctly decided, though upon reasons not properly developed, that where the directors of a corporation, in breach of their trust, had organized themselves into a construction company to build the railroad, which the corporation was created to build, and had *contracted with themselves* to build the road, and had, in order to pay themselves for so doing, put a fraudulent mortgage upon the properties of the railroad company, and had issued bonds thereunder, — the corporation could not maintain a bill in equity to set aside and cancel the mortgage as a cloud upon its title.<sup>4</sup> But where the corporation has pledged its bonds in violation of a statute,<sup>5</sup> no action in equity can be maintained for the surrender and cancellation of them by the corporation, or by a stockholder in right of the corporation, without first

<sup>1</sup> Rogers v. Chicago &c. R. Co., 6 Abb. N. Cas. (N. Y.) 253.

<sup>2</sup> Post, § 6126.

<sup>3</sup> Lewis v. Meier, 14 Fed. Rep. 311.

<sup>4</sup> Ibid.

<sup>5</sup> In this case the statute of Wisconsin prohibiting the issuing or pledging of bonds by corporations for less than *seventy-five per cent* of their par value: *Ante*, § 6059.

tendering the amount due to the pledgee,—this being merely an application of the maxim that he who seeks equity must do equity.<sup>1</sup> It has been held that a mortgage given by a corporation for money borrowed and applied in the payment of real estate purchased by the corporation, will not be *canceled* at the instance of the corporation or its members, on the ground that the corporation also issued to the lender certain shares of stock, together with certain notes of its officers, as collateral security; since the lender had the right to all the collateral security he could get, and it came with an exceeding ill grace for the company, or any of its members, to seek to invalidate such security in his hands, without first repaying to him his money.<sup>2</sup>

**§ 6093. Bonds Convertible into Stock.**—The obligation of selling the unissued *shares* of the corporation only at their par value in money or money's worth,<sup>3</sup> cannot be evaded by the device of issuing bonds convertible into stock.<sup>4</sup> If the potential capital of the corporation has been filled up, clearly it would be beyond the power of the corporation to

<sup>1</sup> *Hinckley v. Pfister*, 83 Wis. 64; s. c. 53 N. W. Rep. 21. The court cite *Mumford v. American Life Ins. & Co.*, 4 N. Y. 463, where it was held, on this principle, that a party who receives securities issued by a foreign corporation in violation of the laws of the domestic State, and then sells them for money, cannot maintain a suit in equity to annul the securities given by them in exchange, without returning those received by him, or the money realized from the sale of them. In the case first above cited, the court also proceeded on the doctrine *in pari delicto, potior est conditio defendentis*,—holding that, as both the corporation and Hinckley, its president, who was the principal complainant in the suit, had participated in the unlawful issue of the bonds, they occupied no position to

ask the intervention of a court of equity; since neither of them could make out a title to relief except by showing a plain and positive violation of the statute. They were in equal wrong with the defendant, the party to whom the bonds had been issued. On this point the court cited *Clarke v. Lincoln Lumber Co.*, 59 Wis. 655, where it was held, on this principle, that a *stockholder*, to whom shares had been issued at less than par, in violation of a statute invalidating all stock so issued, could not maintain an action upon the contract or recover back the money paid under it.

<sup>2</sup> *Powell v. Blair*, 133 Pa. St. 550; s. c. 19 Atl. Rep. 559.

<sup>3</sup> *Ante*, § 1562, *et seq.*

<sup>4</sup> See *Sturges v. Stetson*, 1 Biss. (U. S.) 246.

execute the contract embodied in such bonds, by exchanging them for share certificates at the request of the bondholders.<sup>1</sup> But here, as in other cases, the contract may be *valid in part*, though *void in part*; and the fact that the bonds may not be convertible into stock, and that so much of the contract is consequently illegal, does not prevent them from standing as a security, or furnish a defense to an action to foreclose the mortgage upon the property of the company given to secure them.<sup>2</sup> We have already seen that a clause, added to a corporate negotiable bond, to the effect that a holder of it may convert it into stock of the corporation upon certain named conditions, does *not render the bond non-negotiable*, and that the fact that the clause giving such an option is detached from the bond, is not of itself a circumstance which will put an intending purchaser upon inquiry so as to let in equities against him.<sup>3</sup> Other decisions have been rendered in respect of the rights of the holders of bonds convertible into stock, with reference to the question whether the bondholder presented his bonds in time to entitle him to demand such a conversion, and also with reference to the question whether, in case the corporation had transferred its shares so as to disable itself from making the conversion, the bondholder was entitled to specific shares, or merely to indemnity by way of damages.<sup>4</sup>

**§ 6094. Right of Holders of Mortgage Bonds of Land Grant Railroad to Exchange Bonds for Land.**—Although the *trustees* in a railway mortgage *may not have power*, under the deed of trust, to enter into an arrangement with a bondholder, by which he exchanges his bonds for land of the railroad granted to it by the government,—yet if the corporation participates in the arrangement, it will be *estopped* from denying the authority of the trustees to make it.<sup>5</sup>

<sup>1</sup> *Ante*, § 2080.

<sup>2</sup> *Wood v. Whelen*, 93 Ill. 153.

<sup>3</sup> *Ante*, § 6079.

<sup>4</sup> *Chaffee v. Middlesex R. Co.*, 146 Mass. 224. See also *Targart v. Northern & C. R. Co.*, 29 Md. 557, where the

rights of a bondholder whose bonds were convertible into stock were determined on a particular state of facts.

<sup>5</sup> *Wood v. Dubuque & C. R. Co.*, 28 Fed. Rep. 910. The holder of certain mortgage bonds of a railroad com-

§ 6095. **Sinking Fund Arrangements.**—In some cases, in addition to the security provided by a mortgage upon the properties of a railway company, the contract provides for the additional security of a *sinking fund*, to be created by the railroad company paying into the hands of the trustees in the mortgage, at stated periods, stated sums of money, which money is to be *invested in stated securities*, generally in bonds of the company itself, provided they can be purchased at not to exceed a given rate,—which sinking fund is to be held by the trustees for the ultimate redemption of such of the bonds as are not so retired. The rights of the parties to such a contract, in respect of such a sinking fund arrangement, are, of course, the rights which the contract gives them,—with the added statement that, where the sinking fund is created under the terms of a *statute*, operative at the time of the contract, the statute is to be looked to as a part of the contract.<sup>1</sup> A court of equity has the power, on a proper application and with the proper parties before it, to direct a trustee, who is required by the instrument of trust to invest the trust funds in

pany which had received a grant of land from the United States, exchanged his bonds with the trustee for the bondholders, under an arrangement, participated in by the railroad company, for specific lands supposed to be at the time within the company's land grant, but which in fact were not. The trustee covenanted that the company would warrant and defend the title. Subsequently, another company succeeded to the first company, taking all its property and agreeing to pay all its debts. It was held that the grantee could maintain an action against the latter company to recover damages for his *eviction* from the land. *Ibid.*

<sup>1</sup> See, for instance, *Wilds v. St. Louis &c. R. Co.*, 64 How. Pr. (N. Y.) 418, where the question before the court was considered partly with reference to statutes of Indiana and

Illinois. Where the contract provided that the trustees should invest the moneys turned over to it by the company for the sinking fund, in the bonds of the company secured by the mortgage, provided they could be purchased at not to exceed ten per cent above par, the bonds so purchased to be indorsed as belonging to the sinking fund and to remain in force, and interest thereon to continue to be paid and to form a part of the capital of the sinking fund; and purchases of the bonds for the sinking fund continued to be made until a date named, when they advanced in value beyond the limit fixed by the contract,—it was held that the suspension of purchase did not suspend the obligation to continue to pay *interest* on the bonds already purchased and in the sinking fund. *Ibid.*

a certain way, to *vary the investment* and invest them in other securities.<sup>1</sup> But the power is exercised very sparingly and only on a principle of necessity, and not even then, according to some views, where all the beneficiaries in the trust are *sui juris*, without their *unanimous consent*.<sup>2</sup>

§ 6096. **Effect of Consolidation.**—As already seen,<sup>3</sup> the effect of the *consolidation* of two corporations is not to destroy the obligations of either of the precedent corporations, but those obligations survive against the consolidated company, and the ordinary legal remedies to enforce them may be exerted against that company.<sup>4</sup> Although the consolidation may take the form of organizing a new corporation, yet *liens* subsisting against the properties of either,—as, for instance, against a *vessel*,—will survive, and may be enforced after the property has been transferred to the new corporation.<sup>5</sup> When,

<sup>1</sup> See the learned note of Mr. Stewart in 36 N. J. Eq. 406, and cases there cited.

<sup>2</sup> Where a railway mortgage, such as we have under consideration, provided also for the creation of a sinking fund by annual payments of money by the corporation to the trustees in the mortgage, such moneys to be invested in certain other specified bonds of the mortgagor,—it was held that a court of equity would not, in the absence of bondholders, but upon an application by the trustee in the mortgage, the railroad company being the only defendant, direct the trustee to invest the *sinking fund* in other bonds of the defendants than those authorized by the mortgage, although bearing a lower rate of interest, merely because the bonds in which they were required to invest the funds by the terms of the mortgage, could not be purchased except at a premium. *Fidelity Ins. &c. Co. v. United New Jersey R. &c. Co.*, 36 N. J. Eq. 405.

<sup>3</sup> *Ante*, § 365, *et seq.*

<sup>4</sup> *People v. Louisville &c. R. Co.*, 129 Ill. 48.

<sup>5</sup> *The Key City*, 14 Wall. (U. S.) 653. That the bonds of railroads secured by mortgage are not excepted from the provisions of the New York Railroad Consolidation Act of 1869, that all debts and liabilities of railroads consolidating under such act, "*except mortgages*," shall attach to the new corporation, such exception not affecting the *debt*, but the security can be enforced only against the property theretofore held by the company which made the mortgage,—see *Polhemus v. Fitchburg R. Co.*, 123 N. Y. 502; *s. c.* 34 N. Y. St. Rep. 420; 43 Alb. L. J. 149; 9 Rail. & Corp. L. J. 149; 26 N. E. Rep. 31. Construction of a special statute authorizing the consolidation of two railway companies, expressly preserving the rights of creditors and at the same time providing that the new company may dispose of any property, real or personal, held by each of said companies, and make and execute titles for the same,—with the conclusion

therefore, under an arrangement by which one railroad is leased to another railroad company, and the lessor company issues *bonds*, guaranteed by the lessee company, convertible, at the option of the holder, into stock of the lessor company, —upon a consolidation of the two companies, a holder of such bonds will be entitled to stock in the consolidated company.<sup>1</sup>

**§ 6097. Bonds Guaranteed or Indorsed by the State. —**

The rights of the State and of the holders of bonds of railroad companies, which have, in pursuance of an *act of the legislature*, been indorsed or guaranteed by the State, depend upon a true construction of the act, which, if referred to on the face of the bonds, becomes in a sense a *part of the contract*.<sup>2</sup> It has

that the clause was intended to release and authorize the consolidated company to sell only such property as was not necessary for the operation of the road: *Spence v. Mobile &c. R. Co.*, 79 Ala. 576. That a consolidated railroad company which, without paying any other consideration, assumes the payment of a mortgage on one of the railroads included in the consolidation, executed by one who was a *trustee ex maleficio* for the first mortgage bondholders of such railroad, is also a *trustee* for such bondholders, who are the equitable owners of the road, free from the incumbrance of the mortgage, — see *Stevens v. Union Trust Co.*, 57 Hun (N. Y.), 498; *s. c.* 30 N. Y. St. Rep. 130; 11 N. Y. Supp. 268.

<sup>1</sup> *Hancock Mut. Life Ins. Co. v. Worcester &c. R. Co.*, 149 Mass. 214, *s. c.* 21 N. E. Rep. 364.

<sup>2</sup> *Memphis &c. R. Co. v. State*, 37 Ark. 632, 642; *Ketchum v. St. Louis*, 101 U. S. 306; *Tompkins v. Little Rock &c. R. Co.*, 125 U. S. 109; affirming *s. c.* 18 Fed. Rep. 344; overruling 15 Fed. Rep. 6, 18. Construction of statutes and constitutional provisions of Missouri relating to bonds of

the State of Missouri, issued in aid of the Hannibal & St. Joseph Railroad: *Ralston v. Crittenden*, 3 McCrary (U. S.), 332. Liability of the Central Pacific Railroad Company to the State of California for aid extended by the State in the building of the Central Pacific Railroad under the California Act of April 4, 1864: *People v. Central Pac. R. Co.*, 76 Cal. 29; *s. c.* 18 Pac. Rep. 90. As to the rights of *bona fide purchasers* of State indorsed bonds as against the State, — see *State v. Cobb*, 64 Ala. 127; *ante*, § 6071. Construction of Arkansas statutes of 1868 and 1869, to provide for the payment of interest upon the bonds of the State issued in aid of such construction, with the conclusion that it created no lien upon the property of the railroad company for whose benefit such State bonds were issued, in favor of the holders of the bonds, which, after a sale to foreclose a mortgage upon the property, remained a lien upon it in the hands of the purchaser at the foreclosure sale: *Tompkins v. Little Rock &c. Co.*, 125 U. S. 109; affirming *s. c.* 18 Fed. Rep. 344, Caldwell, J., dissenting; see 21 Fed. Rep. 370. Payment of the



been held that, where the State guarantees the bonds of a railroad company, which are to be issued in exchange for its outstanding mortgage bonds, with the provision that the bonds so taken up shall stand as security to the State until all the bonds secured by mortgage shall be retired, *the State is entitled to the benefit of the mortgage* as regards the mortgage bonds taken up, so long as any of such bonds remain outstanding.<sup>1</sup> It is a principle of equity that a creditor is entitled to the benefits of all securities or pledges which a *surety* may receive from the principal debtor, either for the payment of the common debt, or for the indemnity of the surety against loss by reason of his liability. Such securities are regarded as a *trust created for the protection of the debt*, and a court of equity will compel the execution of the trust. It has been held that this principle applies to the statutory lien created in favor of the State, where the State has indorsed the bonds of a railroad company to give them credit and circulation. This lien, by the terms of the statute, in the case under consideration, was held to be a security for the payment of the indorsed bonds, and to operate as a specific appropriation of the property and franchises of the railroad corporation to their payment, whenever default should be made by the corporation in the payment of the principal or interest. The holders of such indorsed bonds might maintain a suit in equity to be subrogated to the lien of the State; and this, although the State, by reason of its sovereignty, could not be made a party to the suit. In all such cases the indemnity to the surety, which is intended by reserving a lien in his favor, is effectuated, and his rights are protected, by applying the security to the payment of the debt.<sup>2</sup>

bonds issued by the State of Missouri, called the Pacific Railroad bonds, under the Missouri Act of Feb. 22, 1851: Opinion in Response to Governor, 49 Mo. 216.

<sup>1</sup> *Gibbes v. Greenville &c. R. Co.*, 13 S. C. 228.

<sup>2</sup> *Forest v. Liddington*, 68 Ala. 1.

The rights of bondholders, under more or less similar conditions of fact, to be subrogated to the lien of the State, was declared in *Tompkins v. Little Rock &c. Co.*, 125 U. S. 109; affirming *s. c.* 18 Fed. Rep. 344; and overruling *s. c.* 15 Fed. Rep. 6; and in *Hand v. Southern &c. R. Co.*, 12

§ 6098. **Further of Such Bonds.**—Where bonds of the State of Florida, payable to bearer, were issued in aid of certain railroad companies, in exchange for the bonds of such companies, and the bonds so issued by the State were signed by the Governor and Treasurer, and sealed with the seal of the State, and sold by the active efforts of the Governor to investors in the kingdom of Holland, it was held that, inasmuch as the bonds, though *fraudulent* in their inception, were put upon the market and *sold in a foreign country*, to a people largely unacquainted with the English language, a case was presented which justified the court in treating the owners of them as *purchasers for value and in good faith*, and entitled to relief accordingly against the railroad companies.<sup>1</sup> The fact that the legislation under which the bonds had been issued had been declared unconstitutional by the Supreme Court of Florida, did not release the liability of the railroad company in favor of the holders of the bonds as grantors of them,—the case upon the facts being, in the opinion of the court, within the rule of the liability of an *indorser of commercial paper*; nor did the fact that the Supreme Court of the State had declared the statute unconstitutional, prevent the State from acquiring a lien under it on the properties of the railroad companies, which lien would be enforced in equity, the court treating the State as a trustee of the lien for the holders of the bonds.<sup>2</sup> It is to be observed that, by the terms of the statute of Florida, the railroad companies were to pay the interest and the principal of the State bonds according to their terms, and that the performance of this obligation was secured by statutory liens on the roads in aid of which the bonds had been issued. After the bonds had been issued and negotiated by the companies receiving them, the Supreme Court of Florida declared that they were unconstitutional and void, and imposed no obligation on the State; but the court also decided that this did not relieve the railroad com-

S. C. 314. And see Rice's Appeal, 79 Pa. St. 168, 206, where the principle is stated.

<sup>1</sup> Railroad Companies v. Schutte, 103 U. S. 118.

<sup>2</sup> *Ibid.*

panies from their obligations to pay the bonds, and that the statutory lien was good and could be enforced against the companies by the *bona fide* holders of the bonds.<sup>1</sup> The decision of the Supreme Court of the United States<sup>2</sup> was, therefore, merely in affirmation of the decisions of the State court, so far as the liability of the railroad companies, as guarantors of the bonds to innocent holders, was concerned. The same doctrine was applied, upon somewhat analogous facts, to bonds issued by the State of Arkansas in aid of the Little Rock and Fort Smith Railway Company, and negotiated by that company to innocent purchasers. Although the Supreme Court of Arkansas declared the act unconstitutional and that the bonds imposed no obligation upon the State,<sup>3</sup> yet the Circuit Court of the United States originally held that they were good as against the railroad company in the hands of *bona fide purchasers for value*, and that such purchasers were entitled to be *subrogated*, as against the railroad company, to the rights of the State under its statutory lien.<sup>4</sup> But this holding was subsequently overruled in the same case,<sup>5</sup> and this decision was affirmed on appeal.<sup>6</sup> Subsequently the Supreme Court of the United States, held in a case between the same parties and affirming the decree in the court below, that the statutes of Arkansas, above referred to, created no lien upon the property of the railroad company for whose benefit the bonds were issued, in favor of the holders of the bonds, such as followed the property into the hands of a purchaser at a sale to foreclose a subsequent mortgage upon it. The court proceeded upon the familiar ground that if it had been intended to create such a lien, the legislature would have said so.<sup>7</sup>

<sup>1</sup> State v. Florida Cent. R. Co., 15 Fla. 690; State v. Jacksonville &c. R. Co., 16 Fla. 708.

<sup>2</sup> Railroad Companies v. Schutte, *supra*.

<sup>3</sup> State v. Little Rock &c. R. Co., 51 Ark. 701.

<sup>4</sup> Tompkins v. Little Rock &c. R. Co., 15 Fed. Rep. 6, 22. Compare Jamison v. Griswold, 2 Mo. App. 150.

<sup>5</sup> Tompkins v. Little Rock &c. R. Co., 18 Fed. Rep. 344; and see dissenting opinion of Caldwell, J., in 21 Fed. Rep. 370.

<sup>6</sup> Tompkins v. Little Rock &c. R. Co., 125 U. S. 109.

<sup>7</sup> Tompkins v. Little Rock &c. R. Co., 125 U. S. 109 (affirming *s. c.* 18 Fed. Rep. 344); distinguishing Ketchum v. St. Louis, 101 U. S. 306,

§ 6099. Subscriptions to Bonds on Condition that a Certain Number of Bonds shall be Subscribed for.— A subscription to the bonds of a railway company, containing a clause that it is not to be binding unless one hundred of such bonds are subscribed for, is not binding until one hundred of the bonds are so subscribed.<sup>1</sup>

§ 6100. Non-liability of Subscribers to Creditors.— Persons who subscribe to the mortgage bonds of a railroad company, upon an agreement to pay the company a certain aggregate sum for the bonds in specified installments, do not thereby become liable to creditors of the company for the amount unpaid on such an agreement, by analogy to the rule which makes subscribers to the stock of a corporation liable to make good to its creditors their unpaid subscriptions.<sup>2</sup>

where it was held that an *equitable mortgage* was created in favor of the county (afterwards city) of St. Louis under a statute of Missouri to secure a loan which it had made to aid the Pacific Railroad in completing its road.

<sup>1</sup> Galena &c. R. Co. v. Ennor, 116 Ill. 55. The same rule applies in the case of subscriptions to stock: *Ante*, § 1235, *et seq.*

<sup>2</sup> Pettibone v. Toledo &c. R. Co., 148 Mass. 411; *s. c.* 19 N. E. Rep. 337; 1 L. R. A. 787; 5 Rail. & Corp. L. J. 320; 39 Alb. L. J. 146. The opinion is a long one, and the case turns partially on the construction of local statutes. But the conclusion of the court seems obvious on general grounds. The contract is *executory*. The subscribers agree to take the bonds in the expectation that the corporation will continue *solvent*. The fact that creditors intervene and endeavor to seize them to satisfy debts due them from the corporation, is, of itself, sufficient evidence of the insolvency of the corporation for the

determination of any controversy between the bondholders and the creditors. They have then a right to say to the creditors: "We agreed to take bonds of a solvent corporation and to pay for them in certain installments. The corporation having become insolvent and unable to make good the agreement on its part, we are released from further performance on our part." The fact that the railroad company had *issued* the bonds to the subscribers, does not seem to be of itself sufficient to take the case out of the principle, at least in the view of a court of equity, which looks to the substance of things; since the mere delivery of the bond is not like the delivery of personal property, but it is the delivery of the unexecuted contract of the corporation to pay money; and when it becomes insolvent, it puts itself in a position where it cannot perform, on its part; and neither it nor its creditors, who must claim through it, can therefore be in a position to exact performance on the part of the other party.

**§ 6101. Taxation of Bonded Indebtedness Assessed upon Payment of Interest.** — Under a scheme of taxation against corporations in Pennsylvania, elsewhere alluded to,<sup>1</sup> by which a tax is laid upon the bonded indebtedness of such corporations and assessed in the form of a drawback upon interest paid by the corporation, very much as dividends are assessed and collected, if such interest has been paid at a less rate than that stipulated in the coupons by a grantor of the indebtedness, who takes it and cancels the coupons and surrenders them to the corporation and charges it with the amount paid, this will be regarded as a payment of the interest for the purposes of the assessment of such a tax, and it will be the duty of the treasurer of the corporation to make the proper assessment in such a case, the Commonwealth not being bound to wait for a general settlement of the accounts between the grantor and the debtor corporation.<sup>2</sup>

## ARTICLE II. COUPONS OF SUCH BONDS.

### SECTION

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### SECTION

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**§ 6107. Coupons are Negotiable Instruments.** — The word “coupon” is derived from the French word *couper*, to cut. The derivation indicates the nature of the instrument. It is an instrument attached to an interest-bearing bond, representing the installment of interest due at a stated period, generally the period of six months. When detached from the bond, it is, like the bond itself, a promise to pay an absolute sum of money to the *bearer* on a date named, and is in legal effect a promissory note payable to the bearer, and negotiable in like manner,<sup>3</sup> except that it is not settled whether or not it

<sup>1</sup> *Post*, ch. 201.

<sup>2</sup> *Com. v. Philadelphia &c. R. Co.*, 137 Pa. St. 481; *s. c.* 20 Atl. Rep. 580.

<sup>3</sup> *Beaver County v. Armstrong*, 44 Pa. St. 63, where the subject under went a thorough consideration. Ha-

is entitled to *grace*.<sup>1</sup> This, of course, is predicated of coupons which are made *payable to the bearer*, or which contain other *negotiable words*. A coupon which simply reads that "on the first day of May, 1852, the York &c. R. Co. will pay \$9.00 on these coupons in Portland," signed by the treasurer of the company, was held not to be a negotiable instrument, because it contained no negotiable words, and it could not therefore *be sued on in the name of the assignee*, in the absence of some statutory provision to that effect.<sup>2</sup> The purchaser of a coupon *payable to bearer*, therefore, acquires full title upon delivery, and the promise of the payor to pay the bearer becomes a promise *to pay to him*, which he can enforce in his own name in an action at law.<sup>3</sup> Such coupons pass from hand to hand by mere *delivery*, and, as in the case of other commercial paper payable to the bearer, a transfer of possession is presumptively a transfer of title, though it does not import a guaranty of payment.<sup>4</sup> Their negotiability is not impaired

ven *v. Grand Junction R. Co.*, 109 Mass. 88, 96; *Langston v. South Carolina R. Co.*, 2 S. C. 248; *Hand v. Savannah &c. R. Co.*, 17 S. C. 219, 254; *Hartman v. Greenhow*, 102 U. S. 672, 684; *National Exch. Bank v. Hartford &c. R. Co.*, 8 R. I. 375; *s. c.* 91 Am. Dec. 237; *Mercer County v. Hackett*, 1 Wall. (U. S.) 83, 96; *Thomson v. Lee County*, 3 Wall. (U. S.) 327; *Aurora City v. West*, 7 Wall. (U. S.) 82, 105; *City v. Lamson*, 9 Wall. (U. S.) 477; *Queensbury v. Culver*, 19 Wall. (U. S.) 83; *Clark v. Iowa City*, 20 Wall. (U. S.) 583, 589; *Knox County v. Aspinwall*, 21 How. (U. S.) 539; *Ketchum v. Duncan*, 96 U. S. 659; *Kennard v. Cass County*, 3 Dill. (U. S.) 147; *Gilbough v. Norfolk &c. R. Co.*, 1 Hughes (U. S.), 210; *Miller v. Berlin*, 13 Blatchf. (U. S.) 245; *Cooper v. Thompson*, 13 Blatchf. (U. S.) 434; *First Nat. Bank v. Bennington*, 16 Blatchf. (U. S.) 53, 54; *Rose v. Bridgeport*, 17 Conn. 243;

*Junction Co. v. Cleneay*, 13 Ind. 161; *Cicero v. Clifford*, 53 Ind. 191; *Mad-dox v. Graham*, 2 Met. (Ky.) 56; *Chesapeake &c. Canal Co. v. Blair*, 45 Md. 102, 110; *Com. v. Emigrant Indust. &c. Bank*, 98 Mass. 12; *s. c.* 93 Am. Dec. 126; *Spooner v. Holmes*, 102 Mass. 503; *s. c.* 3 Am. Rep. 491; *Brainerd v. New York &c. R.*, 25 N. Y. 496; *Evertsen v. National Bank*, 4 Hun (N. Y.), 692, 694; *s. c.* 23 Am. Rep. 9; 66 N. Y. 14; *Arents v. Com.*, 18 Gratt. (Va.) 750, 776. *Contra*, but not authority, *Clarke v. Janesville*, 1 Biss. (U. S.) 98.

<sup>1</sup> That they are: *Evertson v. National Bank*, 66 N. Y. 14; *s. c.* 23 Am. Rep. 9. That they are not: *Chaffee v. Middlesex R. Co.*, 146 Mass. 224.

<sup>2</sup> *Jackson v. York &c. R. Co.*, 48 Me. 147; *Myers v. York &c. R.*, 43 Me. 232.

<sup>3</sup> *Cooper v. Thompson*, 13 Blatchf. (U. S.) 434, 437; *Lexington v. Butler*, 14 Wall. (U. S.) 282, 283.

*Ketchum v. Duncan*, 96 U. S. 659.

by the fact that they are, by their terms, given for interest maturing upon bonds specified by their *numbers*.<sup>1</sup>

§ 6108. **Status of Coupons Which have been Detached from the Bonds.** — “Coupons, when severed from the bonds, are *negotiable and pass by delivery*. They then cease to be incidents of the bonds, and become in fact independent claims. They do not lose their validity, if for any cause the bonds are canceled or paid before maturity; nor their negotiable character; nor their ability to support separate actions; and the amount for which they are issued draws interest from its maturity. They then possess the essential attributes of commercial paper.”<sup>2</sup>

§ 6109. **Actions upon Detached Coupons.** — Interest coupons, whether attached to or detached from negotiable corporate bonds, which are in their form promises to pay a sum stated *to the bearer*, upon a date named, being negotiable instruments,<sup>3</sup> may be sued on by the lawful holder *in his own name*;<sup>4</sup> but not where they contain no negotiable words.<sup>5</sup> But, as elsewhere seen,<sup>6</sup> according to a sound view, the holder of the coupons cannot, by *levying his execution upon the property conveyed in the mortgage, get a preference* over the holders of other bonds and coupons of the same series. Where a series of railroad mortgage bonds contain the stipulation that, if the net earnings of the road shall not be sufficient in any one year to pay the interest, then *scrip* may, at the option of the company, be issued for the interest, the option must be exercised promptly by the company, or a bondholder may maintain an

<sup>1</sup> Evertson v. National Bank, 66 N. Y. 14; s. c. 23 Am. Rep. 9. See an elaborate note upon the subject of coupon bonds and coupons in 64 Am. Dec. 428, to which the author acknowledges his indebtedness.

<sup>2</sup> Clark v. Iowa City, 20 Wall. (U. S.) 583, 589, opinion of the court by Mr. Justice Field; *ante*, § 6107.

<sup>3</sup> *Ante*, §§ 6107, 6108.

<sup>4</sup> Knox County v. Aspinwall, 21 How. (U. S.) 539; Philadelphia &c. R. Co. v. Smith, 105 Pa. St. 195; Philadelphia &c. R. Co. v. Fidelity Ins. &c. Co., 105 Pa. St. 216; Texas &c. R. Co. v. Marlor, 123 U. S. 687; City v. Lamson, 9 Wall. (U. S.) 477.

<sup>5</sup> Jackson v. York &c. R. Co., 48 Me. 147; Myers v. York &c. R. Co., 43 Me. 232.

<sup>6</sup> *Post*, § 6124.

action upon his coupons without demand, and recover a judgment in money.<sup>1</sup> In *declaring* upon a coupon which has been detached from the bond, the holder, if his declaration is properly drawn, *need not produce the bond*; since he has a right of action on the detached coupon, although he may not be the holder of the bond to which it was originally attached.<sup>2</sup> It is said to be proper enough to *recite the bonds* in such general way as to explain and bring into view the relation which the coupons originally held to the bonds, and which they still in some respects hold. But such recitals are in the nature of an inducement or preamble, and they do not make the action an action upon the bonds, but it is still an action upon the detached coupons merely.<sup>3</sup>

§ 6110. **Coupons when Due and Payable.**—*Prima facie*, a coupon attached to a mortgage bond is due and payable according to the date named therein; but in order to ascertain whether this is so or not, the coupon cannot be read by itself, detached from the rest of the contract. The *contract* will, in general, consist of the *bond*, the attached *coupons*, and the *mortgage* securing the same; and these, as elsewhere seen,<sup>4</sup> are generally to be read together as one contract. Where the coupons make reference to the mortgage and the bond, this charges the holder of both the coupons and the bond with notice of the provisions contained in each of the instruments. "If, therefore, according to the plain intent and meaning of the provisions in the mortgage, it was designed to invest a majority of the bondholders thereunder with power, at their option, to waive defaults in the payment of moneys secured by said mortgage, we do not see how the claim that these coupons were negotiable instruments can be supported. If such coupons were negotiable instruments invested with the qualities pertaining to such securities, the mortgage and

<sup>1</sup> Texas &c. R. Co. v. Marlor, 123 U. S. 687.

<sup>2</sup> City v. Lamson, 9 Wall. (U. S.) 477; Knox County v. Aspinwall, 21 How. (U. S.) 539.

<sup>3</sup> City v. Lamson, 9 Wall. (U. S.) 477.

<sup>4</sup> *Ante*, § 6075; McClelland v. Norfolk Southern R. Co., 110 N. Y. 469; s. c. 6 Am. St. Rep. 397.



bonds to which they were attached when issued cannot be resorted to, to qualify, limit, or explain the agreement therein expressed. In that event their holders, having purchased them in good faith for value and without notice of any defense existing thereto, would be entitled to maintain an action thereon and recover, according to well-settled principles of commercial law. If, however, these coupons contained notice to the holders of any facts or circumstances showing that the time of their payment was subject to a contingency over which the holder had no control, and which might postpone their payment indefinitely, then they could not be said to be *bona fide holders* thereof, as the negotiability of the paper would be thereby destroyed.”<sup>1</sup> When, therefore, in an action to recover the amount of certain interest coupons cut from certain railway mortgage bonds, it appeared that the bonds referred to the coupons on their face, and that both the *bonds* and the *mortgage* contained conditions to the effect that the time of payment of the principal and interest might be changed and postponed, from time to time, at the option of a *majority* of the bondholders,—it was held that the *coupons* were not negotiable instruments; that a purchaser of them was chargeable with notice of the terms of the bonds; and that if the payment of interest had been postponed in accordance with the conditions of the bonds, until the period of extension had expired, an action at law could not be maintained on the bonds, although the plaintiff had not assented to the postponement. Where, however, by the terms of the bonds and the mortgage, a *majority* of the bondholders were empowered, “in case of default” in the payment of interest, to *waive* the default and to instruct the trustees under the mortgage to waive it, and that no action on the part of the bondholders or trustees, “in the case of any default,” should “affect any subsequent default, or any right arising therefrom,”—it was held that the bondholders had no authority to anticipate and provide for a default in the payment of interest before it accrued,

<sup>1</sup> McClelland v. Norfolk Southern R. Co., 110 N. Y. 469, 475; s. c. 6 Am. St. Rep. 397.

but that every coupon-holder had the right to insist that the conditions of the exercise of the power should be exactly complied with, and that a written direction by a majority of the bondholders to the trustees in the mortgage, to postpone the payment of interest for five years, was inoperative, and no defense to an action upon coupons subsequently falling due.<sup>1</sup>

§ 6111. **Interest on Overdue Coupons.** — Overdue interest coupons, being absolute promises to pay a certain sum of money on the date named, will, with the qualifications hereafter stated, carry interest from the date of their maturity; and it would seem that this interest is secured by the lien of the mortgage securing the bonds to which they are attached.<sup>2</sup>

§ 6112. **The Question as a Question of Pleading and Burden of Proof.** — In many cases the question is presented as a question of *pleading*, and as a question relating to the *burden of proof*. On strict principles, it would be necessary for the plaintiff to aver and prove a presentation of the coupons at the place of payment named therein, and at the date of payment, or at a subsequent date, in order to show such a *breach of the contract* to pay them as would authorize him to recover interest. But the rule of judicial convenience which excuses the averment of a *demand* in actions upon written instruments, but which makes the bringing of the suit a demand, has been so far misapplied, with reference to this question, as to involve the courts in the conclusion that the plaintiff need

<sup>1</sup> McClelland v. Norfolk Southern R. Co., 110 N. Y. 469, 475; s. c. 6 Am. St. Rep. 397.

<sup>2</sup> Mills v. Jefferson, 20 Wis. 50; Pruy n v. Milwaukee, 18 Wis. 367; Gelpcke v. Dubuque, 1 Wall. (U. S.) 175, 206; Aurora City v. West, 7 Wall. (U. S.) 82; Genoa v. Woodruff, 92 U. S. 502; Amy v. Dubuque, 98 U. S. 470; Walnut v. Wade, 103 U. S. 683; Koshkonong v. Burton, 104 U. S. 668, 677; Pana v. Bowler, 107 U. S. 529; Knox County v. Aspinwall, 21 How.

(U. S.) 539; City v. Lamson, 9 Wall. (U. S.) 477; Lexington v. Butler, 14 Wall. (U. S.) 282; Clark v. Iowa City, 20 Wall. (U. S.) 583; Ashuelot R. Co. v. Elliot, 57 N. H. 397; North Pa. R. Co. v. Adams, 54 Pa. St. 94; s. c. 93 Am. Dec. 677; Jeffersonville v. Patterson, 26 Ind. 15; s. c. 89 Am. Dec. 448; Welsh v. First Division & C. R. Co., 25 Minn. 314. In Gilbert v. Washington City & C. R. Co., 33 Gratt. (Va.) 586, this question was raised, but not decided.

not, in order to show a right to recover interest from the maturity of the coupons, *aver and prove a presentation of them for payment* at the place and time of payment named therein, or on any subsequent date. In strict logic, unless he does so aver and prove, he does not show such a breach of the contract as would allow him to recover interest except from the date of the bringing of the suit. But the rule of the courts seems to be that it is not necessary for the plaintiff to make, in his complaint, an averment of the presentation of the coupons for payment and of the failure or refusal of the defendant to pay them, but that if the defendant was ready to pay them at the time and place where they were payable, this is a matter of *affirmative defense* for it to aver and prove.<sup>1</sup>

§ 6113. **Interest Runs from Date of Demand and Refusal.**—It must undoubtedly be accepted as a sound principle of law that interest on coupons runs only from *demand of payment and refusal*, unless a state of circumstances is shown to exist which excuses the holder from making demand. This will be apparent upon a moment's reflection. These coupons, when detached, are in themselves negotiable instruments, passing from hand to hand by delivery. The coupons of a given series of bonds may be in the hands of hundreds, or even thousands, of unknown people; they may be scattered among the bankers of the world; and it would be a most unjust conclusion to hold that, where the corporation is ready and willing to pay them, and holds funds in its treasury for that purpose, their holders can compel the corporation to pay interest upon interest, and even at a higher rate than that named in the bond, merely because they do not see fit to present their interest coupons for payment.<sup>2</sup> It is incontestable that, under such circumstances, the corporation cannot be expected to make search all over the world for coupon-holders, in order to tender to them the payment of their coupons, es-

<sup>1</sup> *Walnut v. Wade*, 103 U. S. 683, 696; *North Pac. R. Co. v. Adams*, 54 Pa. St. 94; *s. c.* 93 Am. Dec. 677.

<sup>2</sup> Cases are found which recognize

the principle that interest runs on coupons only from the date of presentation. *Beaver County v. Armstrong*, 44 Pa. St. 63.

pecially as, from the nature of the case, it can neither know who they are nor where they are.<sup>1</sup> This is more especially true where the coupons are, by their terms, made *payable at a particular place*; for unless payment is demanded at that place, *the contract is not broken*. The general doctrine is that, where there is a contract to pay money on a day fixed, and *the contract is broken*, interest is allowed, *by way of damages*, where it is not allowed by statute; and this rule is said to be universal in respect to bills and notes payable on time.<sup>2</sup> The true rule, recognized by several decisions, therefore is that interest on the coupon runs, not from the date when it is payable, but from the date when the contract embodied therein is broken,—that is to say, from the date when it is presented for payment and the payment of it is refused, unless a state of facts is shown which would make such presentment nugatory, and which would therefore excuse the coupon-holder from making it,—which state of facts will generally be the public and known insolvency of the corporation.<sup>3</sup>

<sup>1</sup> “The company,” said Read, J., speaking with reference to such a case, “were not bound to seek their creditors in a foreign country (Co. Litt. 210 b)”; and it was accordingly held that, where the company showed a willingness and ample ability to pay at all times, and the coupon-holder resided abroad and did not present her coupons, so that it was merely negligence which prevented her from receiving the payment of them as they fell due, the company had not broken their contract, and were not bound to pay interest on the coupons. *Emlen v. Lehigh Coal &c. Co.*, 47 Pa. St. 76, 83; *s. c.* 86 Am. Dec. 518. This case arose on a special verdict, and the question on the burden of proof was not involved.

<sup>2</sup> *Aurora City v. West*, 7 Wall. (U. S.) 82, 105.

<sup>3</sup> Case recognizing the principle that interest runs only from demand

and refusal: *Beaver County v. Armstrong*, 44 Pa. St. 63. In one case it is said in the opinion of the court by Mr. Justice Clifford: “Being written contracts for the payment of money, and negotiable because payable to bearer and passing from hand to hand, as other negotiable instruments, it is quite apparent, on general principles, that they should draw interest *after payment of the principal is unjustly neglected or refused*.” *Aurora City v. West*, 7 Wall. (U. S.) 82, 105. In another case, the coupons were, by their terms, payable to bearer in the city of New York. In an action upon them, the complaint did not aver a presentation of them at the place of payment, but alleged that the defendant had no funds in the city of New York. It was held that the plaintiff was entitled to interest from the maturity of the coupons. *Jeffersonville v. Patterson*, 26 Ind. 15.

§ 6114. **Interest Runs at What Rate.**—Whether the interest on the coupons will be computed at the same rate as the interest on the bonds, or at the *legal rate of interest* fixed by the law of the State whose law governs the contract, has been made a question in several cases. The Supreme Court of the United States hold it to be a *question of local law*. When, therefore, the question arose, under the laws of Illinois, in which State it had been held that a *note* given for a sum of money, bearing interest at a given rate per month, continues to bear that rate of interest as long as the principal remains unpaid,<sup>1</sup> the Supreme Court of the United States, applying the local rule, held that, where the bonds carried interest at the rate of ten per cent, the coupons would bear interest at the *same rate*, and not at the rate of six per cent, which was the legal rate of interest in Illinois, except where the parties had contracted for a different rate.<sup>2</sup> The question is then to be answered by analogy to the law of the particular State as to the rate of interest which a *promissory note* bears, after its maturity, where the rate is not expressed in the note itself; and there are many holdings to the effect that the law will apply the *legal rate of interest* without regard to the rate which the note has borne down to the date of its maturity.<sup>3</sup>

§ 6115. **When Statute of Limitations Runs against Coupons.**—The statute of limitations of a State which, by its terms, bars all *written contracts* within a stated number of years after the cause of action thereon has accrued, *commences*

In *Gorman v. Sinking Fund Comm'rs*, 25 Fed. Rep. 647, it is held that where the holder of *State coupons* has a right, under a statute, to have them *funded*, he must present them and *demand* that they be funded, in order that his right to maintain an action to compel the commissioners to fund them may be fixed; and this was so, although the commission had notoriously and publicly proclaimed that they would not fund such coupons.

<sup>1</sup> *Phinney v. Baldwin*, 16 Ill. 108; s. c. 61 Am. Dec. 62.

<sup>2</sup> *Ohio v. Frank*, 103 U. S. 697.

<sup>3</sup> *Spencer v. Pierce*, 5 R. I. 63; *Holden v. Trust Co.*, 100 U. S. 72 (under laws of District of Columbia). In *Lawton v. South Carolina R. Co.*, 2 S. C. 248, it was held that the coupons would bear interest at the rate of seven per cent, which was the legal rate of interest in South Carolina, although the bonds bore interest at the rate of only six per cent.

to run against actions upon coupons for interest annexed to the bonds issued by municipal corporations of the State, when they have been *detached from the bonds* and transferred to parties other than the holders of the bonds, *from the maturity* of the coupons respectively.<sup>1</sup> The same rule is, no doubt, applicable to coupons from the bonds of private corporations.

§ 6116. **Payment of Coupons by Third Persons.** — If a third person, under an arrangement with the corporation, advances money to pay the interest on its bonds, and, as security for his advances, is allowed to take up and retain uncanceled the coupons representing such interest as they are presented by the several bondholders for payment, these coupons will stand as valid securities in his hands as against the corporation, and the mortgage by which they are secured may be enforced for his benefit.<sup>2</sup> But, as between him and the bondholders, who presented their coupons for payment and received the amount of the same in ignorance of the fact that they were paid by the third party and transferred to him without being canceled, but who supposed them to have been *paid*, the latter have prior equities; so that if, upon a foreclosure of the mortgage covering the bonds and coupons, the sum realized is not enough to pay the face of the bonds and the matured coupons, the person so advancing money to take up coupons is *not entitled to share in the proceeds of the sale*.<sup>3</sup> In other words, one who thus, under a secret arrangement with the corporation, and for the purpose of keeping its credit good before the public, advances money to take up its coupons or its bonds before they mature, is remitted, as against the creditors of the corporation, to the position of a *second mortgagee* in respect of the mortgage by which the bonds are secured; so that if there is any surplus, after satisfying the demands of the bond-

<sup>1</sup> Clark *v.* Iowa City, 20 Wall. (U. S.) 583; overruling on this point City *v.* Lamson, 9 Wall. (U. S.) 477; and Lexington *v.* Butler, 14 Wall. (U. S.) 282.

<sup>2</sup> Union Trust Co. *v.* Monticello &c.

R. Co., 63 N. Y. 311; s. c. 20 Am. Rep. 541; Cameron *v.* Tome, 64 Md. 507, 511.

<sup>3</sup> Union Trust Co. *v.* Monticello &c. R. Co., 63 N. Y. 311; s. c. 20 Am. Rep. 541.

holders under the mortgage and those of other creditors equal or prior in right, then he may have distribution out of such surplus.<sup>1</sup>

§ 6117. **Coupons Share pro Rata in Mortgage Foreclosure.**

An interest coupon, payable to bearer, *detached* from the bond of a corporation, and owned by one party, is still a part of the mortgage indebtedness, and is secured by the lien of the mortgage, although the bond itself may be owned by another party. An *assignment* of the coupon carries with it, in equity, an assignment of that aliquot portion of the mortgage security which is represented by the coupon; and the holder of the coupon will be entitled to *share pro rata* with the holders of the residue of the mortgage debt, in the distribution of the proceeds of a sale foreclosing the mortgage.<sup>2</sup> Where, in such a case, a third person, with his own money, takes up maturing coupons without the knowledge of the holders, it is a *question of fact*, to be determined upon the evidence, whether it is intended to be a *payment* or a *purchase* which leaves the coupons outstanding for his protection, so far as they will protect him under the principles already stated.<sup>3</sup> Where the *promoter* of a corporation, who owned nearly all of its shares, had placed a mortgage upon it to secure its negotiable bonds, to which interest coupons were attached, and, in order to preserve the credit of the company and avert disaster while its works were being constructed, gave notice that coupons might be presented for payment, and paid them as they were presented, and canceled part of them, and afterwards turned them over, partly canceled, to contractors who had advanced material in the construction of the works of the corporation, and the mortgage was afterwards foreclosed, and a question arose as to the right of the contractors, as intervening pe-

<sup>1</sup> Haven v. Grand Junction &c. R. Co., 109 Mass. 88.

<sup>2</sup> Miller v. Rutland &c. R. Co., 40 Vt. 399; s. c. 94 Am. Dec. 413; approved in Haven v. Grand Junction &c. R. Co., 109 Mass. 88, 96.

<sup>3</sup> Ketchum v. Duncan, 96 U. S. 659; Wood v. Guarantee Trust &c. Co., 128 U. S. 416. That *payment* is a *question of fact for a jury*, in cases tried by jury, see 1 Thomp. Trials, § 1251.

tioners, to share in the proceeds of the sale,—it was held that, after the promoter of the corporation had employed his own funds in the ostensible payment of the coupons which he had turned over to these contractors, thereby keeping up the credit of the bonds and enabling them to be floated and marketed, it would be inequitable to allow *him* to share *pari passu* with the holders of other bonds and coupons in the same series in the distribution; and that, as he had transferred the coupons to the contractors after they were *past due*, they did not receive them subject to any protection which attaches to the assignee of commercial paper before maturity, but merely stepped into the shoes of their assignor, and were not entitled to any higher rights in respect of them than he was able to transfer.<sup>1</sup>

### ARTICLE III. REMEDIES OF BONDHOLDERS.

SECTION	SECTION
6121. Remedies available to individual bondholders.	6125. When separate bondholder may sue for interest, but not for principal.
6122. Remedies of single bondholder not concluded by action or non-action of majority.	6126. Bondholders represented in litigation by the trustee in the mortgage.
6123. Unless such be the true construction of the entire contract.	6127. Measure of damages for failure to deliver bonds.
6124. Separate bondholder cannot levy execution upon mortgaged property.	6128. Cross-bill by bondholders.

§ 6121. Remedies Available to Individual Bondholders.— Each separate bondholder is secured by the mortgage to the extent only of *his aliquot portion* of the property conveyed.<sup>2</sup>

<sup>1</sup> Wood v. Guarantee &c. Co., 128 U. S. 416. Nor did the doctrine of Fosdick v. Schall, 99 U. S. 235 (*post*, §7114), entitle the contractors to any preference, because that doctrine has never been applied except with reference to *railroad companies*, and because the materials which they furnished were furnished for the purpose of *construction*, and not for the purpose of *operation*. *Ibid.* As to the rights

of the holders of coupons under a mortgage, who have *funded* the same, or *exchanged* them for bonds issued under a subsequent mortgage, authorized by an act which was held to be *unconstitutional*,—see Hand v. Savannah &c. R. Co., 12 S. C. 314, as explained in the same case, 17 S. C. 219, where there is an extensive discussion of the nature of coupons.

<sup>2</sup> *Post*, §§ 6228, 6243.



That is to say, if this theory is sound, the security inures to his benefit only to the extent of the proportion which his holdings of the bonds, issued under the mortgage, bear to the entire amount so issued. Such being his status, undoubtedly if there is a *default as to him*, and the default has continued for the period of grace permitted by the terms of the mortgage, then he has a *right* to whatever legal or equitable remedies his contract gives him. He has a right, it must be assumed, (1) to an *action at law* against the corporation to recover on the unpaid coupons, or on the bonds, provided they have become due under the terms of the contract by reason of the non-payment of the coupons;<sup>1</sup> (2) to demand that the trustees

<sup>1</sup> This is the well-known rule in regard to *debts secured collaterally*, unless the contract, by its terms, is *exclusive*, and remits the creditor to the security only. In every other case he has his *election* to sue at law to recover the debt, or to proceed to enforce the security; and in many cases both remedies are open to him. Thus, it has been reasoned in a Federal case that "it is quite immaterial whether the mortgage secures the interest of the bonds by a lien upon the lands of the company, or by a lien upon the earnings of the company, or by a lien upon both, or whether it is not secured at all by the mortgage. If there is an agreement to pay interest, and it is not paid, there is a breach of the bond for which the holder can maintain an action." *Marlor v. Texas &c. R. Co.*, 19 Fed. Rep. 867, 868, *per* Wallace, J. So, with reference to the question under immediate consideration, it has been held that a stipulation in a railroad mortgage that, in case of default in the payment of interest for sixty days, the trustees, on written request of one-third in interest of the bondholders, must take possession, operate, and "sell" the road, etc., is

a *cumulative remedy*, and not exclusive of the remedies given by law. *Dow v. Memphis &c. R. Co.*, 20 Fed. Rep. 260; *s. c.* affirmed, 124 U. S. 652. See *Langston v. South Carolina R. Co.*, 2 S. C. 248, which was an action on railroad bonds and attached coupons. Another Federal court has held, in conformity with the doctrine of the above text, that dissenting bondholders may sue in *assumpsit* for the amount of their unpaid coupons, though the *majority in interest* have consented to *waive* the rights secured by the mortgage. *Manning v. Norfolk Southern R. Co.*, 29 Fed. Rep. 838. In Pennsylvania, and probably in all other American jurisdictions, the holder of bonds issued by a corporation, *payable to bearer*, may maintain an action on them *in his own name*, possession being *prima facie* evidence of ownership. *Carr v. Le Fevre*, 27 Pa. St. 413. The Pennsylvania court has more recently held that an *action* will lie by one bondholder against a corporation *for interest* due on a bond, although the principal is not yet due, and notwithstanding the fact that the mortgage securing the bond provides that, upon default in payment of interest,

in the mortgage shall proceed to take possession under the powers therein conferred, or shall bring an appropriate action to foreclose the same; and (3), in case the trustees refuse so to do, and in some of the State jurisdictions without any demand upon, or refusal of, the trustees so to proceed, the bondholder may himself proceed in equity to have the mortgage foreclosed, bringing the action not only for himself, but for all other bondholders standing on a common footing with him.<sup>1</sup>

§ 6122. Remedies of Single Bondholder not Concluded by Action or Non-action of Majority. — It is plain that the principle which is gaining some ground, that *a majority of the bondholders are to rule*,<sup>2</sup> cannot be applied in all cases. Each bond is a separate contract with the holder of that bond. The corporation may elect to pay some bondholders and to postpone others; and if they pay all the bondholders but one, can it be said that he is precluded from proceeding with whatever remedies the law would otherwise give him? In the Supreme Court of the United States, where this convenient but often unjust doctrine of the right of the majority of the bondholders to rule has sprung up, the clearest and strongest expressions can be found in favor of the rights of the single bondholder. In a well-considered case in that court,<sup>3</sup> where the terms of the mortgage declared that the con-

the trustees to whom the mortgage was executed shall, at the request of the holders of a certain amount of bonds, proceed by *scire facias*, to collect interest and principal for the benefit of all bondholders equally. *Montgomery County Agric. Soc. v. Francis*, 103 Pa. St. 378. But, in the view of the same court, he cannot have *execution* out of the mortgaged property. *Post*, § 6124. So, where a railroad mortgage provided that, in the event of a failure of net earnings sufficient to pay interest on the bonds secured by it, the company can, at its option, issue certain *scrip* in lieu

thereof, — a bondholder is not bound to accept scrip unless the condition supervenes which authorizes the company to issue it, and the *burden* is on them to prove that it has supervened, and he is not bound to prove the contrary in the first instance; but his right of action is *prima facie* perfect upon the proof of the non-payment of interest on the presentation of his bond at the time and place where the interest is made payable. *Marlor v. Texas &c. R. Co.*, 19 Fed. Rep. 867.

<sup>1</sup> *Post*, § 6210.

<sup>2</sup> *Post*, § 6213.

<sup>3</sup> The conclusion of the court is

veyance was for the purpose of securing the payment of the *interest* as well as the *principal* of the bonds issued under it, and declared that the mortgagor's right of possession should terminate upon a *default of the payment of the interest*, as well as the principal of any of the bonds,—the court took the view that, independently of the provisions of the other articles, the trustees in the mortgage, or, on their failure so to do, *any bondholder*, on the non-payment of *any* installment of interest on *any* bond, *might file a bill for the enforcement of the security*, by the foreclosure of the mortgage and sale of the mortgaged property. “This right,” said Mr. Justice Matthews, “belongs to each bondholder separately, and its exercise is not dependent upon the co-operation or consent of any others, or of the trustees. It is properly and strictly enforceable by, and in the name of, the latter; but, if necessary, may be prosecuted without, and even against, them. It follows from the nature of the security, and arises upon its face, unless restrained by its terms.”<sup>1</sup>

§ 6123. **Unless Such be the True Construction of the Entire Contract.** — But in every case the question what remedies are open to individual bondholders *will depend upon the true construction of the contract*; and for this purpose the bonds and the mortgage are to be read together as one contract, upon a familiar principle. But, as elsewhere seen,<sup>2</sup> where the question relates to what rights arise under the bonds considered independently of the mortgage, in case of a discrepancy between the bonds and the mortgage, the bonds will govern; and, on the same principle, if a question arises as to what remedies are available under the mortgage, and there is a discrepancy between the language of the mortgage and the bonds with reference to that question, then, it must be concluded, that the language of the mortgage will govern. Cases have recently arisen in respect of railroad mortgages where the terms of the

scarcely weakened by the fact that three of the justices dissented, but merely on a construction of the terms of the mortgage.

<sup>1</sup> Chicago &c. R. Co. v. Fosdick, 106 U. S. 47, 68.

<sup>2</sup> *Ante*, § 6088.

contract have been construed either as providing an exhaustive remedy, or else as curtailing to some extent the ordinary legal remedy of the holder of unpaid coupons. Thus, it has been held that the holder of *coupons* belonging to the mortgage bonds of a railroad company cannot maintain an *action at law* upon such *coupons*, from the simple fact that they are upon their face *past due* and *prima facie* payable; since whether they are due and payable depends upon a just construction of the *entire contract*, which consists of the *bonds* and the *mortgage*, as well as the *coupons*.<sup>1</sup>

§ 6124. **Separate Bondholder cannot Levy Execution upon Mortgaged Property.**—Thus, it has been held in a modern case in Pennsylvania, that, while the holder of unpaid coupons detached from railway mortgage bonds, may sue the company at law and recover a judgment for his unpaid interest,<sup>2</sup> yet he cannot cause the execution to be levied upon the property covered by the mortgage, because that property has been conveyed to the trustee under the mortgage, *in trust for all the bondholders*, and because the bondholders under the mortgage stand, in reference to that security, *upon an equal right*, and are entitled to *equality of distribution*, and one of them cannot be allowed thus to get a *preference* over the others. But, as to other property of the company not conveyed to the trustee, the bondholder may treat himself as an individual creditor, and may proceed to recover judgment for the amount of unpaid coupons or bonds, and to enforce the collection thereof against the defendant. “But his execution must be levied on property actually owned by the company, and not upon that which has been conveyed to trustees by mortgage or deed of trust duly executed and recorded. He stands, when suing at law, and proceeding against the railroad company, on the same plane as any other creditor. His writ of *feri facias* will reach the same property and in the same way. When, however, it becomes necessary for him to reach the

<sup>1</sup> McClelland v. Norfolk Southern R. Co., 110 N. Y. 469; s. c. 6 Am. St. Rep. 397.

<sup>2</sup> Montgomery County Agric. Soc. v. Francis, 103 Pa. St. 378.

property held by the trustee, he must proceed against him, not for his own separate benefit, but as a bondholder, and on behalf of the bondholders as a class. What may be realized by such proceeding belongs to the whole class, and must be distributed among its members *pro rata*.”<sup>1</sup> This holding is so sound and just that it ought to receive universal assent.

§ 6125. **When Separate Bondholder may Sue for Interest, but not for Principal.**—The same may be said of a recent decision of the Court of Appeals of New York, in a case where the holder of three railway mortgage bonds brought an action in the nature of *an action at law*, to recover both the principal and interest due thereon. The trial court held that he was entitled to recover the interest represented by the past-due coupons, but not the principal, and this judgment was affirmed by the Court of Appeals, two judges dissenting.<sup>2</sup> The opinion, written by Chief Judge Ruger and found among his papers after his death, was adopted by the court. The bonds contained the following recital: “In case of default in the payment of any of the interest coupons attached to this bond, in the manner provided in the trust deed and mortgage hereinafter mentioned, then and in that case the principal sum of this bond *shall become due, in the manner and with the effect provided in the said trust deed or mortgage.*” The mortgage contained the following clause: “If default be made by the said party of the first part in any half-year’s interest on any of said bonds, and the warrants or coupons for such interest shall have been presented and its payment demanded, and such default shall have continued for six months after such demand without the consent of the holders of such coupon or bond, then and thereupon the principal of all of said bonds hereby secured shall be and become immediately due and payable, anything in such bonds to the contrary notwithstanding; and

<sup>1</sup> *Com. v. Susquehanna &c. R. Co.*, 122 Pa. St. 306, 321; *s. c.* 15 Atl. Rep. 448; 7 L. R. A. 225. Closely allied to this case, in principle and treatment, is the case of *Philadelphia &c. R. Co.*

*v. Woelpper*, 64 Pa. St. 366; *s. c.* 3 Am. Rep. 596.

<sup>2</sup> *Batchelder v. Council Grove Water Co.*, 131 N. Y. 42; *s. c.* 29 N. E. Rep. 801 (Finch and Gray, JJ., dissenting.)

the said party of the second part may so declare the same and notify the party of the first part thereof; and *upon the written request of the holders of a majority of the said bonds, then outstanding, shall proceed to collect both principal and interest of all such bonds outstanding, by foreclosure and sale of said property, or otherwise as herein provided.*" At the time when the bondholder brought the action, certain of the coupons had matured, but not the bonds. It was held that, by the proper construction of the bonds and the mortgage to which it referred, the bonds became *due only in the manner and with the effect provided in the mortgage*, which effect was that they could only be sued upon by the trustees upon the written request of a majority of the bondholders, and then only by a proceeding for a foreclosure and sale of the property, or otherwise as provided in the mortgage. It was held proper for the trial court to render judgment for the *past-due coupons*, because they were payable unconditionally on a prescribed day, — though the court said nothing as to the effect of the judgment or whether it could be levied upon the property conveyed in the mortgage, which question was in the Pennsylvania case just cited. In the opinion of the court the following reasoning occurs: "This clause plainly limits the effect of the provision making the principal of the bonds due upon the failure to pay semi-annual interest, and it prescribes the manner in which such a breach of the contract shall be made available. It authorizes the trustee, upon the request of a majority of the bondholders, to foreclose the mortgage and distribute the proceeds realized thereby, equally among the bondholders. By prescribing the effect which the clause shall have on the contract, and the particular manner in which a default in the payment of interest shall be availed of, it impliedly excludes all other methods, and confines the bondholder to the remedies expressly authorized. If the method provided by the mortgage be pursued, it subjects the action to be taken by the bondholders to the will of a majority and insures that course of action, with respect to the property of the debtor, which will inure to the best interest of the bondholders as a class.

This prevents individual bondholders from pursuing an individual course of action and thus harassing their common debtor, and jeopardizing the fund provided for the common benefit. The manifest equity and justice of such a proceeding indicate the intent of the parties in drafting the form of the bond."<sup>1</sup>

**§ 6126. Bondholders Represented in Litigation by the Trustee in the Mortgage.** — It is coming to be a generally conceded principle, in the absence of fraud, that in any proceeding in equity affecting the rights of the mortgage bondholders of a corporation, they are sufficiently represented, as *parties* to the proceeding, by the trustee in the mortgage, who is bound, in the execution of his trust, to take whatever steps may be necessary for the protection of their rights. From this it follows that, in the absence of fraud, they will be concluded by the result of any litigation affecting their rights, to which the trustee in the mortgage was a party. This rule has been adopted, from the necessity of the case, by the courts of the United States, in suits in equity to foreclose such mortgages, — it being impossible to join all the bondholders; though where circumstances render it proper, it is within the discretion of the court to allow such to come in and be made parties as may petition the court to that effect.<sup>2</sup> Thus, to state the strongest possible case illustrating the principle, it has been held that a *decree* in equity *canceling bonds* of one railroad corporation and a mortgage given by another railroad corporation upon its property to secure the payment of the same, upon a bill filed by the latter company against the former and also against the surviving trustee under the mortgage, *binds all the bondholders*, unless obtained by fraud.<sup>3</sup> But the practitioner should not be misled, by the foregoing statement, into the conclusion that this is the rule in all the State

<sup>1</sup> *Batchelder v. Council Grove Water Co.*, 131 N. Y. 42, 46; *s. c.* 29 N. E. Rep. 801.

<sup>2</sup> *Post*, §§ 6214, 6216, 6217.

<sup>3</sup> *Beals v. Illinois &c. R. Co.*, 133

U. S. 290. See also *Kerrison v. Stewart*, 93 U. S. 155; *Shaw v. Railroad Co.*, 100 U. S. 605; *Richter v. Jerome*, 123 U. S. 233.

courts. It is well known that in some of the State courts, the *bondholders*, being the real parties in interest and the beneficiaries under the mortgage deed of trust, are the *parties* who are required to bring the bill to foreclose the mortgage.<sup>1</sup> By parity of reasoning, they are regarded in those courts as *necessary parties* to any suit affecting their rights. The inconvenience of bringing them all in is overcome by the rule of chancery practice which permits the bringing in of those who can be reached by process, and which requires them to litigate, not only for themselves, but for all others who stand on an equal footing with them, and which *binds the others*, through them, *by representation*.<sup>2</sup> Where such a principle prevails, the bondholders are *necessary parties* to a suit in equity to cancel the mortgage and bonds secured by it, and service of process on the trustees in the mortgage is not sufficient to conclude the bondholders.<sup>3</sup> The writer suggests that the decisions which hold the bondholders bound by representation through the trustee in the mortgage, except where the trustee brings an action to foreclose the mortgage, have failed to discriminate properly in respect of the consideration that the trustee in such an instrument is a trustee only of the powers which have been especially granted to him by the instrument, and which he has accepted by accepting the trust. If the instrument requires him to defend any litigation, affecting unfavorably the rights of the bondholders, then there is ground for concluding that, when he does so defend, he will bind the bondholders by representation. But, if it does not require him so to do, his act in defending is no more than the act of a stranger; for in doing it he is attempting to exercise a power which has not been conferred upon him, and to do something for them which they have not authorized him to do, or agreed that he shall do.

### §6127. Measure of Damages for Failure to Deliver Bonds.

Where a corporation is under a contract or other obligation

<sup>1</sup> Compare *post*, § 6210.

<sup>2</sup> *Post*, § 6209.

<sup>3</sup> *Harrisburgh &c. R. Co.'s Appeal* (Pa. St.), 15 Atl. Rep. 459; 1 L. R. A. 230.



to deliver its bonds, and puts it out of its power so to do, and becomes insolvent,—in an action for a breach of its obligation, the measure of damages has been held to be the *market value* of the bonds at the time when the company put it out of its power to deliver them.<sup>1</sup> But one who has sold and conveyed land to a corporation, upon an agreement to receive its mortgage bonds for the purchase price, but who refuses to receive them, and they are afterwards appropriated by the company,—cannot claim as a *distributee* of the assets of the company upon its becoming insolvent, on the footing of being a bondholder in respect of the bonds, but his only right of action against the company is for the purchase price of the land.<sup>2</sup>

§ 6128. **Cross-bill by Bondholders.**—Where a judgment creditor of an insolvent railroad corporation brought a suit in equity, seeking, among other things, to impeach the validity of a mortgage and of the bonds secured by the mortgage, it was held that a *cross-bill between the several bondholders* who asserted antagonistic interests under the mortgage was proper and necessary.<sup>3</sup>

<sup>1</sup> Galena &c. R. Co. v. Ennor, 123 Ill. 505; *s. c. sub nom.* Cleveland Iron Co. v. Ennor, 14 N. E. Rep. 673.      Shenandoah &c. R. Co., 33 W. Va. 761; *s. c.* 11 S. E. Rep. 58.  
<sup>2</sup> Rice's Appeal, 79 Pa. St. 168.  
 Compare Fidelity Ins. &c. Co. v.

<sup>3</sup> Morton v. New Orleans &c. R. Co., 79 Ala. 590.

## CHAPTER CXXXII.

### POWER OF CORPORATIONS TO MORTGAGE THEIR PROPERTY AND FRANCHISES.

#### SECTION

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§ 6131. **Implied Power of Corporations to Mortgage.**— We have already seen that, according to the American doctrine, every private corporation has an implied power to *borrow money* to enable it to carry out the purposes of its creation,<sup>1</sup> and to issue the usual and appropriate *evidences of debt* therefor.<sup>2</sup> This power carries with it, by the same reasonable implication, the power to *mortgage its property* to secure any debts which it may lawfully contract for the purposes of its creation; and such is the universal American doctrine, in the absence of statutory prohibitions, and saving always those corporations whose property is dedicated to the performance of public duties.<sup>3</sup> With this important exception, it may therefore be laid down that every private corporation, in the absence of any prohibition in its charter, or governing statute, may borrow money for the purpose of carrying out the lawful objects of its incorporation, and may mortgage its real and personal property to secure the loan.<sup>4</sup> In the English law, the power to mortgage their property is generally conceded to companies, where such power is not restrained by their charters, deeds of settlement, or other governing instruments; and the validity of the mortgage will generally depend upon the validity of the debt which it was intended to secure.<sup>5</sup>

§ 6132. **To What Corporations This Power Ascribed.**— This power has been ascribed to an *agricultural society*, in the

<sup>1</sup> *Ante*, § 5697.

<sup>2</sup> *Ante* §§ 5697, 5731, 6050.

<sup>3</sup> *Ante*, §§ 5355, 5880; *post*, § 6133.

<sup>4</sup> *Aurora Agric. Soc. v. Paddock*, 80 Ill. 263; *Bardstown &c. R. Co. v. Metcalfe*, 4 Met. (Ky.) 199; *s. c.* 81 Am. Dec. 541; *Richards v. Merrimack &c. R.*, 44 N. H. 127, 135; *Jackson v. Brown*, 5 Wend. (N. Y.) 590; *Barry v. Merchants' Exch. Co.*, 1 Sandf. Ch. (N. Y.) 280; *Burt v. Rattle*, 31 Ohio St. 116; *Gordon v. Preston*, 1 Watts (Pa.), 385; *s. c.* 26 Am. Dec. 75; *Watts's Appeal*, 78 Pa. St. 370; *Detroit v. Mutual Gas Co.*, 43 Mich. 594; *West v. Madison County Agric. Board*,

82 Ill. 205; *Leggett v. New Jersey Man. &c. Co.*, 1 N. J. Eq. 541; *s. c.* 23 Am. Dec. 728; *Clark v. Titcomb*, 42 Barb. (N. Y.) 122; *Wood v. Meyer*, *s. c.* 7 South. Rep. 359; *Lehigh Valley Coal Co. v. West Depere Agric. Works*, 63 Wis. 45; *Susquehanna &c. Co. v. General Ins. Co.*, 3 Md. 305; *s. c.* 56 Am. Dec. 740; *Eureka Iron &c. Works v. Bresnahan*, 60 Mich. 332; *s. c.* 27 N. W. Rep. 524; *Badger v. Batavia Paper Man. Co.*, 70 Ill. 302; *Thompson v. Lambert*, 44 Iowa, 239.

<sup>5</sup> *Re Patent File Co.*, L. R. 6 Ch. 83; *s. c.* 40 L. J. (Ch.) 190; *Lind. Comp. Law* (5th ed.), 202.

absence of a prohibition, so as to enable it to mortgage its fair grounds, to raise money to advance the objects of its incorporation;<sup>1</sup> to a company formed for the purpose of erecting a *public exchange* building;<sup>2</sup> to a *banking corporation*, having power by its charter to purchase, hold, and convey such real estate as is requisite for the prosecution of its business, etc.;<sup>3</sup> to a *trading corporation*;<sup>4</sup> to a *gaslight corporation*;<sup>5</sup> to *steamship* companies in England;<sup>6</sup> and to *manufacturing* companies in the same country.<sup>7</sup> A corporation organized to *supply heat to buildings* in a city, by means of pipes laid in the public streets, is an ordinary manufacturing corporation, and not a *quasi-public* corporation, for the purpose of determining whether it has a power to mortgage its property; and, being such, it may make a mortgage of its property without special authority.<sup>8</sup>

**§ 6133. From What Other Powers the Power to Mortgage Implied.**—The power of a corporation to mortgage its property is necessarily implied in the power to *contract debts*; since in making a mortgage to secure a debt which it has contracted, it merely appropriates its property to the payment of its debt, which the law would do *in invitum* in case the debt were not secured and should go unpaid. As a mortgage is merely a conditional *sale*, or a sale with a right of defeasance, and consequently, viewed in either light, something less than and included in an absolute sale,—it must follow that the general power conferred upon a corporation to *sell*, or otherwise alien its property, includes, by necessary implication, the

<sup>1</sup> Thompson v. Lambert, 44 Iowa, 239; Aurora Agric. Soc. v. Paddock, 80 Ill. 263; Preston v. Loughran, 34 N. Y. St. Rep. 391; s. c. 12 N. Y. Supp. 313 (under a statute).

<sup>2</sup> Barry v. Merchants' Exch. Co., 1 Sandf. Ch. (N. Y.) 280.

<sup>3</sup> Jackson v. Brown, 5 Wend. (N. Y.) 590; Leggett v. New Jersey Man. &c. Co., 1 N. J. Eq. 541; s. c. 23 Am. Dec. 728.

<sup>4</sup> Wood v. Meyer (Miss.), 7 South.

Rep. 359; Shears v. Jacob, L. R. 1 C. P. 513; Deffell v. White, L. R. 2 C. P. 144.

<sup>5</sup> Detroit v. Mutual Gas Co., 43 Mich. 594.

<sup>6</sup> Australian Steam Clipper Co. v. Mounsey, 4 Kay & J. 733.

<sup>7</sup> Ex parte National Bank, L. R. 14 Eq. 507; Re Patent File Co., L. R. 6 Ch. 83.

<sup>8</sup> Evans v. Boston Heating Co., 157 Mass. 37; s. c. 31 N. E. Rep. 698.

power to mortgage it for any lawful purpose.<sup>1</sup> The power of a corporation to mortgage its land, on a proper occasion and for a proper purpose, has been, in like manner, implied from a granted power to dispose of its land by *deed* or *lease*.<sup>2</sup> So, the power of a corporation to *pledge* its securities for the payment of its debts, has been held to be included in the power to *sell* such securities for that purpose.<sup>3</sup> In short, the power of a corporation to mortgage its real estate has been held to be incidental to the power of acquiring and holding real estate and of making contracts;<sup>4</sup> and a grant of "all powers incident and useful to corporations" has been held broad enough to include a power to make a chattel mortgage.<sup>5</sup> A comprehensive statement of the foregoing is that "the power of a corporation to sell and convey its property, and to borrow money, and make contracts, implies the power to mortgage its property, real or personal, to secure the payment of its debts."<sup>6</sup>

<sup>1</sup> *Gordon v. Preston*, 1 Watts (Pa.), 385; s. c. 26 Am. Dec. 75; *Leggett v. New Jersey Man. &c. Co.*, 1 N. J. Eq. 541; s. c. 23 Am. Dec. 728; *Willamette Man. Co. v. Bank of British Columbia*, 119 U. S. 191. "A mortgage," it has been well observed, "is a conveyance or deed. It is an alienation of the estate." *Leggett v. New Jersey Man. &c. Co.*, 1 N. J. Eq. 541; s. c. 23 Am. Dec. 728. A power to sell includes a power to mortgage, even under the *statute of uses*, which is strictly construed; and, *a fortiori*, it ought to include it under a statutory grant, which is to be beneficially construed in furtherance of the object of the grant. *Gordon v. Preston*, 1 Watts (Pa.), 385; s. c. 26 Am. Dec. 75. A corporation authorized to acquire, purchase, dispose of, and convey real and personal property, to negotiate its paper, and to borrow credits, has power to mortgage its property to secure such loans. *Taylor v. Agricultural &c. Asso.*, 68 Ala.

229. To much the same effect, see *McAllister v. Plant*, 54 Miss. 106; *Booth v. Robinson*, 55 Md. 419. The power to mortgage has been held to be granted by such words as the following: "To purchase and hold" certain property and to "sell and dispose of it at their pleasure." *Gordon v. Preston*, 1 Watts (Pa.), 385; s. c. 26 Am. Dec. 75.

<sup>2</sup> *Watts's Appeal*, 78 Pa. St. 370.

<sup>3</sup> *Leo v. Union Pac. R. Co.*, 17 Fed. Rep. 273.

<sup>4</sup> *Aurora Agric. Soc. v. Paddock*, 80 Ill. 263.

<sup>5</sup> *Badger v. Batavia Paper Man. Co.*, 70 Ill. 302.

<sup>6</sup> *Richards v. Merrimack &c. R.*, 44 N. H. 127, 135; citing *Gordon v. Preston*, 1 Watts (Pa.), 385; s. c. 26 Am. Dec. 75; *Haxtun v. Bishop*, 3 Wend. (N. Y.) 13; *De Ruyter v. St. Peter's Church*, 3 Barb. Ch. (N. Y.) 134; s. c. 3 N. Y. 238, 242; *Despatch Line v. Bellamy Man. Co.*, 12 N. H. 205; s. c. 37 Am. Dec. 203; *Flint*

§ 6134. **Further of This Subject.** — But whilst the power to *sell* necessarily carries with it the power to *mortgage*, it does not follow that the *want of a power to sell* is an inhibition on the power to mortgage; and it has been held that it is not.<sup>1</sup> Nor does the power to mortgage include the power to mortgage for purposes not within the general powers of the corporation, or not connected with the object for which it was created, — though, on principles elsewhere considered, where there is a *general power*, the equities of the mortgagee will not be defeated by the fact that the power was exercised for an improper or unauthorized purpose *in the particular instance*.<sup>2</sup> From the principle of the American law that the *power of corporations to mortgage their properties is presumed*, it has been held, — even in respect of railway companies, but in decisions which do not seem to have been well considered, because such power is not presumed in the case of railway companies,<sup>3</sup> — that a *special power* to mortgage will not be construed as taking away or abridging any *general power* which the company may possess.<sup>4</sup> A general power to mortgage the *whole* of any property of a corporation necessarily carries with it the power to mortgage a *part* of such property, provided the property is of such a nature as to be divisible without detriment to the public interests. It has accordingly been held that the power, granted to a *railroad company*, to mortgage its road, enables it to mortgage any part of it.<sup>5</sup> So, a general power to mortgage its property enables a *plank-road company* to mortgage its franchise of taking tolls on a part

*v. Clinton Co.*, 12 N. H. 430; *Pierce v. Emery*, 32 N. H. 484, 504; *Jackson v. Brown*, 5 Wend. (N. Y.) 590, 594.

<sup>1</sup> *Krider v. Western College*, 31 Iowa, 547; *Middletown Sav. Bank v. Dubuque*, 15 Iowa, 394, 401. So an inhibition on the power to *sell* has been held not an inhibition on the power to *lease*. *Dubuque v. Miller*, 11 Iowa, 583.

<sup>2</sup> *Ante*, § 5975. That corporations

organized under Illinois Act of Feb. 18, 1857, had power to mortgage their property, — see *Gaytes v. Lewis*, 2 Biss. (U. S.) 136; *Joy v. Jackson & Co.*, 11 Mich. 155.

<sup>3</sup> *Ante*, § 5355.

<sup>4</sup> *Allen v. Montgomery R. Co.*, 11 Ala. 437; *Mobile &c. R. Co. v. Tallman*, 15 Ala. 472.

<sup>5</sup> *Pullan v. Cincinnati &c. R. Co.*, 4 Biss. (U. S.) 35.

of its road, provided the road is capable of being divided, so that separate tolls may be taken on that part.<sup>1</sup>

**§ 6135. Statutory Power to Mortgage Liberally Construed.** — Although it is the general rule that the powers granted to corporations are to be strictly construed,<sup>2</sup> and that where the legislature has prescribed a particular purpose for which, and mode in which, a corporate act is to be performed,

<sup>1</sup> *Joy v. Jackson &c. Co.*, 11 Mich. 155. *Enabling acts* relating to mortgages by corporations were *construed* in the following cases, with the conclusions stated: — That the corporation was authorized to loan money on bond and mortgage for either of three purposes; and that the burden of proof was not on the corporation, in a suit to enforce such bonds and mortgages, to show that they arose from some of its lawful pursuits: *Farmers' Loan &c. Co. v. Perry*, 3 Sandf. Ch. (N. Y.) 339. That a *water-power company* had power to mortgage its franchises, including the right to the use of the water: *Willamette Man. Co. v. Bank of British Columbia*, 119 U. S. 191. That the purchase by a railroad company, incorporated in Tennessee, of a majority of the stock of another, a Kentucky corporation, for the purpose of gaining the control and practical ownership of the latter's railroad with its franchises, and the issue of its bonds for the construction and equipment of the road, was in the direction, among the purposes, and within the powers granted and authorized by such general laws: *Wehrhane v. Nashville &c. R. Co.*, 42 Hun (N. Y.), 660, *mem.*; *s. c.* 4 N. Y. St. Rep. 541. That so much of the Tennessee Act of March 24, 1877, amending the statute in relation to the *consolidation of railways*, as limited the power of such companies to execute mortgages or liens

affecting particular classes of their creditors, is not repealed by the Tennessee Act of March 15, 1881, empowering such companies to execute mortgages, etc.: *Frazier v. Railway Co.*, 88 Tenn. 138; *s. c.* 12 S. W. Rep. 537; 40 Am. & Eng. Rail. Cas. 358. That a *turnpike company* may mortgage its road to secure the contractor for constructing it: *Greensburgh &c. Co. v. McCormick*, 45 Ind. 239. That the Florida Central Railroad Company had power to execute a bond which was to be a *mortgage by virtue of the statute*, and without the execution of an additional mortgage to secure it, and as to the effect of such bond when executed: *State v. Florida &c. R. Co.*, 15 Fla. 690. That the *Union Pacific Railroad Company* is not required to pay interest on the bonds issued by the company to the government until the principal becomes due: *United States v. Union Pac. R. Co.*, 91 U. S. 72. That a supplement to a charter does not limit the power to *the completion of the road* as authorized at the time of its passage, but extends to the necessary acquisition of rolling stock and the building or acquiring of branches subsequently authorized: *Gloninger v. Pittsburgh &c. R. Co.*, 139 Pa. St. 13; *s. c.* 21 Atl. Rep. 211. Rights of holders of bonds issued by railroad companies in Florida: *State v. Anderson*, 91 U. S. 667.

<sup>2</sup> *Ante*, §§ 5345, 5659.

if done for any other purpose or in any other mode, it is void,<sup>1</sup>—yet when the reasons upon which these rules rest is examined, it will be seen that they do not exact a strict construction of the power to mortgage. The doctrine that such powers ought to be strictly construed and pursued was founded in the idea that they are in derogation of common right and of the common law.<sup>2</sup> But since private corporations possess, at common law, a general power to mortgage their property, a statutory power to mortgage is not in derogation of the common law, and obviously it in no way infringes the common rights of the people. The courts are therefore disposed to construe such powers liberally for the purpose of effectuating the purpose for which they were granted.<sup>3</sup>

### § 6136. Power Extends to Mortgaging All their Property.

We have elsewhere seen,<sup>4</sup> that corporations possess, by implication of law, and without any express grant of such power, *the general power to alien* and dispose of *all* their property for lawful purposes. It must follow, on the principles of preceding sections,<sup>5</sup> that corporations possess, without any express grant of power, the power to mortgage *all* their property, just as a natural person may;<sup>6</sup> though it has been said that the fact that a company pledges, mortgages, or conveys in trust all its property *is a badge of fraud*.<sup>7</sup> Whether this be a sound conclusion or not, it is plain that a conveyance by a corporation is subject to be impeached in equity at the suit of its

<sup>1</sup> *McSpedon v. New York*, 7 Bosw. (N. Y.) 601; *s. c.* 20 How. Pr. (N. Y.) 395; *Hood v. New York & C. R. Co.*, 23 Conn. 609.

<sup>2</sup> *Ante*, §§ 3013, 5681.

<sup>3</sup> *Central Gold Min. Co. v. Platt*, 3 Daly (N. Y.), 263, 272.

<sup>4</sup> *Post*, § 6466.

<sup>5</sup> *Ante*, §§ 5363, 6133.

<sup>6</sup> *Mobile & C. R. Co. v. Talman*, 15 Ala. 472, 488; *Allen v. Montgomery R. Co.*, 11 Ala. 437. *Power to mortgage all the property* except its franchise to be a corporation, is denied in Eng-

land, under a deed of settlement, which confers power to borrow money "on the security of the funds and property of the association." Such a mortgage, in the opinion of Knight Bruce, L. J., was a plain breach of trust on the part of the directors, because it was inconsistent with the continuance of the society. *Re Providence Life & Fire Ins. Co.*, 33 L. J. Ch. 535.

<sup>7</sup> *Mobile & C. R. Co. v. Talman*, *supra*.



creditors, just as a similar conveyance made by a natural person would be.<sup>1</sup>

§ 6137. **Railway Companies No Such Implied Power.**—As the property of railway companies is devoted to the discharge of *public duties*, it is generally held that such companies have no power to *mortgage, lease, or otherwise alien* their property and franchises such as are *necessary to the performance of those duties*, unless the legislature has expressly granted it, and that an attempt to exercise such power will not exonerate them from responsibility for the performance of those duties.<sup>2</sup> Such a company cannot, therefore, make a *general mortgage* covering its *franchise, its railroad, and all its other property*, without the authority of the legislature.<sup>3</sup> This doctrine has been held to apply to a *horse railroad* company, as well as to a *steam railroad* company.<sup>4</sup> It also follows from this that a *purchaser of railway property, at a sale to foreclose a mortgage thereon*, does not stand in the position of an *innocent*

<sup>1</sup> *Mobile &c. R. Co. v. Talman*, *supra*; *Allen v. Montgomery R. Co.*, *supra*; *post*, ch. 147. Where a *banking corporation* had, by its charter, the power to purchase, hold, and convey any real estate for its use, subject to the limitation that it should hold no more than necessary for its immediate accommodation in transacting its business, or such as it might have acquired, by sale or otherwise, for the purpose of securing debts due to it,—it was held that it might mortgage all the real estate so held by it. *Leggett v. New Jersey Man. &c. Co.*, 1 N. J. Eq. 541; *s. c.* 23 Am. Dec. 726.

<sup>2</sup> *Ante*, §§ 5355, 5356; *Frazier v. Railway Co.*, 88 Tenn. 138, 152; *s. c.* 12 S. W. Rep. 537; 40 Am. & Eng. Rail. Cas. 358; *Thomas v. Railroad Co.*, 101 U. S. 71. On the contrary, that such companies have the general power to mortgage their property and *secondary franchises* for the purpose

of equipping their roads,—see *Miller v. Rutland &c. R. Co.*, 36 Vt. 452; *Eldridge v. Smith*, 34 Vt. 484.

<sup>3</sup> *Com. v. Smith*, 10 Allen (Mass.), 448; *s. c.* 87 Am. Dec. 672; *Richardson v. Sibley*, 11 Allen (Mass.), 65; *s. c.* 87 Am. Dec. 700.

<sup>4</sup> *Richardson v. Sibley*, *supra*. It has been ruled in Alabama that the general powers of a railroad corporation extend to the creation of a lien on all its property, without reference to the mode of creating the debt. This being so, a provision in the charter of such a corporation, authorizing it to mortgage its property for a particular purpose, such as “*to borrow money to carry into effect the objects of the charter*,” did not restrict its power to mortgage it for *another purpose*, within the general scope of the objects for which the company was created. *Allen v. Montgomery &c. R. Co.*, 11 Ala. 437, 454.

*purchaser without notice*, but that he must inquire at his peril whether the company had power to make the mortgage; otherwise he will take the property subject to obligations subsisting against it, which the mortgage, if valid, might have displaced. When, therefore, a statute provided that "no railroad company shall have power . . . to give or create any mortgage, or any other kind of lien on its railway property in this State, which shall be valid and binding against judgments and decrees and executions therefrom, for timbers furnished and work and labor done on, or for damages done to, persons and property in the operation of its railroad in this State"; and the charter of a particular railroad company provided that "the said company may at any time *increase its capital to a sum sufficient to complete the said road, and to stock it with everything necessary to give it a full operation* and effect, either by opening books for *new stock*, or by *selling new stock*, or by borrowing money on the credit of the company, and on the mortgage of its charter and works," etc.; and the company, twenty-five years after its road was completed and in full operation, made a mortgage thereon, which was sold to foreclose the same,—it was held that the purchasing corporation took the property subject to claims of the nature mentioned in the first-named statute.<sup>1</sup> It has been held *in England* that a railway company may transfer *all its rolling stock* to a creditor, by way of security for a debt on which he had commenced an action. Accordingly, where two creditors sued such a company, and one of them was about to obtain a judgment, and the company compromised the action with him, by pledging all its rolling stock to him, it was held that the other creditor could not complain; since the company merely did voluntarily what would have been done under compulsion of a judgment and execution if no compromise had taken place.<sup>2</sup> But, clearly, this does not express the American law; since in this country all the rolling stock of a railway company cannot be taken in execution.<sup>3</sup>

<sup>1</sup> *Frazier v. Railway Co.*, 88 Tenn. 138, 150, 151, *supra*.

<sup>2</sup> *Blackmore v. Yates*, 2 L. R. Ex.

224; *s. c.* 36 L. J. Ex. 121; 15 Week. Rep. 750.

<sup>3</sup> Compare *ante*, §§ 5373, 5374; *post*,

§ 6138. **Such Powers Frequently Conferred by Statute.** — Statutes have frequently been enacted conferring upon corporations, formed for the carrying out of public objects, the power to mortgage their franchises. Thus, some of the earlier statutes of Massachusetts expressly authorized particular railroad corporations to mortgage their property for the purpose of securing the payment of bonds issued by them; and provided that, in case of failure to perform the conditions of such bonds, the property might be sold, and that the purchasers, before beginning the business of managing the railroad, should become a corporation with the powers and privileges, duties and restrictions, of the original corporation.<sup>1</sup> And, as recited by Mr. Justice Gray in an opinion on this question, some railway corporations in Massachusetts had been in terms authorized to *lease* or *assign* their franchises and all or part of their tracks to other similar corporations.<sup>2</sup> “In each of those instances,” said the learned judge, “the property or franchise of the first corporation would pass into the possession and management of another corporation, subject to the like legislative control as the first; not into the hands of individuals.”<sup>3</sup>

§ 6139. **Corporations may Mortgage to Secure Pre-existing Debts.** — An express power, conferred upon a corporation by statute, of securing its debts by a mortgage of any or all of its real estate, empowers it to execute a mortgage to secure a pre-existing indebtedness; and the fact that the notes representing the indebtedness were executed subsequently to the

ch. 192, art. I. That a *street railroad company* has power, under Rev. Stats. Mo. 1879, § 706, to mortgage its right of way, — see *Hovelman v. Kansas City Horse R. Co.*, 79 Mo. 632, 643.

<sup>1</sup> Mass. Stat. 1855, ch. 24; *Ibid.*, ch. 408, § 11; Mass. Stat. 1856, ch. 279; Mass. Stat. 1857, ch. 278, § 9; Mass. Stat. 1859, ch. 144, § 9; *Ibid.*, ch. 202, § 13; Mass. Stat. 1861, ch. 48, § 11; *Ibid.*, ch. 147, § 4.

<sup>2</sup> *Richardson v. Sibley*, 11 Allen (Mass.), 56, 68; s. c. 87 Am. Dec. 700; citing Mass. Stat. 1855, ch. 338; Mass. Stat. 1857, ch. 211, § 4; *Ibid.*, ch. 216, § 4; *Ibid.*, ch. 227, § 14; *Ibid.*, ch. 250; Mass. Stat. 1858, ch. 38, § 9; Mass. Stat. 1859, ch. 35, § 2; *Ibid.*, ch. 180, § 2; Mass. Stat. 1861, ch. 48, § 13; *Ibid.*, ch. 81; *Ibid.*, ch. 89, § 8; *Ibid.*, ch. 90, § 3; *Ibid.*, ch. 135, § 8.

<sup>3</sup> *Richardson v. Sibley*, *supra*.

mortgage is of no consequence, provided the debt, though in another form, existed before.<sup>1</sup>

§ 6140. **Power to Mortgage Franchises.**—The courts are united upon the proposition that a corporation has no power, independently of the express grant of the legislature, to mortgage or otherwise alien its *franchise of being a corporation*.<sup>2</sup> It follows that those who purchase, at a judicial or other sale, the property and franchises of a corporation, do not thereby *become a corporation*. The purchase may vest in them all that is bought, *as property*, but they cannot prosecute the enterprise, as being a corporation, until they have been duly incorporated. Nor are they entitled to the restriction upon individual liability of members or stockholders accorded to the stockholders of the old corporation. If they issue bonds before becoming incorporated, they are liable thereon as ordinary obligors are; and the fact that they use the name of the old corporation in issuing such bonds makes no difference.<sup>3</sup> But, as already seen, the *secondary franchises* of a corporation are *assignable*, except such franchises as are necessary to the performance of *public obligations*, and those are assignable only with the express consent of the legislature.<sup>4</sup> The franchise of *receiving tolls* is a secondary franchise, which is in its nature assignable, at least with the consent of the legislature; and it has been held that authority in the governing statute of a

<sup>1</sup> *Martin v. Niagara Falls Paper Man. Co.*, 122 N. Y. 165; *s. c.* 25 N. E. Rep. 903; 33 N. Y. St. Rep. 318; affirming *s. c.* 44 Hun (N. Y.), 130; 8 N. Y. St. Rep. 265.

<sup>2</sup> *Ante*, § 5353; *Coe v. Columbus &c. R. Co.*, 10 Ohio St. 372; *s. c.* 75 Am. Dec. 518; *Arthur v. Commercial &c. Bank*, 9 Smedes & M. (Miss.) 394, 431; *s. c.* 48 Am. Dec. 719; *State v. Consolidation Coal Co.*, 46 Md. 1, 9; *Hays v. Ottoway &c. R. Co.*, 61 Ill. 422; *Richardson v. Sibley*, 11 Allen (Mass.), 65; *s. c.* 87 Am. Dec. 700; *Com. v. Smith*, 10 Allen (Mass.), 448, 455; *s. c.* 87 Am. Dec. 672; *East Bos-*

*ton &c. R. Co. v. Hubbard*, 10 Allen (Mass.), 459; *Clarke v. Omaha &c. R. Co.*, 4 Neb. 458, 465; *s. c.* 19 Am. Ry. Rep. 423, 430; *Richards v. Merrimack &c. R.*, 44 N. H. 127, 136; *Bardstown &c. R. Co. v. Metcalfe*, 4 Met. (Ky.) 199, 206; *s. c.* 81 Am. Dec. 541; *Pittsburg &c. R. Co. v. Allegheny Co.*, 63 Pa. St. 126, 135; *Stewart's Appeal*, 56 Pa. St. 413, 422; *Wood v. Bedford &c. R. Co.*, 8 Phila. (Pa.) 94; *Eldridge v. Smith*, 34 Vt. 483.

<sup>3</sup> *Chaffe v. Ludeling*, 27 La. An. 607.

<sup>4</sup> *Ante*, § 5352.

*plank-road company* "to mortgage the road or other property," carries with it the right to mortgage the franchise of receiving tolls, though not to mortgage any franchise essentially corporate in its nature, and such as cannot be enjoyed by a natural person.<sup>1</sup>

§ 6141. **Power to Mortgage its After-acquired Property.**—Whenever a corporation has power to mortgage its property generally, it has, in the absence of any restraining statute, power to mortgage *property to be by it thereafter acquired*, in like manner as a natural person has.<sup>2</sup> Such mortgages are indeed *invalid at law*, it being a fundamental maxim of the common law that a man cannot grant or convey what he does not own.<sup>3</sup> But it has long been settled, both in England and this country, that courts of equity will uphold and give effect to such mortgages, in so far as they do not conflict with the rights of subsequent creditors and purchasers without notice.<sup>4</sup>

<sup>1</sup> *Joy v. Jackson &c. Co.*, 11 Mich. 155.

<sup>2</sup> *Carpenter v. Black Hawk Gold Min. Co.*, 65 N. Y. 43, 51; *Fisk v. Potter*, 2 Abb. App. Dec. (N. Y.) 138.

<sup>3</sup> Bacon's Maxims Reg. 14; Noy's Maxims, 62; Perkins on Conv., tit. Grant, § 65; *Lunn v. Thornton*, 1 C. B. 379; *Jones v. Richardson*, 10 Met. (Mass.) 481; *Barnard v. Eaton*, 2 Cush. (Mass.) 294; *Rice v. Stone*, 1 Allen (Mass.), 566; *Low v. Pew*, 108 Mass. 347; s. c. 11 Am. Rep. 357; *Otis v. Sill*, 8 Barb. (N. Y.) 102; *Seymour v. Canandaigua &c. R. Co.*, 25 Barb. (N. Y.) 284, 304, *per* E. D. Smith, J.; *Looker v. Peckwell*, 38 N. J. L. 253; *Smithurst v. Edmunds*, 14 N. J. Eq. 408, 413; *Robinson v. MacDonnell*, 5 Maule & S. 228; *Gale v. Burnell*, 7 Ad. & El. (N. s.) 850; *Winslow v. Merchants' Ins. Co.*, 4 Met. (Mass.) 306; s. c. 38 Am. Dec. 368; *Moody v. Wright*, 13 Met. (Mass.) 17; s. c. 46 Am. Dec. 706; *Chapman v. Weimer*,

4 Ohio St. 481; *Pierce v. Emery*, 32 N. H. 484; *Van Hoozer v. Cory*, 34 Barb. (N. Y.) 9. But a grant of a thing which the grantor has *potentially*, though not *actually*, is good. *Grantham v. Hawley*, Hobart, 132. See also *Congreve v. Evetts*, 10 Ex. 298; *Hope v. Hayley*, 5 El. & Bl. 830; *Chidell v. Galsworthy*, 6 C. B. (N. s.) 471.

<sup>4</sup> *Seabourn v. Powell*, 2 Vern. 10; *Doe v. Pott*, 2 Dougl. 710; *Noel v. Bewley*, 3 Sim. 103; *Ex parte Cotton*, 6 Jur. 1045; *Metcalf v. Archbishop of York*, 1 Mylne & C. 547, 553; *Langton v. Horton*, 1 Hare, 549; *Mitchell v. Winslow*, 1 Story (U. S.), 630; *Field v. New York*, 6 N. Y. 179, 186; s. c. 57 Am. Dec. 435; *Pierce v. Emery*, 32 N. H. 484; *Pierce v. Milwaukee &c. R. Co.*, 24 Wis. 551; s. c. 1 Am. Rep. 203; *Farmers' Loan & Trust Co. v. Fisher*, 17 Wis. 114; *Miller v. Rutland &c. R. Co.*, 36 Vt. 452; *Pennock v. Coe*, 23 How. (U. S.) 117. The old

§ 6142. When Railroad Companies have This Power. — Railroad companies, as already seen,<sup>1</sup> have, in general, no power to mortgage such of their properties as are necessary to the performance of their public duties, unless such power has been conferred by the legislature. But where the power to mortgage their property and franchises has been *expressly conferred* upon such corporations, this is held to carry with it, by a reasonable implication, the same power to mortgage their after-acquired property which a natural person possesses.<sup>2</sup> For instance, a *railroad company* which has power under its charter to *pledge* its property, franchises, rights, and credits, may mortgage property to be by it subsequently acquired. The power to pledge its franchises and rights carries with it, as an incident, the power to pledge everything that may be necessary to the enjoyment of the franchise, and such a mortgage is good as against subsequent creditors.<sup>3</sup> So, where a statute regulating railroad companies gives every such corporation power to borrow money and to pledge its property and income to secure payment thereof, it has power, for such purpose, to mortgage property thereafter to be acquired by it.<sup>4</sup> So, under a statutory power to borrow money for the purpose of constructing and equipping its road, and to issue bonds therefor, and, for the purpose of securing the payment of such bonds and the interest accruing thereon, to mortgage

cases on this subject are reviewed at length by Paige, J., in *Otis v. Sill*, 8 Barb. (N. Y.) 102. See also *Matter of Howe*, 1 Paige (N. Y.), 125, 128; *s. c.* 19 Am. Dec. 395; *White v. Carpenter*, 2 Paige (N. Y.), 217. And a *covenant to give a mortgage on subsequently acquired property* is equivalent to an *equitable mortgage* thereon, and good in equity, except as to subsequent purchasers without notice. *Fletcher v. Manning*, 2 Story (U. S.), 555; *Pie v. Danbury*, 3 Brown C. C. 595; *Burn v. Burn*, 3 Ves. 573, 576; *Metcalfe v. Archbishop of York*, 1 Mylne & C. 547, 553; *Robertson v. Morton*, 1 Drury & W. 195. Where a

railroad company executed and recorded a mortgage of all the lands it owned or should thereafter acquire, etc., and an *agent* of the company sold and conveyed land to the company, it was held that he must be deemed to have *waived* any claim to a *vendor's lien* for the price as against the mortgagees and those claiming under them. *Fisk v. Potter*, 2 Abb. App. Dec. (N. Y.) 138.

<sup>1</sup> *Ante*, §§ 5355, 5356, 5880.

<sup>2</sup> *Pierce v. Emery*, 32 N. H. 484.

<sup>3</sup> *Phillips v. Winslow*, 18 B. Mon. (Ky.) 431, 445; *s. c.* 68 Am. Dec. 729.

<sup>4</sup> *Ludlow v. Hurd*, 1 Disney (Ohio), 552.

"all or any part of their road, property, rights, liberties, and franchises," — a railroad company may execute a valid mortgage of "all the road, property, rights, liberties, privileges, corporate franchise, incomes, tolls, and receipts, *now held or hereafter to be acquired.*" Such mortgage will constitute a lien on the engines, cars, furniture of stations, etc., required for the transaction of the business of the company, whether owned at the date of the mortgage or subsequently acquired, which will be valid in equity.<sup>1</sup> So, it has been held that a statute which authorizes the directors of a railway corporation to borrow money for the purpose of carrying out the objects of the incorporation, to issue evidences of the indebtedness therefor, and, for the purpose of securing the payment of the same, "to pledge, by mortgage or otherwise, the entire road, fixtures, and equipment, with all the appurtenances, income, and resources thereof, as far as the same can be done without prejudice to the previous and existing liens on the same," — is broad enough to authorize a mortgage of property to be subsequently acquired by the corporation.<sup>2</sup>

§ 6143. **Theory of the Rule Which Accords This Power to Railway Companies.** — This rule has been placed upon two theories: 1. That the *after-acquired property* of a railway company in and about its railway, rolling stock, etc., may be regarded as *accretions*, in the sense of certain ancient common-law authorities.<sup>3</sup> It is believed, however, that a more exten-

<sup>1</sup> Philadelphia &c. R. Co. v. Woelper, 64 Pa. St. 366; s. c. 3 Am. Rep. 596; quoting with approval Covey v. Pittsburgh &c. R. Co., 3 Phila. (Pa.) 173; distinguishing Robert's Appeal, 60 Pa. St. 400. All the cases in which such mortgages have been drawn in question, so far as the writer has observed, were contests between the beneficiaries under the mortgage and subsequent creditors or purchasers.

<sup>2</sup> Coe v. Columbus &c. R. Co., 10 Ohio St. 372, 393; s. c. 75 Am. Dec. 518, 533.

<sup>3</sup> These authorities, as pointed out by Mr. Justice Sharswood, are to the effect that, while the maxim, *qui non habet, ille non dat*, or, as oftener expressed, *nemo dat quod non habet*, is a settled principle of the common law, yet it does not extend so far as to prevent a man from granting the *accretions* or fruits of what he has at the time of the grant, — as, for instance, all the wool which shall grow on the sheep which he has, for a term of years. Thus, where a lessor made a covenant that the lessee of a term

sive examination of the holdings of the courts of common law on this question will show that those holdings are too weak to support such mortgages; and, accordingly, in order to sustain them, resort has been had to the rule of *equity*, under which assignments of contingent estates and interests, not good in law, are enforced and effectuated, whenever the property comes into existence.<sup>1</sup>

§ 6144. **A Practical View of This Subject.** — A *practical view of the subject* is that, as railway property is subject to rapid deterioration, and as most of the railroads are “bonded,” so to speak, either before their construction or when they are but partly constructed, unless the mortgage could be made to reach forward and cover the after-acquired property, it would not be a good security, and would not be effective to raise the money required by the company to complete the construction of its road and to equip it. “The bare road,” said Sharswood, J., “only then constructed in part, without any rolling stock or equipments, would have been no security, or a very inadequate one. Had the road even been fully equipped at the date of the mortgage, can it be doubted that the legislature meant that it should comprise everything subsequently acquired to replace the old and worn-out materials and to main-

might take the corn that should be growing at the end of the term, it was held to be a good grant, upon the weak and quaint reason that the land is the mother of all fruits. *Grantham v. Hawley*, Hobart, 132. Therefore, it is said that he that hath the land may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant. Ass. 21 Henry VI. Another old authority is to the effect that a person may grant all the tithe wool that he shall have in such a year. 1 Plowd. 12 a. So, if a man grant *vesturam terræ*, the grantee shall have the corn, grass, underwood, sweepage, and the like. 1 Inst. 4 b. Quoting and reasoning upon the basis of these author-

ities, it was said by Mr. Justice Sharswood, that “it is indubitable that a mortgage of land will pass all structures and fixtures that may afterwards be erected upon it by the mortgagor.” *Philadelphia &c. R. Co. v. Woelpper*, 64 Pa. St. 366; s. c. 3 Am. Rep. 596.

<sup>1</sup> In *Philadelphia &c. R. Co. v. Woelpper*, 64 Pa. St. 366; s. c. 3 Am. Rep. 596, — the decision is based by Mr. Justice Sharswood on both these principles; and this last is the reasoning on which Judge Agnew proceeded in a case in the Philadelphia Common Pleas: *Covey v. Philadelphia &c. R. Co.*, 3 Phila. (Pa.) 173, quoted in next section.



tain and keep up the equipment? No money would have been loaned on a security daily deteriorating, and which must eventually perish entirely.”<sup>1</sup>

§ 6145. **Effect of a Mortgage of After-acquired Property.**—There is a difference of judicial opinion as to the effect of a mortgage which covers *after-acquired property*, especially in respect of the operation of such a mortgage upon after-acquired *personal property*. The divergence of opinion is this:—According to one view, the mortgage does not become operative upon the after-acquired *personal property* without *delivery*; but, according to the other view, it becomes operative as fast as such property is acquired. According to the former view, a mortgage of after-acquired personal property operates as a mere *executory contract to deliver* the same; and whereas a sale of personal property, not followed by delivery, is void at law as against creditors and purchasers,<sup>2</sup> so under this theory a mortgage of after-acquired property becomes operative against creditors and purchasers only from the time when the mortgagor acquires title and possession of the property, and *executes the contract* by delivering possession of it to the mortgagee.<sup>3</sup> But, according to the latter view, the

<sup>1</sup> Philadelphia &c. R. Co. v. Woelper, 64 Pa. St. 366; s. c. 3 Am. Rep. 596, 600. Similar was the observation of Judge Agnew, in a case in the Philadelphia Common Pleas: “To build a railroad requires a vast capital beyond ordinary means, and to borrow it, to carry into effect the objects of the incorporation, demands all the security within the possible power of the corporation to give. By necessity and practice, the money of the creditor capitalist finishes and equips the road; and slender indeed would his security be which extends not beyond worn-out rails, and rolling stock, and equipments first in use, and these, indeed, not often in being at the time of the execution of the mortgage. In

giving the power to borrow and pledge, it must be supposed the power was given to its fullest extent, in order to carry into effect the object of the incorporation.” Covey v. Pittsburgh &c. R. Co., 3 Phila. (Pa.) 173.

<sup>2</sup> Monroe v. Hussey, 1 Or. 188; s. c. 75 Am. Dec. 552; Born v. Shaw, 29 Pa. St. 288; s. c. 72 Am. Dec. 633, and note 634.

<sup>3</sup> Moody v. Wright, 13 Met. (Mass.) 17; s. c. 46 Am. Dec. 706; Coe v. Columbus &c. R. Co., 10 Ohio St. 372; s. c. 75 Am. Dec. 518; Pettis v. Kellogg, 7 Cush. (Mass.) 456; Farmers’ Loan & Trust Co. v. Long Beach Improv. Co., 27 Hun (N. Y.), 89; conceded in Thompson v. Foerstel, 10 Mo. App. 290, 301.

acquisition by the mortgagor of each item of such property, even before it has been delivered to the mortgagee in execution of the contract, *feeds the estoppel* of the mortgage, so to speak.<sup>1</sup> The *former class of cases* rests, in so far as such mortgages are intended to operate upon real property, upon the policy of the registration laws, and, in so far as they are intended to operate upon personal property, upon the policy of the statute of frauds; and the substantial conclusion, ably reasoned by Gholson, J., in the Supreme Court of Ohio, is that a corporation cannot, under its general powers, make a mortgage of after-acquired property which will operate as a substantial security either at law or in equity; and that the claim upon such a security would be invalid as to the real estate of a corporation, against both creditors and purchasers, and as to its personal property against creditors until *possession* be taken, and of doubtful validity against purchasers.<sup>2</sup> On the other hand, the *latter view* rests upon principles derived from the English Court of Chancery; and, according to it, as applied to a railway mortgage covering after-acquired property, the lien thereby created attaches to subsequently acquired personal property as fast as it comes into existence, to the exclusion of the rights of all subsequent creditors and purchasers *affected with notice*.<sup>3</sup> Under either theory of the

<sup>1</sup> *Williamson v. New Jersey &c. R. Co.*, 25 N. J. Eq. 13; *Pennock v. Coe*, 23 How. (U. S.) 117; *Hamlin v. European &c. R. Co.*, 72 Me. 83. See also *Metcalfe v. Archbishop of York*, 1 Mylne & C. 547; *Lyde v. Mynn*, 1 Mylne & K. 683; *Wellesley v. Wellesley*, 4 Mylne & C. 561; *Field v. New York*, 6 N. Y. 179; *s. c.* 57 Am. Dec. 435. Compare *Langton v. Horton*, 1 Hare, 549, where the mortgage was perfected by *delivery* of possession before other creditors sued out execution.

<sup>2</sup> *Coe v. Columbus &c. R. Co.*, 10 Ohio St. 372, 392; *s. c.* 75 Am. Dec. 518, 531.

<sup>3</sup> *Pennock v. Coe*, 23 How. (U. S.)

117. According to an excellent summary of a decision of the Supreme Judicial Court of Maine, by Mr. Spaulding, the official reporter, "such a mortgage operates upon the inchoate right of the company to a conveyance of *lands* under contracts subsequently made, as soon as the contracts are made and the company is in possession under them for the purposes of the charter. It will take effect upon *lands* subsequently contracted for or purchased to secure adequate facilities and space for engine and car houses and other railroad accommodations, to which the company at the time of the purchase had a right and expected to build their road;

effect of such mortgages, and under any remedial system, legal, equitable, or a blending of the two,—unless the rule has been changed by local statutes, *where the mortgagee takes possession* prior to the intervention of the rights of subsequent purchasers or creditors, he may hold such possession as against them.<sup>1</sup>

§ 6146. **Such a Mortgage Enforceable against a Subsequent Vendor's Lien.**—The theory which upholds mortgages of after-acquired property in the fullest sense has led to the conclusion that such a mortgage is enforceable against a subsequent vendor's lien. Since the legal title to after-acquired property accrues to the corporation, the mortgage attaches, and the rights which the vendor would have in an ordinary case are gone.<sup>2</sup>

§ 6147. **Whether Such Mortgages will Cut under the Liens of Mechanics and Material-men.**—This is a question which presents a conflict of opinion; and obviously the question depends somewhat on the terms of the statute in each particular case, giving the lien to the mechanic or material-man. If the statute creates a lien in his favor such as will follow the specific materials he has furnished into the road-bed or other structure, then there seems to be no good reason why his specific lien should not hold the property in preference to the general lien of the prior mortgagor. And even where the lien of the statute is general, there is a strong equity in giving a mechanic or material-man a priority over the prior mortgage until he is paid. The contrary rule outrages every sense of justice, since it results in nothing more than

and such incumbrance will continue though the road is not built to such lands, and the right to use them in direct connection with the road without further legislative authority has expired." *Hamlin v. European &c. R. Co.*, 72 Me. 83.

<sup>1</sup> *Langton v. Horton*, 1 Hare, 549; *Thompson v. Foerstel*, 10 Mo. App.

290, 301; *Chapman v. Weimer*, 4 Ohio St. 481. That a levying creditor gets only the mortgagor's *equity of redemption*, see *Coe v. McBrown*, 22 Ind. 252.

<sup>2</sup> *Pierce v. Milwaukee &c. R. Co.*, 24 Wis. 551; s. c. 1 Am. Rep. 203. Compare *Farmers' Loan & Trust Co. v. Fisher*, 17 Wis. 114; *Miller v. Rutland &c. R. Co.*, 36 Vt. 452.

in allowing one man to get another man's property without paying him anything for it. It is true he might have kept possession of his property till he got his pay; but this is an answer which any rogue or cheat may make to an unsuspecting man from whom he has inveigled property on a credit. Some courts have recently taken this view of the question;<sup>1</sup> but other courts hold the reverse.<sup>2</sup>

**§ 6148. Mortgage or Pledge of Future Earnings.**—A railway or other corporation having a general power to mortgage, may, on like grounds, make a valid mortgage or pledge of its *future net earnings*, to raise money for the construction and equipment of its road or other property.<sup>3</sup> The validity

<sup>1</sup> Neilson v. Iowa Eastern R. Co., 44 Iowa, 71; s. c. 10 West. Jur. 604; 3 Cent. L. J. 703; Taylor v. Burlington &c. R. Co., 4 Dill. (U. S.) 570; s. c. 4 Cent. L. J. 536.

<sup>2</sup> Pierce v. Emery, 32 N. H. 484. In this case there was a mortgage of a railroad covering future accretions. Some railroad iron arrived from Europe subject to duty. An agreement was made between the railroad company and certain persons that the latter should pay the duty and allow the road to lay the iron in its track, and retain a special lien on the iron for the money so advanced. It was held that this lien could not be asserted against the iron after it had been delivered to the corporation, unless the trustees under the mortgage had notice of it and assented to it. The terms of the agreement were that, unless the money advanced was paid within a specified time, the persons making the advance might take up the iron and hold it until they were paid. But the court held that, it having passed according to this bargain, into the possession of the corporation, the lien for duties was gone, and could not be asserted by

the persons so advancing the money as against the mortgagee; but that the contract was valid as between the parties making it, and, if the trustees assented to it, the contract would be binding in equity on the trustees and bondholders.

<sup>3</sup> Jessup v. Bridge, 11 Iowa, 572, 574; s. c. 79 Am. Dec. 513; Dunham v. Isett, 15 Iowa, 284; Galena &c. R. Co. v. Menzies, 26 Ill. 121. Such a mortgage was construed in Texas &c. R. Co. v. Marlbor, 123 U. S. 687,—the court sustaining an action against the corporation by a bondholder to recover annual interest *in money*, on failure of the company to exercise its option to pay in *scrip*. "We know of no law which prevents a corporation from leasing portions of its works or even causing some of its works to be built with an understanding with the contractor that he shall be permitted to reimburse himself by the receipt of the tolls arising from the same. The contractor in such case becomes the agent of the company, and it is responsible for his acts." Boykin v. Shaffer, 13 La. An. 129, 137, per Merrick, C. J.; citing Rabassa v. Orleans Nav. Co., 5 La. 461; s. c. 25

of such mortgages is supported on the same ground which supports the validity of other mortgages of subsequently acquired property. They are necessarily *good as against subsequent creditors*, otherwise they would convey no preference, and would be of no value as a security. A railroad company authorized by statute<sup>1</sup> to mortgage the income of its property, may, in order to make the mortgage effectual, stipulate therein that, upon default, the trustee may take possession, operate the road, and receive its earnings.<sup>2</sup> That a mortgage of the *net earnings* or *net income* of a railway property is of *doubtful and conjectural value as a security*, must be concluded when one reflects upon the difficulty of determining to what extent the directors of the company possess the discretion of applying its general earnings in maintaining the existing status or in bettering the property. To hold, in favor of bondholders, that, as against them, the directors have no right to do more than preserve the property in the condition in which it existed when the bonds were issued, would be impracticable in the case of a railway property in a growing country, where increased demands are made upon its carrying capacity by the public from year to year. On the other hand, to remit the security of the bondholders in this regard to the absolute discretion of the directors, and to allow them to absorb all the earnings of the company in bettering its property, its income bonds in the mean time going unpaid, — would deprive such a mortgage of the substantial character of a security, and leave it the mere executory contract of the corporation to pay money with intervening interest. The difficulties of construction in this respect are as great as those which have arisen in respect of the question, arising between the life tenant and remainderman, what stock dividends made by a corporation are to be deemed capital and what income.<sup>3</sup>

Am. Dec. 200,—which see. That a railway company, having no express power in its charter so to do, cannot lawfully issue *deferred income bonds*, —see *McCalmont v. Philadelphia & R. Co.*, 14 Phila. (Pa.) 479.

<sup>1</sup> In this case, Gen. Stats. Minn. 1878, ch. 34, § 70.

<sup>2</sup> *Seibert v. Minneapolis & C. R. Co.*, 52 Minn. 246; s. c. 53 N. W. Rep. 1151.

<sup>3</sup> *Ante*, § 2192, *et seq.* See also *ante*,

§ 6149. **Power to Mortgage Subscriptions to its Stock.** — A principle already stated<sup>1</sup> is broad enough to confer upon a corporation power to alien any of its property of whatever description. A power to sell certainly includes a power to mortgage, which is nothing more than a defeasible sale.<sup>2</sup> It has been several times held that a railroad company has power to *assign its stock subscriptions* for the purpose of raising money to build and equip its road.<sup>3</sup> Possessing this power, it is difficult to see upon what principle a power to *mortgage* or *pledge* such *choses in action* can be denied. But this power was denied by the Supreme Court of Illinois, whilst conceding that the company would have had power to *sell* the subscriptions. It was moreover held that a statute giving such a company power to mortgage its "railroad track, right of way, depot grounds, rights, privileges, franchises, immunities, machinery, machine-houses, rolling stock, furniture, tools, implements, appendages and appurtenances," did not confer power to mortgage its stock subscriptions to secure bonds which it issued for the purpose of raising money.<sup>4</sup> This decision, so far as it denies the right of a railway company to pledge, for the legitimate purposes of its organization, the subscriptions to its capital stock, is so clearly destitute of support in reason and authority that it ought not be quoted as law. But such a power would have to be exercised in subordination to any restraint existing, under the terms of the charter or otherwise, upon the *power of the directors to make calls*; since the directors could not transfer more than the corporation possessed. As the power of the directors to make calls is a *discretionary power*,<sup>5</sup> it does not appear upon what principle this power could be assigned by

§ 2268. The difficulty of determining what are *net earnings* under a mortgage of the net earnings of a railway company, and the extent to which the directors are, notwithstanding the mortgage, at liberty to consume the earnings in improving the property, while the annual interest due the bondholders remains unpaid, is illus-

trated by the case of *Day v. Ogdensburgh & C. R. Co.*, 107 N. Y., 129. The same difficulty arises in respect of the rights of *preferred stockholders*: *Ante*, § 2268, *et seq.*

<sup>1</sup> *Ante*, § 5374.

<sup>2</sup> *Ante*, §§ 5363, 6133.

<sup>3</sup> *Ante*, § 1818.

<sup>4</sup> *Morris v. Cheney*, 51 Ill. 451.

<sup>5</sup> *Ante*, § 1705, 1706.

them to a third person advancing money to the company. But where a *call has already been made* by the directors, acting within their powers, and notice of the call has been regularly given,<sup>1</sup> then the proportion to be paid by each stockholder under the call, in respect of the shares held by him, becomes a *debt* due and payable by him to the company. This debt, as we have seen, is assignable by operation of law,—that is to say, it is subject to *garnishment* by a creditor of the company.<sup>2</sup> Such being its nature, no reason seems to exist, under the principles of law, which should preclude the corporation from assigning it, by way of mortgage or pledge, to secure an advance of money.<sup>3</sup>

§ 6150. *State of the English Law on This Question.*—In England, the question of the power of the directors of a company to *mortgage future calls*, the making of which has been vested in their *discretion*, has generally been presented as a mere question of the *interpretation of the company's deed of settlement, articles of association, or other constating instrument*, and not as a question involving an interpretation of an act of Parliament. Such a power was held not to be granted by a clause in the deed of settlement of a company which authorized the directors to borrow on the security of its “*funds or property*.” The reason given for this conclusion was, in part, that already suggested, that it would put an end to the *discretion* which the directors are bound to exercise in making the calls.<sup>4</sup> But this decision does not seem to be tenable, provided the directors have the discretionary power to call in advance *all* that is due from the shareholders; since an assignment of the uncalled capital, payable at a future day named, would be tantamount to making a call upon the shareholders for payment upon that day; and surely a court of equity ought not to concern itself with the form or manner in which the directors should make the call, provided the rights

<sup>1</sup> *Ante*, § 1746, *et seq.*

<sup>2</sup> *Ante*, §§ 3578, 3579.

<sup>3</sup> That *calls actually made* may be assigned by way of mortgage or pledge, see *Gibbs' Case*, L. R. 10 Eq. 312; *Re Sankey Brook Coal Co. No. 2*, L. R. 10 Eq. 381.

<sup>4</sup> *Stanley's Case*, 33 L. J. Ch. 335;

*s. c.* 4 De Gex, J. & Sm. 407. To the same effect, is *King v. Marshall*, 33 Beav. 560; *Bank of South Australia v. Abrahams*, L. R. 6 P. C. 562. See also and compare *Ex parte Bradshaw*, 15 Ch. Div. 465; *English Channel Steamship Co. v. Rolt*, 17 Ch. Div. 715.

of the shareholders were secured by having reasonable notice. We also find decisions in that country, arising under deeds of settlement giving the directors power to mortgage "the property and effects of the company," in which the conclusion has been reached that this does not embrace a power to mortgage uncalled capital; since the words quoted refer to *things actually existing*, and not to things having a mere potential existence.<sup>1</sup> But the same decisions concede that, after the call has been made, it becomes a *debt* which may be *assigned* by way of *pledge* or *mortgage*. But where, in the company's memorandum of association, the power was expressed in these words, "to borrow money on behalf of the company, and to mortgage, sell, and dispose of all or any part of the company's property and *rights*,"—it was held by Mr. Justice Kay, in the Chancery Division, that this included the power to assign, by way of mortgage or pledge, the uncalled capital of the company.<sup>2</sup>

### § 6151. Mortgage of the "Undertaking" in English Law.

The word "undertaking," which is used in English railway mortgages, has been defined in the Companies Clauses Consolidation Act<sup>3</sup> to mean "the undertaking or works, of whatever nature, by the special act authorized to be executed." The word "undertaking" is held not to embrace *debts due the company*; for to hold the contrary would paralyze the proceedings of the company and prevent its carrying on its business. Accordingly, a mortgage debenture, whereby the company charged "all the lands, tenements, and estates of the company, and all their 'undertaking,'" did not embrace *unpaid calls* of

<sup>1</sup> Re Sankey Brook Coal Co., L. R. 10 Eq. 381; s. c. 22 L. T. (N. S.) 784; 18 Week. Rep. 914.

<sup>2</sup> Howard v. Patent Ivory Man. Co., 38 Ch. Div. 156, 169. But where the directors of a company, having power to raise money for the purposes of the company, in such manner as they should deem best, issued debentures, charging all the lands, property, and effects of the company, of what nature and kind soever, which the company should then hold or be possessed of,—it was held that the debenture-holder should be paid, in preference to other creditors of the

company, out of any money raised by calls, either made or to be made, for payment of the debts of the company. Ex parte Lehman, 23 L. T. (N. S.) 599; s. c. 19 Week. Rep. 344, per Vice-Chancellor Stuart. As no full report of this case is accessible to the author, he is unable to state the grounds upon which it proceeds. But it seems to be no authority. It was denied by the Privy Council in Bank of South Australia v. Abrahams, L. R. 6 P. C. 270.

<sup>3</sup> 8 & 9 Vict., ch. 16, §§ 2, 41, 42, and schedule (C).



its capital, which the directors had not called in.<sup>1</sup> At a later date it was settled that a mortgage of the "undertaking" of a railroad company does not create any specific charge upon the company's stock or surplus lands, but extends no further than to create a right to a receiver of its *earnings*, so long as it continues a *going concern*.<sup>2</sup>

§ 6152. **Unregistered Debentures under the English Companies Act.**—The Companies Act, 1862, provides that "every limited company under this act shall keep a register of all mortgages and charges specifically affecting property of the company, and shall enter in such register, in respect of each mortgage or charge, a short description of the property mortgaged or charged, amount of charge created, and the names of the mortgagees or persons entitled to such charge"; and that, "if any property of the company is mortgaged, or charged without such entry as aforesaid being made, every director, manager, or other officer of the company, who knowingly and willfully authorizes or permits the omission of such entry, shall incur a *penalty* not exceeding fifty pounds."<sup>3</sup> With this statute in force, a *solicitor*, not usually employed by the company, was employed by them to act in a particular matter, and, having required security for costs, they gave him a charge on certain debts due them. About five weeks after this, a winding-up petition was presented, on which an order was shortly afterwards made. The charge had not been registered. It was held, affirming a decision of the Master of the Rolls, that, although the statute did not make the charge void, yet the solicitor could not avail himself of it; since, as solicitor of the company, it was his duty to see that the directions of the legislature were carried out.<sup>4</sup> So, where the directors of the company advanced money to it,<sup>5</sup> or guaranteed its debts,<sup>6</sup> and took a charge or mortgage in their favor, which they failed to regis-

<sup>1</sup> King v. Marshall, 33 Beav. 565. See *ante*, § 6149.

<sup>2</sup> Gardner v. London &c. R. Co., L. R. 2 Ch. 201. The Companies Act, 1867, does not operate to entitle mortgagees of a railway company's "undertaking" to *priority* in payment out of the proceeds of the surplus lands of the company, which have been sold on an application of its judgment creditors; but it leaves a charge on

the undertaking what it was before, — a charge on the railway as a *going concern*. Re Hull &c. R. Co., 40 Ch. Div. 119.

<sup>3</sup> 25 & 26 Vict., ch. 89, § 43.

<sup>4</sup> Ex parte Valpy, L. R. 7 Ch. 289.

<sup>5</sup> Re Native Iron Ore Co., 2 Ch. Div. 345.

<sup>6</sup> Re Wynn Hall Coal Co., L. R. 10 Eq. 515.

ter in accordance with the statute, such charge or mortgage was held void as against creditors. These decisions proceed upon a principle announced by Lord Justice James, in one of them,<sup>1</sup> that everyone standing in a fiduciary relation toward a company is bound to see that the company obeys the directions of the legislature. The conclusion, therefore, was that, since the legislature required mortgages and charges made by a company upon its property to be registered in a certain way, if a director should advance money to the company and take as a security a debenture giving a charge on the undertaking, but should not see to it that it was registered as prescribed by the statute, the security would be void as to him. It did not escape the attention of that able equity judge, Sir George Jessel, M. R., that in these decisions, courts of equity, which rather relieve against penalties than create them, were creating a very severe penalty in addition to the one imposed by the statute, and that the statute, while giving the penalty, did not declare that the security should be void. He, therefore, in several opinions, expressed a very strong disapproval of them,<sup>2</sup> and in one of his opinions he made an elaborate argument against the rule which they established.<sup>3</sup> His views were finally adopted by the House of Lords, and the controversy was put at rest, by holding that the director advancing the money, and failing to see to the registration of the mortgage or other security, as required by the statute, was liable to the penalty of the statute, but not to the forfeiture of his security.<sup>4</sup>

§ 6153. **Mortgage to Secure Future Advances.**—A corporation possessing power to mortgage its property can make a valid mortgage thereof to secure *future advances*.<sup>5</sup> Such

<sup>1</sup> *Ex parte Valpy*, L. R. 7 Ch. 289.

<sup>2</sup> *Re Borough of Hackney Newspaper Co.*, 3 Ch. Div. 669; *Re International Pulp & Co.*, 6 Ch. Div. 556.

<sup>3</sup> *Re Globe New Patent Iron & Co.*, 48 L. J. Ch. 295.

<sup>4</sup> *Wright v. Horton*, 12 App. Cas. 371. The writer understands that the failure of the officers or directors of the company to comply with the statute was never held to invalidate the security where the money was advanced by a *stranger*. On the contrary, it was held that a mortgage in

favor of a person who is not an officer or director of the company, as one in favor of its bankers (*Ex parte National Bank*, L. R. 14 Eq. 507), or one in favor of its *shareholders* (*Re General South American Co.*, 2 Ch. Div. 337), is perfectly valid as against the company.

<sup>5</sup> *Jones v. Guaranty & Co.*, 101 U. S. 622. See, on the general subject of mortgages to secure future advances or liabilities, and their validity,—*Lansing v. Woodworth*, 1 Sandf. Ch. (N. Y.) 43; *Brinkerhoff v. Marvin*, 5 Johns.

mortgages are legal, and have priority over liens which do not intervene before the advance is made.<sup>1</sup>

§ 6154. **Construction of Statutes Prohibiting Such Mortgages.** — Statutes prohibiting such mortgages will not, it seems, be so construed as to avoid mortgages made for the purpose of raising money to take up *antecedent debts*. Thus, a statute enacting that no estate conveyed in mortgage shall be held by the mortgagee for the payment of any sum of money, or the performance of any other thing, the obligation or liability to the payment of which arises, is made, or contracted, after the execution and delivery of such mortgage, has been held not to invalidate a railway mortgage which was formally executed prior to the issuing of the bonds which it secured, provided the bonds were in fact issued to take up an antecedent indebtedness contracted for corporate purposes.<sup>2</sup>

§ 6155. **Company may Execute Subsequent Mortgages until Power Exhausted.** — It has been justly held that there is nothing in the nature of an ordinary railway mortgage, or the obligations or rights arising thereunder, which disables the corporation from executing subsequent mortgages or liens to secure other debts, subject, of course, to the paramount lien of the prior mortgage; and that, when these subsequent liens are sought to be enforced, the prior lienor can do no more than complain if his security is thereby endangered, in which case it is left open to conjecture that the court might afford him suitable relief.<sup>3</sup>

§ 6156. **Power to Mortgage its Real Property Situated in Another State.** — If a corporation has, under its charter,

Ch. (N. Y.) 320; *Lawrence v. Tucker*, 23 How. (U. S.) 14; *Gardner v. Graham*, 7 Vin. Abr. 22, pl. 3. Mortgage to secure more than is due valid as against subsequent creditors: *Gordon v. Preston*, 1 Watts (Pa.), 385, 388; s. c. 26 Am. Dec. 75. See *Irwin v. Tabb*, 17 Serg. & R. (Pa.) 419.

<sup>1</sup> *Barry v. Merchants' Exch. Co.*, 1 Sandf. Ch. (N. Y.) 280, 314.

<sup>2</sup> *Richards v. Merrimack & C. Railroad*, 44 N. H. 127, 137.

<sup>3</sup> *Coe v. Columbus & C. R. Co.*, 10 Ohio St. 372, 401, s. c. 75 Am. Dec. 518, 540.

or under a statute subsisting in the State of its creation, or under the general principles of law as detailed in this chapter, the general power to mortgage its real estate, then it must be concluded that this power will enable it to mortgage its real estate situated in another State, unless such a mortgage is prohibited by the law of that State.<sup>1</sup> When, therefore, a corporation had mortgaged its property and franchises, situated both in the State of its creation and in an adjoining State, it was held that a court of the United States, sitting within the State of its creation, had jurisdiction of a bill in equity, filed by the beneficiary in the mortgage, to compel the trustees named therein to sell such of the property covered by the mortgage as was situated in the adjoining State.<sup>2</sup> The law of the State creating the corporation determines whether it had power to mortgage its real property; everything relating to the execution and enforcement of the mortgage is governed by the local law where the property is situated. Where the trustees, under a deed of trust so executed, proceed to foreclose or otherwise enforce it in accordance with its terms, and in conformity with the common law, its enforcement will not be enjoined unless it can be shown that it was not executed in accordance with the law of the State where the property is, or that the proceedings to enforce it are in derogation to that law.<sup>3</sup>

### § 6157. Mortgages in Violation of Such Prohibition Void.

There is judicial authority to the effect that where there is a statute containing a general prohibition upon particular corporations as to mortgaging their property, a mortgage made in violation of it will be deemed *void in toto*, and the court will not separate particular articles of property from the residue and hold it good as to them; since the plain intent of the corporation is not to transfer the few articles separate from the entire mass of its property included within its mortgage,

<sup>1</sup> Bassett v. Monte Christo &c. Min. Co., 15 Nev. 293.

<sup>2</sup> Randolph v. Wilmington &c. R. Co., 11 Phila. (Pa.) 502.

<sup>3</sup> Central Gold Min. Co. v. Platt, 3 Daly (N. Y.), 263, 273.

and the prohibition of the statute is general.<sup>1</sup> But at the same time it is held that creditors, by accepting from a corporation a mortgage void on its face, that is, a mortgage which the corporation had no power to issue, do not thereby *estop* themselves from pursuing their ordinary legal remedies as general creditors against the corporation.<sup>2</sup>

§ 6158. **Prohibition against Selling Includes a Prohibition against Mortgaging.** — We have seen that a statute granting the power to sell includes the power to mortgage.<sup>3</sup> By parity of reasoning, a statute prohibiting a corporation from *selling* its property includes, by necessary implication, the prohibition of the power to *mortgage*, since a mortgage may become by defeasance an absolute sale. "It makes no difference," said Gray, J., "whether the transfer is absolute or conditional, to take effect immediately upon its delivery, or at some future time. A mortgage, transferring a title which upon the happening of a certain contingency may be made absolute by sale or foreclosure, has the effect, as soon as it becomes of any value to secure the purpose for which it was made, to accomplish as complete a transfer of the corporate franchise and property and the means of performing the corporate duty, as if it had been originally an outright sale."<sup>4</sup>

§ 6159. **How far the Principle of Estoppel Works against Corporations in Respect of Ultra Vires Mortgages.** — "Corporations," it is said, "will not be permitted to exercise powers that might be hurtful to the public interests, beyond those expressly conferred by their charters; but where a corporation has exercised powers germane and incidental to those conferred, and in furtherance of the general objects of the corporation, although the subject of the contract may not be within any definite power given, it will be estopped from denying it had authority to make such contract. Good faith

<sup>1</sup> Richardson v. Sibley, 11 Allen (Mass.), 65, 72; s. c. 87 Am. Dec. 700.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ante*, § 5363. See also *ante*, § 6133.

<sup>4</sup> Richardson v. Sibley, 11 Allen (Mass.), 65, 71; s. c. 87 Am. Dec. 700. But, to the contrary, see *ante*, § 6134.

to third parties who deal with such corporations, and who may have no accurate knowledge of the extent of their powers under their charters, demands this adoption of this salutary rule.”<sup>1</sup> Applying this principle, it has been repeatedly held that a corporation, after having borrowed money on a mortgage of its property, and applied the money so raised to its corporate uses, will not be heard to deny the authority of its directors or their agents to execute the mortgage.<sup>2</sup> Accordingly, it was held no defense to a bill to foreclose a mortgage of corporate property that the persons who executed the mortgage were not directors of the company, nor authorized to bind the company by it, it being admitted that the corporation got the benefit of the money advanced to it.<sup>3</sup>

**§ 6160. Estoppel in Respect of Mortgage of Property Acquired Ultra Vires.**—On stronger grounds, where a corporation has exceeded its powers in acquiring property which it has afterwards mortgaged, it cannot defeat the title of its mortgagee by setting up its want of power to acquire the property. A corporation will not be allowed thus to *impeach its own executed contracts*, and to take advantage of its own wrong. Neither can its mortgagee, who has sold the property under the mortgage, excuse himself, on such a ground, from crediting the corporation with the proceeds of the sale.<sup>4</sup>

**§ 6161. Mortgages to Secure Debts in Excess of Charter Limits.**—It has been held that a mortgage given to secure an indebtedness created by a corporation in excess of the limits prescribed by its *articles of incorporation*, is not for that reason void, although the indebtedness has been created in favor of

<sup>1</sup> *West v. Madison County Agric. Board*, 82 Ill. 205; *Chicago Building Soc. v. Crowell*, 65 Ill. 453; *Bradley v. Ballard*, 55 Ill. 413; *s. c.* 8 Am. Rep. 656.

<sup>2</sup> *West v. Madison County Agric. Board*, 82 Ill. 205; *Aurora Agric. Soc. v. Paddock*, 80 Ill. 263; *Ottawa Northern Plank Road Co. v. Murray*,

15 Ill. 336; *Dimpfel v. Ohio &c. R. Co.*, 9 Biss. (U. S.) 127; *Tyrrell v. Cairo &c. R. Co.*, 7 Mo. App. 294; *Langdon v. Vermont &c. R. Co.*, 53 Vt. 228; *Dekay v. Voorhis*, 36 N. J. Eq. 37; *Ante*, § 5258.

<sup>3</sup> *Ottawa Northern Plank Road Co. v. Murray*, *supra*.

<sup>4</sup> *Parish v. Wheeler*, 22 N. Y. 494.

a director, and the mortgage is given to secure him in *preference* to other creditors,<sup>1</sup>—the court proceeding upon the ground that an indebtedness created in excess of such a limit is not void, though the directors creating it might be answerable to the stockholders for negligence or breach of trust.

§ 6162. **How far Legislature may Validate Void Mortgage or Conveyance.**—But, as it is within the competency of the legislature to *authorize* a corporation to mortgage or otherwise convey its property and franchises, so the legislature of a State may, within the limits hereafter stated, by a *curative act*, validate such a conveyance, by waiving any public objections to the same; that is to say, “the legislature may waive the public right to object to the acts of others, because they are opposed to the public interests, and where any act is invalid for want of legislative assent, may waive the objection and ratify such act by a subsequent statute.”<sup>2</sup> But the legislature obviously *cannot*, by such a curative statute, *change the rights of individuals* in respect of such void mortgage or other conveyance, which have already become *vested*; but such rights are to be determined according to the laws in force when they accrued.<sup>3</sup> It cannot revive a void mortgage, so as to give it precedence over a subsequent lien, which is by its terms made subject thereto or in respect of which the subsequent lienor is entitled to stand in the position of an innocent purchaser.<sup>4</sup> Nor can it confirm a fraudulent foreclosure sale of the mortgaged property of a corporation.<sup>5</sup> Nor can the legislatures in many States, pass *special acts* of this nature, because of constitutional inhibitions.<sup>6</sup>

<sup>1</sup> Garrett v. Burlington Plow Co., 70 Iowa, 697; s. c. 59 Am. Rep. 461; Warfield v. Marshall County Canning Co., 72 Iowa, 666; 2 Am. St. Rep. 263; s. c. 19 Am. & Eng. Corp. Cas. 194; 34 N. W. Rep. 1.

<sup>2</sup> Richards v. Merrimack &c. Railroad, 44 N. H. 127, 136; citing Pierce

v. Emery, 32 N. H. 484, 504; Shaw v. Norfolk &c. Co., 5 Gray (Mass.), 162.

<sup>3</sup> Richards v. Merrimack &c. Railroad, 44 N. H. 127, 137; citing Rich v. Flanders, 39 N. H. 304.

<sup>4</sup> *Ibid.*

<sup>5</sup> White Mountains R. v. White Mountains Railroad, 50 N. H. 50.

<sup>6</sup> *Ante*, §§ 539, 573, *et seq.*

§ 6163. **Mortgages under the New York Manufacturing Act.**—The statute of New York governing manufacturing corporations authorizes such corporations, *with the assent of their stockholders* as hereafter stated,<sup>1</sup> to “secure the payment of any debt heretofore contracted, or which may be contracted, by it, in the business for which it was incorporated, by mortgaging all or any part of the real or personal estate of such corporation.”<sup>2</sup> Under the statute as it stood after the amendment of 1864, a mortgage of the real estate of such a company could be made only to secure the *payment of debts*, and could not be made to *raise money* to carry on the operations of the company; but nevertheless a mortgage executed to secure bonds issued to pay debts, and also to raise money to carry on the business of the company, was not void *in toto*, but was valid in so far as the bonds were issued to pay debts.<sup>3</sup> This statute, of course, carries with it the negative implication that a manufacturing corporation cannot give a mortgage for some other purpose than carrying on its business; and hence it has been held that a mortgage given by a gaslight company for another purpose is invalid.<sup>4</sup> But the statute conveys authority to such a corporation to give a mortgage to secure *notes* previously given for debts of the corporation and *renewed*.<sup>5</sup> The statute does not enable a gaslight corporation to mortgage its corporate *franchises*, nor will the consent of its stockholders to a mortgage of its real and personal estate, as required by another portion of the statute,<sup>6</sup> be construed as conferring such a power.<sup>7</sup> A mortgage given by a manufacturing company to a bank, as *collateral* and continuing security for all existing or future negotiable securities, made, indorsed, or accepted by the company and discounted by the mortgagee bank, and for all moneys owing by the company to the bank, is valid, as between the parties, to the extent of all obligations of the corporation to the bank, and of all *renewals* thereof.<sup>8</sup> Prior to 1878, the statute did not authorize cor-

<sup>1</sup> *Post*, § 6172.

<sup>2</sup> N. Y. Act 1848, ch. 40, § 2; N. Y. Act 1864, ch. 517, § 2; N. Y. Act 1871, ch. 481.

<sup>3</sup> *Carpenter v. Black Hawk Gold Min. Co.*, 65 N. Y. 43.

<sup>4</sup> *Astor v. Westchester Gaslight Co.*, 33 Hun (N. Y.), 333.

<sup>5</sup> *Martin v. Niagara Falls Paper Man. Co.*, 44 Hun (N. Y.), 130; *s. c.* 8 N. Y. St. Rep. 265; *s. c.* affirmed, 122

N. Y. 165; 25 N. E. Rep. 303; 33 N. Y. St. Rep. 318.

<sup>6</sup> *Post*, § 6172.

<sup>7</sup> *Lord v. Yonkers Fuel Gas Co.*, 99 N. Y. 547.

<sup>8</sup> *Martin v. Niagara Falls Paper Man. Co.*, 122 N. Y. 165; *s. c.* 25 N. E. Rep. 303; 33 N. Y. St. Rep. 318; affirming *s. c.* 44 Hun (N. Y.), 130; 8 N. Y. St. Rep. 265.



porations to mortgage their *franchises*, and a mortgage was held invalid in so far as it purported to convey the franchises of the company.<sup>1</sup> But in that year the statute was amended so as to enable such corporation, for the purpose of securing the payment of any debt, to mortgage all or any part of its goods or chattels, and also "its franchises, privileges, rights, and liberties,"<sup>2</sup> and providing for the written assent of two-thirds of the shareholders, as hereafter stated. After the passage of this amendment, a mortgage covering only the real and personal estate of the company, but containing no mention of its *franchises, privileges, rights, or liberties*, was, of course, held inoperative as to its *franchises*.<sup>3</sup> And it is not essential to the validity of a mortgage under the statute that it should have been given to secure an *antecedent debt*, but it may be given to secure a debt *contracted simultaneously* with the execution of the mortgage, if the debt is legitimate and incurred in the business of the company;<sup>4</sup> but the fact that the mortgage was given to secure *notes* representing an *antecedent indebtedness*, which notes were executed after the execution of the mortgage, was deemed of no consequence; since the indebtedness, though in another form, existed at the time of its execution, or was created simultaneously therewith.<sup>5</sup>

§ 6164. **Fraudulent Mortgages.**—The impeachment of corporate mortgages, by general creditors, on the ground of fraud, is a subject which belongs to the general doctrines of the law relating to *fraudulent conveyances*, and not specially to the power of corporations. We shall therefore consider it but briefly, and recur to it again when dealing with *insolvent corporations*.<sup>6</sup> It is elsewhere seen that the question whether mortgages can be given by corporations to particular creditors, to secure *bona fide* debts due by the corporation to them, in *preference* to other creditors, is one which presents a conflict of judicial opinion.<sup>7</sup> Where a railroad company contracted with certain parties, who were associated together as a

<sup>1</sup> *Carpenter v. Black Hawk Gold Min. Co.*, 65 N. Y. 43.

<sup>2</sup> *Laws N. Y. 1878*, ch. 163.

<sup>3</sup> *Lord v. Yonkers Fuel Gas Co.*, 99 N. Y. 547.

<sup>4</sup> *Ibid.*; *Martin v. Niagara Falls Paper Man. Co.*, 122 N. Y. 165; *s. c.* 25

N. E. Rep. 303; 33 N. Y. St. Rep. 318; affirming *s. c.* 44 Hun (N. Y.), 130; 8 N. Y. St. Rep. 265.

<sup>5</sup> *Martin v. Niagara Falls Paper Man. Co.*, *supra*.

<sup>6</sup> *Post*, § 6526.

<sup>7</sup> *Post*, § 6492.

*construction company*, for the construction of a portion of its road, and agreed to make payment in its mortgage bonds, and two of its directors were beneficial parties in the contract, and, as a part of the transaction, the other contracting parties agreed to assume subscriptions by all individual directors of the railway company to its capital stock, which was worthless, and to relieve them from all liability under it—it was held that the contract was immoral and corrupt, and such as could not be forced in equity; and that the mortgage bonds issued under it to the construction company were voidable at election of the parties affected by the fraud, save in the hands of *bona fide* purchasers for value, and that they were consequently void in the hands of those who took them under circumstances which ought to have put them on inquiry as to their validity.<sup>1</sup> The stockholders of the corporation, not concerned in such a contract, may therefore denounce and repudiate it.<sup>2</sup> But, notwithstanding the fact that such a contract may be avoided by the corporation, or by its shareholders where the corporation fails or refuses to sue, under principles already stated,<sup>3</sup> equity will not, for that reason, deprive those who have advanced money to, or conferred benefits upon, the corporation under it, of their right to *equitable compensation*. For instance, in the case above stated, the holders of the bonds will be allowed, in a suit to foreclose the mortgage, to take a decree for the payment of the sums actually expended for construction under the contract, and remaining unpaid, which were payable and paid in bonds thus declared void.<sup>4</sup> It has

<sup>1</sup> *Thomas v. Brownville &c. R. Co.*, 109 U. S. 522.

<sup>2</sup> *Wardell v. Railroad Co.*, 103 U. S. 651; affirming *s. c.* 4 Dill. (U. S.) 339.

<sup>3</sup> *Ante*, § 4479, *et seq.*

<sup>4</sup> *Thomas v. Brownville &c. R. Co.*, 109 U. S. 522. That *directors* who make a *contract with themselves* will not be allowed to recover on the contract, but will be allowed in equity a *quantum meruit*, see *Gardner v. Butler*, 30 N. J. Eq. 702; *Wardell v. Railroad*

*Co.*, 103 U. S. 651; affirming *s. c.* 4 Dill. (U. S.) 339. Action by a single stockholder to remedy the breach of trust of the *president* and *general manager* of a railway company in appropriating its bonds to the payment of the debts of other corporations: *Chicago v. Cameron*, 120 Ill. 447. Action by bondholders against corporation, grounded on *fraud* and *deceit* in issuing the bonds: *Raymond v. Spring Grove &c. R. Co.*, 21 Week, L. Bul. (Ohio) 103.

been held that where a railroad company, which owns a majority of the stock of another such company, procures the latter to issue bonds to it, furnishing a sufficient consideration therefor, and using no improper means to procure the issue, it is immaterial to the validity of the transaction that the former procured and used such bonds as security to float a loan made for its own exclusive benefit.<sup>1</sup> Nor will the fact that the directors of a railroad company violated its charter, by issuing mortgage bonds in an amount greater than twice its paid-up capital, entitle its general creditors, who become such with notice of the mortgage, to share in the proceeds of the foreclosure sale on an equality with *bona fide* purchasers of the bonds.<sup>2</sup>

§ 6165. Who may Impeach Void Corporate Mortgages. — *Subsequent creditors* cannot impeach an *executed contract* of a corporation, where their dealings with it, of which they claim the benefit, occurred after the contract became executed.<sup>3</sup> But it has been held that where bonds, and a mortgage to secure the same, have been issued by a corporation without authority of law, such bonds and mortgage may be *attacked collaterally* by a *subsequent mortgagee without notice*, whose mortgage has not been taken subject to the existence of the prior lien. In such a case, it is not a good argument that the corporation would be estopped to impeach the bonds and mortgage, and

<sup>1</sup> *Gloninger v. Pittsburgh &c. R. Co.*, 139 Pa. St. 13; s. c. 21 Atl. Rep. 211.

<sup>2</sup> *Fidelity Ins. &c. Co. v. West Pennsylvania &c. R. Co.*, 138 Pa. St. 494; s. c. 21 Am. St. Rep. 911; 21 Atl. Rep. 21. That an agreement, unknown to the bondholders, between a railroad company, which has defrauded its bondholders by selling them bonds issued without lawful authority, and a third party, that the latter would advance money to pay coupons under the bonds at maturity, and that they should be considered as un-

paid, will not enable the person so advancing the money to share in the proceeds of the mortgaged property equally with the bondholders, — was decided in the same case. Validity of a corporate mortgage determined on the evidence in favor of the mortgagees, the same being assailed on the ground of fraud: *Porter v. Pittsburgh Bessemer Steel Co.*, 120 U. S. 649; s. c. on rehearing, 122 U. S. 267.

<sup>3</sup> *Graham v. Railroad Co.*, 102 U. S. 148; *Porter v. Pittsburgh Bessemer Steel Co.*, 120 U. S. 649, 673.

that a subsequent mortgagee could not have any higher or better title than its mortgagor could confer.<sup>1</sup> But it is held that the second mortgagee cannot, in such a case, maintain a bill in equity to impeach the validity of a prior mortgage, for the reason that, being void and subject to collateral attack as such, by any party whose rights are thereby injuriously affected,—the holders of the mortgage having no title which they can maintain against the subsequent mortgagee, and the latter has a plain, complete, and adequate remedy at law, for any interference with the mortgaged property.<sup>2</sup> Where a mortgage is *voidable*, by reason of the failure to comply with a *statutory formality* in its authorization or execution, then, upon the question of the right to impeach it, it will be necessary to consider *for whose benefit* the statutory formalities were prescribed. Where, for instance, the *meeting* of the stockholders called to authorize the giving of the mortgage was *not notified* in compliance with the statute, it was held that the mortgage could not, for that reason, be impeached by *subsequent lien creditors*, because the statutory provision was given for the protection of the stockholders,—and more especially, where the corporation and stockholders had become *estopped* from impeaching it, by the fact of the corporation having received and retained the benefits accruing under it.<sup>3</sup> So, where bonds of a corporation were *pledged* as collateral security for corporate notes, instead of being *sold* for cash, it was held that the objection that this disposition was unlawful, while open to the corporation or its stockholders, was not open to one who held the property of the corporation under a *voluntary conveyance*, or by a *purchaser of an equity of redemption* in the property of the corporation at an execution sale.<sup>4</sup> When a mortgage, informally executed, has become good, as to the

<sup>1</sup> *Com. v. Smith*, 10 Allen (Mass.), 448, 4.9; s. c. 87 Am. Dec. 672. It is to be observed that, in this case, the court expressly “find no evidence that the Commonwealth (the second mortgagee) has ever known and sanctioned the irregular and illegal issue

of the bonds in question, either directly or by implication.”

<sup>2</sup> *Ibid.*

<sup>3</sup> *Campbell v. Argenta & c. Min. Co.*, 51 Fed. Rep. 1.

<sup>4</sup> *Beecher v. Marquette & c. Rolling Mill Co.*, 45 Mich. 103.

corporation making it, by *ratification*, a *creditor* of the corporation, who became such after the lapse of a sufficient time from which to assume a ratification, cannot impeach it. He can have no higher right in this regard than the corporation through which he claims. Accordingly, where a mortgage of corporate property was made by a majority of the directors who had met for that purpose on an illegal day, and without notice of any kind to those directors who did not attend, it was held that a creditor who became such after the lapse of *eight months*, during which time the corporation did nothing to repudiate the mortgage, though the absent members had notice of its existence from the minutes, could not claim payment of his debt out of the proceeds of a sale of the corporate property.<sup>1</sup> So, where certain members of a corporation mortgaged their interest in the corporation for money which was applied to corporate purposes, and the corporation afterwards issued a formal mortgage of the corporate property in lieu of the same, this latter was held a good mortgage as against general creditors.<sup>2</sup>

<sup>1</sup> *Gordon v. Preston*, 1 Watts (Pa.), 385; s. c. 26 Am. Dec. 75.

<sup>2</sup> *Head v. Horn*, 18 Cal. 211.

## CHAPTER CXXXIII.

### POWER OF DIRECTORS AND OFFICERS TO EXECUTE SUCH MORTGAGES.

SECTION	SECTION
6171. Qualification of the trustees in the mortgage.	6176. Must take place at a meeting duly assembled.
6172. Assent of stockholders of a given value.	6177. Construction of resolutions of directors and other authorizing instruments.
6173. Further as to the consent of the stockholders.	6178. Mortgages made by promoters prior to organization.
6174. Further of the same subject.	6179. Power of agent to mortgage and pledge corporate property.
6175. Authorization by the directors.	

§ 6171. **Qualification of the Trustees in the Mortgage.** — Where it was provided in a mortgage executed by a railroad company that, in case of any vacancy in the board of trustees to whom the mortgage had been executed, the remaining trustees or trustee should supply the vacancy by appointment from the bondholders, it was held to be no objection to the qualification of a *trustee*, that he took an assignment of a single bond of the corporation for the purpose of qualifying himself for the execution of the trust, in the absence of fraud.<sup>1</sup> It was further held, under the same mortgage, that where a trustee was qualified for the execution of the trust at the time when he assumed the same, his subsequent disqualification would not invalidate the mortgage; since it is a rule in equity that a party who holds in his hands trust property knowingly, even by wrong, will be charged with the due execution of the trust.<sup>2</sup>

§ 6172. **Assent of Stockholders of a Given Value.** — Statutes exist in several of the States restraining the power of various corporations to mortgage their property to cases where stockholders

<sup>1</sup> Richards v. Merrimack &c. Railroad, 44 N. H. 127, 138.

<sup>2</sup> *Ibid.* 139.

of a given value consent thereto; and these statutes have given rise to a variety of decisions, which will be briefly noticed. The second section of the *New York statute* relating to corporations formed for *manufacturing, mining, mechanical, or chemical purposes*, provided that any company formed under that act should be capable in law of purchasing, holding, or conveying any real or personal estate which might be necessary to enable it to carry on its business, but should not mortgage the same or give a lease thereon.<sup>1</sup> The latter clause was subsequently modified by an act which provided that such companies "may secure the payment of any debt heretofore contracted, or which may be contracted by it in the business for which it was incorporated, by mortgaging all or any part of the real estate, — provided that the written consent of the stockholders, owning at least two-thirds of the capital stock of such corporation, shall be first filed in the office of the clerk of the county where the mortgaged property is situated."<sup>2</sup> The statute was again amended in 1871<sup>3</sup> so that, as it now stands, it reads as follows: "Any corporation formed under the said act . . . may secure the payment of any debt heretofore contracted, or which may be contracted, by it in the business for which it was incorporated, by mortgaging all or any part of the real or personal estate of such corporation; and any mortgage so made shall be as valid, to all intents and purposes, as if executed by an individual owning such real or personal estate, providing that the written assent of the stockholders, owning at least two-thirds of the capital stock of such corporation, shall first be filed in the office of the clerk of the county where the mortgaged property is situated." This statute has no application to the case where the corporation *buys land* and executes a mortgage to secure future advances for improvements made thereon, and the deeds and mortgages are executed and delivered contemporaneously.<sup>4</sup> The statute is sufficiently complied with if the assent of the stockholders is given *contemporaneously* with the execution of the mortgage,<sup>5</sup> at least where the question arises as between the parties to the mortgage and their privies, *e. g.*, between an *assignee* of the mortgage

<sup>1</sup> N. Y. Laws 1848, ch. 40, § 2. Compare *ante*, § 6163.

<sup>2</sup> N. Y. Laws 1864, ch. 517, § 2.

<sup>3</sup> N. Y. Laws 1871, ch. 481.

<sup>4</sup> *McComb v. Barcelona Apartment Asso.*, 134 N. Y. 598; *s. c.* 31 N. E. Rep. 613; affirming *s. c.* 10 N. Y.

Supp. 546. Similarly, see *McMurray v. St. Louis & Co.*, 33 Mo. 377.

<sup>5</sup> *Welch v. Importers' Nat. Bank*, 122 N. Y. 177; *s. c.* 25 N. E. Rep. 269; 33 N. Y. St. Rep. 452; *Everson v. Eddy*, 36 N. Y. St. Rep. 763; *s. c.* 12 N. Y. Supp. 872.

and a receiver of the corporation.<sup>1</sup> Such *assent*, even if *given after the execution of the mortgage*, will validate the mortgage, if there are no intervening rights, even though the assent is not filed in the office of the clerk of the county where the mortgaged property is situated;<sup>2</sup> and, as elsewhere seen,<sup>3</sup> the want of such assent may be cured by a subsequent *ratification*. If more than two-thirds of the capital stock is *owned by one person*, of course he is competent to give the statutory consent;<sup>4</sup> and so the fact that there are but *two shareholders* assenting to the mortgage, makes no difference, provided they own the requisite amount of shares.<sup>5</sup>

**§ 6173. Further as to the Consent of the Stockholders.**—The fact that a portion of the *shares* represented in the assent have *not been paid for* in full has been held immaterial.<sup>6</sup> If the *corporation is itself the owner* of a portion of its stock,—assuming that there can be such a solecism as a corporation owning its own shares,<sup>7</sup>—it cannot give the assent required by the statute; nor can the assenting shareholders be deemed to represent a proportionate amount of the stock owned by the corporation.<sup>8</sup> If the corporation has made an assignment, absolute on its face, of certificates of stock owned by it, as collateral security for a debt, the shares thus transferred cannot be deducted from the whole number, in estimating whether the required consent has been given; but it seems that the *assignee* of the shares stands in the position of a shareholder, and has a right to a *vote* upon the question of giving the mort-

<sup>1</sup> *Welch v. Importers' Nat. Bank*, 122 N. Y. 177; *s. c.* 25 N. E. Rep. 269; 33 N. Y. St. Rep. 452. The provision that the written assent "*shall first be filed*" is said to have merely the effect of preventing the mortgage from taking effect as a valid instrument until the assent is filed: *Greenpoint Sugar Co. v. Kings Co. Man. Co.*, 7 Hun (N. Y.), 44; *s. c.* affirmed *sub nom.* *Greenpoint Sugar Co. v. Whiting*, 69 N. Y. 328.

<sup>2</sup> *Rochester Sav. Bank v. Averell*, 96 N. Y. 467; *Martin v. Niagara Falls Paper Man. Co.*, 122 N. Y. 165, 170;

*s. c.* 25 N. E. Rep. 303; 33 N. Y. St. Rep. 318; affirming *s. c.* 44 N. Y., 130; 8 N. Y. St. Rep. 265. See also *Lord v. Yonkers Fuel Gas Co.*, 99 N. Y. 555.

<sup>3</sup> *Post*, § 5314.

<sup>4</sup> *Martin v. Niagara Falls Paper Man. Co.*, *supra*.

<sup>5</sup> *Welch v. Importers' Nat. Bank*, *supra*.

<sup>6</sup> *Lyceum v. Ellis*, 30 N. Y. St. Rep. 242; *s. c.* 8 N. Y. Supp. 867.

<sup>7</sup> As to which, see *ante*, § 2054, *et seq.*

<sup>8</sup> *Vail v. Hamilton*, 85 N. Y. 453.



gage.<sup>1</sup> A *receiver* of a corporation, after it passes into insolvency, has a standing in court to maintain an action to set aside a mortgage executed by it without the requisite consent of its stockholders, because he does not stand merely in the shoes of the corporation, but is also a representative of its general creditors.<sup>2</sup> The fact that the consent was given by *stockholders owning the debt* intended to be secured by the mortgage, does not invalidate the mortgage; because a corporation, unless prohibited, may become indebted to its own stockholders, and may give them security for the debt,<sup>3</sup>—though such a circumstance will subject the transaction to judicial scrutiny. In such a case, the mortgage will pass judicial scrutiny if the indebtedness proves to be genuine, and if the stockholders voting the execution of the mortgage are not individually benefited, for the reason that it does not increase the liability of the company *to them*;<sup>4</sup> and the same is true where a mortgage is made to a *trustee* of a corporation.<sup>5</sup> In determining the question whether the assent of two-thirds of the capital stock has been given, the statute is construed to mean two-thirds of the stock *actually issued or actually subscribed for*, and not two-thirds of the *nominal amount* to which the capital of the company is limited in the certificate of incorporation. In other words, it refers to its *actual* subscribed capital, and not to its *potential* capital.<sup>6</sup> The instrument expressing the consent of the shareholders will be sufficient if it contains *reasonable evidence* of the consent of two-thirds of their number, and sufficiently *identifies the mortgage* to the making of which the assent is intended to be given; and the fact that the amount of indebtedness intended to be secured is not expressed in the assent has been held not to vitiate it.<sup>7</sup> Persons who have subscribed for shares and

<sup>1</sup> Vail v. Hamilton, 85 N. Y. 453.

<sup>2</sup> *Ibid.* As to whom such a receiver represents, see *post*, § 6939, *et seq.*

<sup>3</sup> *Ante*, § 1076.

<sup>4</sup> Rettenhouse v. Winch, 11 N. Y. St. Rep. 122, and 32 N. Y. St. Rep. 506; *s. c.* affirmed, 133 N. Y. 678, *mem.*

<sup>5</sup> Welch v. Importers' &c. Nat. Bank, 122 N. Y. 177; *s. c.* 25 N. E. Rep. 269; 33 N. Y. St. Rep. 452.

<sup>6</sup> Greenpoint Sugar Co. v. Kings Co. Man. Co., 7 Hun (N. Y.), 44; *s. c.* affirmed *sub nom.* Greenpoint Sugar M. Co. v. Whitin, 69 N. Y. 328.

<sup>7</sup> *Ibid.*

who hold offices in the company, but who have received no certificates and made no payment, as well as persons who have subscribed and made substantial payment for their shares, either in cash or in work, are stockholders for the purpose of giving their assent, although no certificate of shares has been issued to them.<sup>1</sup>

§ 6174. **Further of the Same Subject.**—Other statutes have been devised to prevent unauthorized mortgages being laid upon the property of corporations without the consent of a stated majority of their stockholders, which provide that such consent must be given at a *meeting, duly notified* for that purpose, in a manner prescribed. Where such a statute forbade a manufacturing corporation from mortgaging its property, unless authorized thereto by a vote of its stockholders holding three-fifths of its capital stock, who should be notified of the object of the meeting called to obtain such vote, and which provided that, without such notice, the proceeding should not be valid,—it was held that, where a meeting had been called pursuant to a notice which specified the object of the meeting to be to authorize the issue of bonds to the extent of \$100,000 secured by mortgage, and the meeting actually authorized an issue to the extent of \$150,000, the proceedings were valid, so long as the stockholders, for whose protection the statute was intended, raised no objection.<sup>2</sup> Where the governing statute required the assent of the stockholders to be given “at a meeting called for the purpose,”<sup>3</sup> a notice given of a meeting, which stated the object to be “to *consider the question* of an issue of bonds of the company secured by a mortgage on its property,” was held sufficient, although the notice did not especially indicate that *final action* was to be taken at the meeting.<sup>4</sup> Nor did the fact

<sup>1</sup> *McComb v. Barcelona Apartment Asso.*, 134 N. Y. 598, *mem.*; *s. c.* 31 N. E. Rep. 613; affirming *s. c.* 10 N. Y. Supp. 546.

<sup>2</sup> *Beecher v. Marquette & c. Rolling Mill Co.*, 45 Mich. 103.

<sup>3</sup> Pub. Stats. Mass., ch. 106, § 23.

<sup>4</sup> *Evans v. Boston Heating Co.*, 157 Mass. 37; *s. c.* 31 N. E. Rep. 698.

that, after the directors had been thus authorized to purchase certain land in which the corporation then had a *leasehold* estate, and to mortgage "any or all of the rights, estate, property, and franchises" of the corporation, the corporation acquired title to the lands in *fee-simple*, invalidate the authorization.<sup>1</sup> In other words, a vote by the stockholders authorizing the directors to mortgage "any or all of the rights, estates, property, and franchises" of the corporation, gives them power to mortgage the *land* of which the corporation acquires the fee subsequently to the vote.<sup>2</sup> Finally, it may be stated that, assuming the assent of the stockholders to be necessary in a given case, if there is no statute prescribing the mode in which the assent must be given, the fact of its having been properly given may be *presumed* from their failure to dissent after a lapse of time, and from their failure to raise any objection to the validity of the mortgage, on a bill to foreclose it.<sup>3</sup> Whether the meeting of stockholders at which the assent is given must be held in the State creating the corporation is to be determined by reference to discussions which have preceded in this work.<sup>4</sup> On principle, the conclusion would be that, as the object of such a meeting is not to make any constituent change in the corporation — not to do anything affecting its organization, but merely to authorize the doing of something arising in the course of its business,—the *meeting* may lawfully be held *outside of the State* creating the corporation, in the absence of a governing statute otherwise providing.<sup>5</sup> Thus, where a corporation was organized in Kansas to operate in Mississippi, it was held, in the absence of evidence that such a meeting was prohibited by the laws of Kansas, that a meeting of its stockholders held in Mississippi, to authorize the issuing of mortgage bonds, was properly held.<sup>6</sup> And, assuming that such a meeting cannot lawfully be held in a foreign jurisdiction, yet the question is one which goes

<sup>1</sup> Evans v. Boston Heating Co., 157 Mass. 37; s. c. 31 N. E. Rep. 698.

<sup>2</sup> *Ibid.*

<sup>3</sup> Enders v. Board of Public Works, 1 Gratt. (Va.) 364; *ante*, § 5298, *et seq.*

<sup>4</sup> *Ante*, § 686, *et seq.*

<sup>5</sup> See *ante*, § 694, *et seq.*

<sup>6</sup> Thompson v. Natchez Water &c. Co., 68 Miss. 423; s. c. 9 South. Rep. 821.

to the *form* and *mode* of executing a power possessed by the corporation, and not to the existence of the power itself; and therefore, like any other matter relating to the manner of executing corporate powers, the informality may be *waived*, and the act *ratified* by the subsequent consent and acquiescence of all the stockholders.<sup>1</sup>

§ 6175. **Authorization by the Directors.**—The ministerial officers of a corporation, *e. g.*, the *president* and the *cashier*, have presumptively no authority to take so important a step as the execution of a mortgage of the property of the corporation; but an authorization from the board of directors must in some form appear. Where the governing statute of the corporation provides that all the affairs, concerns, and property of the corporation shall be managed by a board of directors, a mortgage of corporate realty, though formally executed by the president and cashier of the company, is voidable, if it is shown that these officers had no authority from the board of directors so to execute it.<sup>2</sup> On principles elsewhere considered,<sup>3</sup> an authorization by the directors to the ministerial officers of the corporation, to execute even so important an instrument as a mortgage of its properties, need not be shown by any *formal resolution* of their board;<sup>4</sup> but the presence of the corporate *seal* upon the instrument, with the signatures of the proper officers, generally the president and secretary, is *presumptive evidence* that the proper precedent authority had been given.<sup>5</sup> If such officers execute the instrument with the knowledge and concurrence of the directors, or with their subsequent and long-continued acquiescence, it will be regarded as the act of the corporation, although there was no precedent authority by a formal resolution or vote.<sup>6</sup> Moreover, the ex-

<sup>1</sup> *Stutz v. Handley*, 41 Fed. Rep. 531; *s. c.* reversed on other grounds, 139 U. S. 417.

<sup>2</sup> *Leggett v. New Jersey &c. Man. Co.* 1 N. J. Eq. 541; *s. c.* 23 Am. Dec. 728.

<sup>3</sup> *Ante*, § 5016.

<sup>4</sup> *Sherman v. Fitch*, 98 Mass. 59; doctrine recognized in *England v. Dearborn*, 141 Mass. 590.

<sup>5</sup> *Ante*, §§ 4895, 5016, 5105; *Southern Cal. &c. Asso. v. Bustamente*, 52 Cal. 192, 196; *Schallard v. Eel River &c. Co.*, 70 Cal. 144.

<sup>6</sup> *Sherman v. Fitch*, 98 Mass. 59.

istence of the resolution may be proved by circumstances; and the fact that it has not been *recorded* in the proper corporate book will not render the mortgage invalid, provided it has been executed by its president and secretary with the corporate seal attached.<sup>1</sup> Still less is it necessary that a corporate vote, authorizing the execution of a mortgage deed in its behalf, should be evidenced by an instrument under the *seal* of the corporation; since it is not like an ordinary power of attorney to convey land. Nor is it necessary that such a vote should be recorded with the deed, as in the case of an ordinary conveyance under power of attorney.<sup>2</sup>

§ 6176. **Must Take Place at a Meeting Duly Assembled.**—But, in the absence of circumstances of assent and acquiescence, such as may, under the doctrine of the preceding section, afford *circumstantial* or *presumptive evidence* of a precedent authorization, then, on principles already discussed,<sup>3</sup> the directors can only give a valid authorization of so important a measure as a mortgage of the property of the corporation, when acting and consulting together as a board, duly assembled; and if the charter prescribes five members as necessary to a *quorum*, a mortgage authorized by a resolution passed by the board when but *four* members are present, will be a nullity.<sup>4</sup> On principles already discussed,<sup>5</sup> if the authorization takes place at other than a stated meeting of the board of directors, *notice must be given* to all the directors, and all must have a right to appear and be consulted, in order to the validity of the authorization. The wisdom of this rule will be apparent from an observation of Mr. Justice Brewer, in giving the opinion of the Supreme Court of Kansas, where he points out that, if any other rule were allowed to prevail, it would be possible, with a board of *twelve* members, for *four* directors to convene a meeting of *seven*, by giving notice to *three*, and withholding it from five others, and thus to bind

<sup>1</sup> Schallard v. Eel River &c. Co.,

70 Cal. 144.

<sup>2</sup> Beckwith v. Windsor Man. Co.,

14 Conn. 594.

<sup>3</sup> Ante, § 3905, et seq.

<sup>4</sup> Coryell v. New Hope Co., 9 N. J. Eq. 457.

<sup>5</sup> Ante, § 707, et seq.; § 3936, et seq.

the corporation by an act which has been in fact condemned by eight, that is to say by two-thirds of the full board.<sup>1</sup> Nevertheless, it must be the law that the *absence of directors* cannot deprive the corporation of the power to act and to bind itself by the acts of the officers in actual charge of its affairs, provided a quorum assemble after due notice.<sup>2</sup> In a recent case, where a corporate mortgage was challenged on the ground that its directors had not been duly notified, it was conceded by the objecting counsel "that a director cannot put a stop to corporate business, by simply leaving its jurisdiction; and that if, after a reasonable search, the parties are unable to find him, the remaining directors may attend to the necessary affairs"; and this concession was quoted with approval by the court.<sup>3</sup> This indicated to the court that an exception to the rule which requires a notice to all the directors might arise upon a concurrence of three conditions: 1. The impracticability of the notice; 2. The existence of an emergency for action; 3. A reasonable necessity for the action taken.<sup>4</sup> When, therefore, a mortgage of the property of a corporation had been executed by a majority of its directors, at a meeting of which an absent director had no notice, the conclusion was that it was not binding, in the absence of a showing that it was impracticable to give notice, and that an emergency existed, demanding the immediate execution of the instrument.<sup>5</sup> The kind of notice which is to be given, in the absence of a statutory prescription, has been already stated.<sup>6</sup> It must be a *personal notice* to each director; and a written notice left at the usual place of residence of a director, during the temporary absence of himself and family, has been held insufficient.<sup>7</sup>

<sup>1</sup> Paola &c. R. Co. v. Anderson County, 16 Kan. 302, 309; cited with approval in Bank of Little Rock v. McCarthy, 55 Ark. 473, 478; s. c. 29 Am. St. Rep. 60.

<sup>2</sup> Sherman v. Fitch, 98 Mass. 59.

<sup>3</sup> Bank of Little Rock v. McCarthy, 55 Ark. 473, 478; s. c. 29 Am. St. Rep. 60.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ante*, §§ 823, 3862. Compare *ante*, § 715, *et seq.*

<sup>7</sup> Bank of Little Rock v. McCarthy, 55 Ark. 473; s. c. 29 Am. St. Rep. 60; 18 L. W. Rep. 759.

§ 6177. **Construction of Resolutions of Directors and Other Authorizing Instruments.** — Where a corporation passed a vote, authorizing and empowering its treasurer to “make, sell, execute, and deliver, in the name of the company, any and all conveyances of land, by deed or bond or otherwise, and all the papers of the company not otherwise provided for in the by-laws,” — it was held that a mortgage made by him, and for *eight years recognized* by the corporation, was to be deemed a corporate act.<sup>1</sup> Power conferred by the board of directors upon the president of a turnpike corporation, to mortgage its *entire* road, has, in conformity with what has preceded,<sup>2</sup> been held to authorize him to mortgage a *part* of the road.<sup>3</sup> A resolution by the directors of a railroad company, authorizing an issue of its bonds and also the execution of a deed of trust upon its road, franchises, and properties, without prescribing the terms which the deed of trust should contain, is sufficient authority for inserting in the deed of trust a provision for a *foreclosure* upon default in payment of *interest* for a period of six months, — such a stipulation being usual in such instruments.<sup>4</sup> A resolution authorizing the president and secretary of a corporation to make arrangements to procure funds to carry on the work and pay the indebtedness of the corporation, and a subsequent resolution authorizing them to execute mortgages on the property of the corporation, as additional security for its old indebtedness, authorizes them, two months after the last resolution, to give a new note for the old indebtedness, and to execute a mortgage securing it, although new property has been acquired in the meantime.<sup>5</sup> In England, where the directors of companies do not have an *ex officio* power to authorize the mortgage of the properties of their companies, similar questions arise upon the construction of powers *to the directors* to make such mortgages; and in this relation it has been held that an authority to the directors, to

<sup>1</sup> Fitch v. Lewiston Steam Mill Co., 80 Me. 34; s. c. 12 Atl. Rep. 732;  
20 Am. & Eng. Corp. Cas. 509.

<sup>2</sup> Ante, § 5367.

<sup>3</sup> Shaver v. Hardin, 82 Iowa, 378; s. c. 48 N. W. Rep. 68.

<sup>4</sup> Greensburgh &c. Co. v. McCormick, 45 Ind. 239.

<sup>5</sup> Savannah &c. R. Co. v. Lancaster, 62 Ala. 555.

mortgage all or any part of the company's "*properties or rights*," empowers them to mortgage its *uncalled capital*.<sup>1</sup>

**§ 6178. Mortgages Made by Promoters Prior to Organization.** — If the *promoters* of a private corporation assume to act as *directors* before it is regularly organized, and in that character to order the issuing of bonds to be secured by a mortgage, for the purpose of raising money to prosecute the works for which the company was projected, the validity of the bonds and mortgage will depend upon the question whether the company, subsequently to its organization, *ratifies* and *adopts* the acts of its promoter.<sup>2</sup> If, after the company has become organized, the directors authorize a sale of the bonds and a delivery of the mortgage, this will be equivalent to an original authority to issue the bonds and to execute the mortgage, and will render the question of the power of the promoters to bind the future corporation, immaterial.<sup>3</sup>

**§ 6179. Power of Agent to Mortgage and Pledge Corporate Property.** — It may be conceded that the *general agent* of a manufacturing corporation, — in one instance, a person who held the two offices of president and treasurer, — has no power to mortgage all its personal property, except its book accounts, to secure the payment of a pre-existing debt, without a previous authority communicated in some form, expressly or tacitly.<sup>4</sup> But, on the other hand, where such a corporation loosely commits all its business affairs to a *superintendent*, and he executes a chattel mortgage to secure a depositor who threatens to withdraw his deposit, the mortgage will be sustained so as to allow the depositor a *preference* on final distribution after *insolvency*.<sup>5</sup> Again, where the consti-

<sup>1</sup> Howard v. Patent Ivory Man. Co., 38 Ch. Div. 156; s. c. 57 L. J. (Ch.) 878; 58 L. T. (N. S.) 395; 36 Week. Rep. 801. As to mortgages of *uncalled capital*, see *ante*, § 6149.

<sup>2</sup> *Ante*, §§ 480, 490, 5321, 5322.

<sup>3</sup> Wood v. Whelen, 93 Ill. 153. The validity of bonds and a mortgage securing the same, issued by a *defect-*

*ively organized corporation*, was established in Bergan v. Porpoise Fishing Co., 42 N. J. Eq. 397; reversing s. c. 41 N. J. Eq. 238. Similarly, see Burhop v. Milwaukee, 21 Wis. 257.

<sup>4</sup> England v. Dearborn, 141 Mass. 590. Compare *ante*, § 4849.

<sup>5</sup> Poole v. West Point Butter &c. Asso., 30 Fed. Rep. 513.



tution of an association for the promotion of *agricultural fairs*, provided for the election of an *executive committee*, to be composed of three members of the board of directors, who should be "competent to transact any official business, unless otherwise instructed," and such committee was especially instructed to *negotiate a loan*,— it was held that they possessed the power to make a mortgage to secure the loan, not by virtue of the special instruction, but under a general power in the constitution.<sup>1</sup>

<sup>1</sup> Taylor v. Agricultural &c. Asso., 68 Ala. 229. That the *president* of a corporation has no power to *release a mortgage* of record without special authority from the board, see Smith v. Smith, 117 Mass. 72.

## CHAPTER CXXXIV.

### VARIOUS INCIDENTS OF MORTGAGES AND OTHER LIENS CREATED BY CORPORATIONS.

#### SECTION

- 6182. Advances made on condition that lender have control of the corporation.
- 6183. Ratification of invalid mortgages.
- 6184. Further of this subject.
- 6185. Ratification in part.
- 6186. Whether executed in conformity with the general law relating to chattel mortgages.
- 6187. Trustee not chargeable as garnishee or under "trustee process" in behalf of general creditors.
- 6188. Right of the mortgagees to net earnings.
- 6189. Form of corporate mortgages.
- 6190. Further of this subject.
- 6191. Whether directors must execute mortgage themselves or can authorize agent to do it.
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#### SECTION

- and franchise by a mortgagee in possession.
- 6193. Construction of the words "grant, bargain, and sell."
- 6194. What passes under particular words in such mortgages.
- 6195. The same subject continued.
- 6196. What descriptive words cover branch roads thereafter built.
- 6197. What does not pass.
- 6198. The same subject continued.
- 6199. Whether property acquired *ultra vires* will pass.
- 6200. Rights of attaching creditors as against the mortgage.
- 6201. Liability for fraudulent assignment of mortgages.
- 6202. Equitable liens and mortgages.
- 6203. Equity will give effect to an informal mortgage, as against subsequent incumbrancers, with notice.

§ 6182. **Advances Made on Condition that Lender have Control of the Corporation.**—An advance of money made to a corporation on condition that the person or corporation making the advance be allowed to name a majority of the directors, and thus control the corporate organization, is *not fraudulent in law*, and circumstances may exist where such a condition will be deemed no more than a reasonable security to the person making the advance;<sup>1</sup> though if the control of the corporation is effected by the corporation placing a major-

<sup>1</sup> *Kitchen v. St. Louis &c. R. Co.*, 69 Mo. 224, 242.

ity of its unissued shares in the hands of such lender, he will not, in the absence of circumstances of *estoppel*, stand liable as a stockholder to the other creditors of the corporation.<sup>1</sup>

§ 6183. **Ratification of Invalid Mortgages.** — An informal corporate mortgage may become valid by ratification, on principles elsewhere considered.<sup>2</sup> It seems that a mortgage informal under a statute may be ratified by the subsequent act of the corporation in *delivering the mortgaged property* to the trustees named in the mortgage, by a valid deed of surrender, saving, of course, the intervening rights of third parties.<sup>3</sup> Where defects exist in a railway mortgage, the same is validated by a subsequent *delivery* of the mortgaged property to the trustees under the mortgage, except as to any rights of third persons which may have supervened. It was so held under a statute provision reciting that “no such mortgage shall be valid against any person except the mortgagor, his executors and administrators, unless possession is delivered or the mortgage is sworn to and recorded in the manner before prescribed,” — the objection to the mortgage being the defective execution of that part of the statutory mandate which required it to be sworn to in a certain manner.<sup>4</sup> Recurring to the principle that a ratification can only be made by the power which might have originally conferred the authority, or by its successor in right,<sup>5</sup> it is a reasonable conclusion that where the directors of a corporation assume to impose a mortgage upon its property without authority from the stockholders, or where a mortgage is imposed upon the property of the corporation by its ministerial officers without a precedent resolution of the board of directors, — the mortgage is not ratified by the mere act of the directors in *levying an assessment* to pay the debt thereby secured; nor does the existence of a statute requiring the assent of two-thirds of the stockholders change this conclusion.<sup>6</sup> Where the restraint

<sup>1</sup> *Ante*, §§ 3214, 3215.

<sup>2</sup> *Ante*, § 5291.

<sup>3</sup> *Ante*, § 5287.

<sup>4</sup> *Richards v. Merrimack & C. R.*,  
44 N. H. 127, 138.

<sup>5</sup> *Alta Silver Min. Co. v. Alta Placer  
Min. Co.*, 78 Cal. 629; s. c. 21 Pac.  
Rep. 373.

<sup>6</sup> *Ibid.*

which the directors or ministerial officers have overstepped in executing the mortgage,—whatever be its nature, statutory or otherwise,—is imposed *for the benefit of the stockholders*, then it is a reasonable conclusion that *they* may waive the irregularity and ratify the act; and what will amount to such waiver and ratification on their part depends largely upon principles already considered.<sup>1</sup> Accordingly, the fact that a mortgage was made, not on a *charter day*, or a day appointed by law, but at a special meeting convened without notice, verbal or written, to those directors who did not attend, did not enable a *subsequent creditor* to impugn the mortgage and claim the proceeds of a sale of the mortgaged property.<sup>2</sup>

§ 6184. **Further of This Subject.**—It is upon this principle, as we have seen,<sup>3</sup> that the *failure to give notice of a meeting* at which an issue of corporate bonds and the mortgage of the property of the corporation to secure the same are authorized, becomes immaterial, when all the persons having any beneficial interest as stockholders in the property of the corporation, ratify the act with full knowledge.<sup>4</sup> So, where the power of the directors to mortgage the corporate property was disputed, it was held that the stockholders, by approving, at their annual meeting, the minutes of the board of directors, which contained a resolution authorizing the borrowing of money and the giving of a mortgage on the corporate property for the same, had ratified the act of the directors, and had estopped themselves from disputing its validity when a

<sup>1</sup> *Ante*, §§ 5314, 5315, 5316. Circumstances under which a railroad company would not be enjoined from the payment of interest on the bonds of another company which it had indorsed, and also from purchasing, or consummating a purchase already made, of the road of the latter company, which was sold under a decree obtained by the former, on the ground that such acts were *ultra vires* and a *fraud* upon the stockholders of the

other company,—the complainants being precluded on the principle of *estoppel* and *ratification*,—see *Cozart v. Georgia R. &c. Co.*, 54 Ga. 379.

<sup>2</sup> *Gordon v. Preston*, 1 Watts (Pa.), 385, 387; s. c. 26 Am. Dec. 75, opinion by Gibson, C. J.

<sup>3</sup> *Ante*, §§ 712, 714.

<sup>4</sup> *Nelson v. Hubbard*, 96 Ala. 238; s. c. 11 South. Rep. 428; 12 Rail. & Corp. L. J. 182; 17 L. R. A. 375.

bill was brought to foreclose the mortgage.<sup>1</sup> So, it has been held, where a turnpike company had issued its bonds, secured by a mortgage of its road, for money borrowed to extend and complete its road,—that stockholders who had acquiesced therein until the money was expended, could not be heard to complain for the first time, in a suit to foreclose the mortgage, that the bonds were unauthorized and *ultra vires*.<sup>2</sup> As already noticed, the doctrine of *estoppel*, so far as applied against stockholders, and the doctrine of *ratification* by stockholders of irregular corporate action, are connected with the equitable doctrine of *laches*, where the stockholders themselves seek the aid of courts of equity to undo a wrong after having delayed for a considerable length of time.<sup>3</sup> Circumstances may exist where even a *long delay* will not estop them, or create the conclusion of a ratification by them of the irregular action which they seek to set aside, or *preclude* them from the aid of a court of equity on the ground of laches. In every such case, as has often been observed, the decision must be rendered according to the peculiar facts before the court; and one case has been met with where bonds of a railroad company had been wrongfully issued, but no attempt had been made for a period of over *eleven years* to enforce their payment, and it was held that the delay by the stockholders to bring an action in equity for their *cancellation*, and for the cancellation of the deed of trust securing their payment, was not such laches as barred their right to relief.<sup>4</sup>

§ 6185. *Ratification in Part.*—The rule that a principal by ratifying a *part* of an unauthorized transaction of his agent, thereby ratifies the whole, is of application to the unauthorized mortgage of corporate property.<sup>5</sup> Thus, a board of trustees

<sup>1</sup> *Aurora Agric. Soc. v. Paddock*, 80 Ill. 263.

<sup>2</sup> *Browning v. Mullins* (Ky.), 13 S. W. Rep. 427.

<sup>3</sup> *Ante*, § 4494, *et seq.*

<sup>4</sup> *Chicago v. Cameron*, 120 Ill. 447; *s. c.* 11 N. E. Rep. 89. Proceedings

for the *judicial confirmation* of the validity of bonds of *irrigating districts*, under Cal. Stat. 1889, p. 212: *Modesto Irrig. Dist. v. Tregoe*, 88 Cal. 334; *s. c.* 26 Pac. Rep. 237.

<sup>5</sup> *Ante*, § 5303.

of a college sent their president out clothed with power to borrow money on their credit. He did so; executed a promissory note in the name of the board of trustees as evidence of it; and to secure payment of it according to its terms, he executed a mortgage upon property belonging to the corporation. Afterwards the corporation, with full knowledge of the facts, ratified the creation of the debt and the giving of the note. It was held that, by these acts, without more, the corporation had so far as they had power confirmed the entire transaction including the making of the mortgage.<sup>1</sup>

**§ 6186. Whether Executed in Conformity with the General Law Relating to Chattel Mortgages.**—There is an unfortunate difference of judicial opinion upon the very important question whether, in the case of a railway mortgage which includes rolling stock and other personal property, it is necessary, in order to make the mortgage good, as against other creditors, in respect of the personal property, that it be executed, sworn to, filed, and recorded, in accordance with the provisions of the general statute of the State relating to *chattel mortgages*. Some of the State courts have held that it must be so executed.<sup>2</sup> The Supreme Court of the United States have held the contrary, on the ground that the directions of such a statute are wholly inapplicable to a railroad company whose line might pass through several of the districts in which chattel mortgages would be required to be filed under the statute, and would extend through several counties, and for other reasons stated in the opinion of the court.<sup>3</sup> The view of the State courts previously cited was taken by Mr. District Judge Ross, in a Federal case, with reference to the statute of California;<sup>4</sup> but his decision has

<sup>1</sup> *Krider v. Western College*, 31 Iowa, 547.

<sup>2</sup> *Hoyle v. Plattsburgh &c. R. Co.*, 54 N. Y. 314; *s. c.* 13 Am. Rep. 595; reaffirmed in *Vilas v. Page*, 106 N. Y. 439, 459; *Radebaugh v. Tacoma &c.*

*R. Co.*, 8 Wash. 570; *s. c.* 36 Pac. Rep. 460.

<sup>3</sup> *Hammock v. Loan &c. Co.*, 105 U. S. 77.

<sup>4</sup> *Union Loan &c. Co. v. Southern Cal. Motor Road Co.*, 51 Fed. Rep. 840.

been reversed by the Federal Circuit Court of Appeals.<sup>1</sup> The question in this last case was whether the *affidavit of good faith* required by the local statute must accompany a railway mortgage which includes personal property, in order to make it good as against other creditors. It seems to have been assumed by the Supreme Court of New Hampshire that such an oath, required by the general statute relating to chattel mortgages, must be made in the case of a railroad mortgage covering personal property; for the court held that such a mortgage is not invalid because the directors, in making the prescribed oath, do not in terms profess to make it *on behalf of the corporation*, but that it is none the less the oath of the mortgagee within the intendment of the statute.<sup>2</sup>

**§ 6187. Trustee not Chargeable as Garnishee or under "Trustee Process" in Behalf of General Creditors.**—The trustee in a mortgage holds the funds in his hands chargeable with the execution of the trust according to its terms; he is bound to account for them to those who are equitably entitled to them under the instrument creating the trust. He cannot, consequently, be charged under "trustee process," in favor of third persons who are creditors, by persons supposed to have the legal interest, if his title as trustee fails.<sup>3</sup>

**§ 6188. Right of the Mortgagees to Net Earnings.**—A mortgagee of corporate property can demand the *rents and profits* of the mortgaged property *only in virtue of an express contract*, and this he must do in the manner provided by such contract. If he has no specific pledge of them, he cannot

<sup>1</sup> 64 Fed. Rep. 450.

<sup>2</sup> *Richards v. Merrimack & C. R.*, 44 N. H. 127, 138; citing and following *Flint v. Clinton & C. Co.*, 12 N. H. 430, 436; which latter case was cited and approved in *Tenney v. East Warren Lumber Co.*, 43 N. H. 343.

<sup>3</sup> *Richards v. Merrimack & C. Railroad*, 44 N. H. 127, 139. The reason on which this rule proceeds, if not quite obvious, was made clear by the ob-

servations of Bell, C. J., and the numerous authorities examined and cited by him. The court cite *De Barante v. Gott*, 6 Barb. (N. Y.) 492, 498; *Shepherd v. McEvers*, 4 Johns. Ch. (N. Y.) 136, 138; *s. c.* 8 Am. Dec. 561; *Murray v. Ballou*, 1 Johns. Ch. (N. Y.) 575. The profession need hardly be again reminded that "trustee process" is the New England name for *garnishment*.

claim them as a legal incident to, or legal right growing out of the mortgage.<sup>1</sup> A railway mortgage will not be construed to embrace money, the proceeds of the running of the road before the time when the mortgagees took possession, unless the plain terms of the mortgage require such a construction.<sup>2</sup> Where the mortgage provides for the payment of the interest out of the "*net earnings*" accruing from the operation of the property, it will often be a difficult question to determine what are net earnings within the meaning of the instrument.<sup>3</sup> It has been held, construing such a mortgage, that the bondholders thereunder, in so far as concerned their right to have their interests paid out of the net earnings, were simple contract creditors, having no lien or other right than to have their interest paid out of a designated fund; that this did not give them the right to appropriate the earnings of the company, to the exclusion of the power of the company to make *additions, extensions, and improvements*, consistent with the purposes of its incorporation. The court reasoned that the parties contemplated a line of active and efficient railroad, managed in the usual manner, according to the discretion of the directors of the mortgagor company, and not one in a state of suspension or liquidation; and the conclusion was that the directors had the right to use the earnings of the company for such improvements, or other lawful purposes in its business, as they might think best.<sup>4</sup> Whilst the *directors* have necessarily a *large discretion* in the application of the income of the mortgaged property in maintaining its condition, and also in making extensions and improvements, — yet, as in the case where the question relates to the payment of interest on *preferred shares*,<sup>5</sup> this discretion is not without limit; and where the bonds and mortgage provide for the

<sup>1</sup> Douglass v. Cline, 12 Bush (Ky.), 608; Ellis v. Boston &c. R. Co., 107 Mass. 1.

<sup>2</sup> Gratz v. Redd, 4 B. Mon. (Ky.) 183. Construction of a mortgage of future "tolls, rents, issues, and

profits," etc.: Newport &c. Bridge Co. v. Douglass, 12 Bush (Ky.), 673.

<sup>3</sup> See, upon this question in another relation, *ante*, § 2268.

<sup>4</sup> Day v. Ogdensburgh &c. R. Co., 107 N. Y. 129. Compare *ante*, § 2266.

<sup>5</sup> *Ante*, § 2291, *et seq.*



payment of interest out of the net income, a bondholder will be entitled to the aid of a court of equity to prevent the directors from diverting the net income to other purposes;<sup>1</sup> though the circumstances which will warrant the interposition present questions of great difficulty.<sup>2</sup>

§ 6189. **Form of Corporate Mortgages.** — Unless the form in which corporate mortgages shall be made is otherwise prescribed by statute, such mortgages may well be in the form of *deeds* conveying the corporate property *in trust* to other persons to secure the payment of negotiable bonds issued by the corporation, in whose hands soever they may be.<sup>3</sup> Indeed, this is now the form almost universally adopted in America. A deed of trust of land, given by a railway company to secure the payment of bonds, which are described therein as “first mortgage land grant,” etc., bonds, which deed of trust provides that if there should be *no default*, the estate, right, title, and interest of the trustees should cease, determine, and become void, is held to be in effect a *mortgage*, and to leave the legal title in the company.<sup>4</sup>

<sup>1</sup> Dayton &c. R. Co. v. Shoemaker, 3 Ohio C. C. 473. It has been held that where it is stipulated in the bonds and mortgage that interest, not exceeding a fixed rate, shall be payable at stated periods out of the net income of the company, and a period elapses during which there is no net income which can be applied to the payment of such interest, the interest which thus accumulates will become a charge upon income subsequently realized, unless it clearly appears, from the instruments embodying the contract, that such was not the intention of the parties. *Ibid.*

<sup>2</sup> Compare *ante*, § 2262, *et seq.*

<sup>3</sup> Carpenter v. Black Hawk Gold Min. Co., 65 N. Y. 43, 51; Curtis v. Leavitt, 15 N. Y. 9, 63, 207; Wright v. Bundy, 11 Ind. 398, 404, 405; Central Gold Min. Co. v. Platt, 3 Daly (N. Y.),

263, 272. See King v. Merchants' Exch. Co., 5 N. Y. 547. So, it has been held that a statute (Laws N. Y. 1864, ch. 517, § 2) giving certain corporations power to mortgage their property “for any debt heretofore contracted or which may be contracted by it in the business for which it was incorporated,” did not restrict the form of the mortgage to a deed directly to the person to whom the debt was due: it might well be made in the form of a deed to trustees for the persons who should become holders of the bonds issued under it. Central Gold Min. Co. v. Platt, 3 Daly (N. Y.), 263, 269-70.

<sup>4</sup> Wisconsin &c. R. Co. v. Wisconsin River Land Co., 71 Wis. 94. This is in accordance with the modern doctrine which is said to be that “when- ever property is transferred, no

§ 6190. **Further of This Subject.** — A note and a mortgage securing the same, executed by the *officers* of a corporation *in their own names*, with the mere addition of their official designation, *may* be the obligations of the corporation, and will be held to be such when declared on, as such, after a judgment by default; since it is *not impossible* for a note and mortgage thus executed to be the note and mortgage of the corporation. The governing principle is that a corporation, if it chooses to do so, can bind itself in this form as well as in any other, just as a party may bind himself, if such is his design, by a fictitious signature; so that, if he admits such to be his intention, he cannot complain that he is judicially held to the consequences of his admission.<sup>1</sup> In like manner, it has been well

matter in what form or by what conveyance, as mere *security for a debt*, the transferee takes merely as a mortgagee, and has no other rights or remedies than the law accords to mortgagees." *Hoile v. Bailey*, 58 Wis. 434, 448; *Schriber v. Le Clair*, 66 Wis. 579, 586; *Starks v. Redfield*, 52 Wis. 349, 352; *Howe v. Carpenter*, 49 Wis. 697, 702; *Carpenter v. Black Hawk Gold Min. Co.*, 65 N. Y. 43, 51. In the judgment in this last case, Earl, C., said: "If this mortgage can properly be said to have been given to secure the payment of any debts, I can perceive no objection to its form. The statute prescribes no form, and there is no rule of law which requires a mortgage upon real estate to be in any particular form. The mere deposit of title deeds to secure the payment of money borrowed is an equitable mortgage. *Rockwell v. Hobby*, 2 Sandf. Oh. (N. Y.) 9; *Jackson v. Parkhurst*, 4 Wend. (N. Y.) 369. An absolute conveyance given as security, and a defeasance bearing the same date, is a mortgage. *Jackson v. Green*, 4 Johns. (N. Y.) 186; *Peterson v. Clark*, 15 Johns. (N. Y.) 205. A sealed grant of land for a term of one year on rent and conditioned to

be void on payment of a certain sum, with a covenant to pay it, is a mortgage. *Elliott v. Pell*, 1 Paige (N. Y.), 263. A deed, absolute on its face, may be shown to be a mere security for money, and thus a mortgage. *Hodges v. Tennessee Marine & Fire Ins. Co.*, 8 N. Y. 416; *Murray v. Walker*, 31 N. Y. 399. In all cases, no matter what the form of the mortgage may be, there is a right of redemption before foreclosure. In this case, the instrument executed to secure the bonds appears upon its face to be a mortgage, and to have been given simply as security. It may, in one sense, be called a trust deed, but it was intended as a mortgage security." For the *interpretation* of a bank charter *by the stockholders*, in executing mortgages under it to secure the State, under a peculiar arrangement by which the State loaned its bonds to the bank and took, as security for its reimbursement, mortgages from its stockholders, — see *Union Bank v. Guice*, 2 La. An. 249; *Eyssallenne v. Citizens' Bank*, 3 La. An. 663.

<sup>1</sup> *Rowe v. Table Mountain &c. Co.*, 10 Cal. 441. See also *Verzan v. McGregor*, 23 Cal. 339, 347, where the

held that an instrument which, on its face, purports to be a mortgage of the personal property of a corporation, is not invalid as such, because it is signed by the president only, with his own name and title, and sealed with his individual seal. The governing principle here is that the *body of the instrument* will be looked to for the purpose of determining whose contract the instrument is; and where, as in the case under consideration, the language of the instrument is incapable of any other conclusion than that it was intended to be the contract of the corporation, the property mortgaged being its property alone, it cannot be made the individual contract of its president by any form of *signature*.<sup>1</sup>

**§ 6191. Whether Directors must Execute Mortgage Themselves or can Authorize Agent to do It.**—It is said to be a general principle of law that one who has a *bare power* to do an act *must execute it himself*, and *cannot delegate* his authority to another; that his authority is exclusively personal, unless, from the express language used, or from the fair presumption growing out of the particular transaction, or of the usages of trade, a broader power was intended to be conferred on the agent.<sup>2</sup> It has been supposed that the power given to the directors of a corporation to appoint agents to

governing principle thus stated is reaffirmed. And see *ante*, § 5030, *et seq.*

<sup>1</sup> *Sherman v. Fitch*, 98 Mass. 59. Where the question arose whether a corporation which had purchased land of *executors*, and given its bond secured by a mortgage, providing for the payment of interest annually to the *widow* of the defendant, who was one of the executors,—was liable to the executors, or to the widow; and the charter provided that the property of the association should be purchased, held, managed, and sold by a *board of five trustees*; but the mortgage was executed by the president and secretary, and not by the trus-

tees, and was not sealed with the corporate seal; and there was no resolution authorizing, ratifying, or in any manner recognizing the making of it, to be found on the books of the corporation;—it was held that the mortgage was *not the act of the corporation* or binding upon it as such, and that the association was consequently liable to the executors, the attempt thus to secure the purchase-money having failed. *McElroy v. Nucleus Asso.*, 131 Pa. St. 393; *s. c.* 18 Atl. Rep. 1063.

<sup>2</sup> *Despatch Line v. Bellamy Man. Co.*, 12 N. H. 205; *s. c.* 37 Am. Dec. 203, 210, *per Parker, C. J.*; *Andover v. Grafton*, 7 N. H. 298, 304.

carry on the ordinary business of the company, is not sufficient, of itself, to authorize them to delegate to agents the power to execute a mortgage of the corporate property, but is confined to the ordinary business of the corporation.<sup>1</sup> But in practice, the directors of business corporations do not execute, over their own signatures, as the agents of the corporation, any species of contract, sealed or unsealed.<sup>2</sup> As the governing body, they give the assent of the corporation, and prescribe what it is to do; and the formal execution is by its ministerial officers, generally its president and secretary,<sup>3</sup> the latter being the custodian of its seal.<sup>4</sup>

§ 6192. **Use of the Corporate Property and Franchise by a Mortgagee in Possession.** — Where a telegraph corporation has placed a mortgagee of its property in possession of the same, the mortgage not including the franchise, such mortgagee, not being the owner of the franchise, may well operate the property in the name of the corporation. A circular issued by the company, describing the completion of the line, the material of which it is constructed, and recommending it to the patronage of the public, will have no effect on his rights; and he may, like any other mortgagee in possession, maintain *replevin* for the corporate personalty, if dispossessed of it.<sup>5</sup>

§ 6193. **Construction of the Words "Grant, Bargain, and Sell."** — The covenants arising from the words "grant, bargain, and sell," in a mortgage given by a corporation to secure an issue of its bonds, are *not fraudulent representations* as to existing incumbrances, on the part of a prior mortgagee and director of the corporation who does not sign the mortgage containing such covenants; but they constitute, under a statute of Illinois, a *warranty* that the land conveyed and

<sup>1</sup> Despatch Line v. Bellamy Man. Co., 12 N. H. 205; s. c. 37 Am. Dec. 203, 210; Savings Bank v. Davis, 8 Conn. 207; Stoughton v. Baker, 4 Mass. 522; s. c. 3 Am. Dec. 236.

<sup>2</sup> But see *ante*, § 5095.

<sup>3</sup> *Ante*, § 5090.

<sup>4</sup> *Ante*, §§ 4694, 5072.

<sup>5</sup> Reed v. Bradley, 17 Ill. 321.

mortgaged is free of all incumbrances, and also a warranty by the corporation to the purchasers of the bonds, that no other mortgage of the property has been made by the corporation. Such covenants bind the corporation alone, and do not bind its individual directors and stockholders.<sup>1</sup>

§ 6194. **What Passes under Particular Words in Such Mortgages.**—This brings us to inquire more particularly *what passes under particular words* in mortgages made by corporations, and especially by railway companies, of their properties. Upon the question what is included in the general terms employed in railroad mortgages, it has been held that a mortgage of the company's "railroad and franchise and also of the station-houses, engine-houses, etc., and other appendages, with all the lands thereto belonging and intended for the use and accommodation of said road," passes only such *lands* of the company as are so connected with and used by the company for their railroad that they would have been authorized to take them *in invitum* under the provisions of their charter; and that, if it is so connected and used, it is immaterial whether it was so taken, or whether it was purchased. It did not, therefore, include an establishment for the manufacture of railroad cars, nor dwelling-houses erected for the purpose of being rented to the company's employés.<sup>2</sup> So, a mortgage of "the said railroad constructed, and to be constructed, together with all and singular the railways, rails, bridges, fences, privileges, rights and real estate, now owned by said company, or which shall hereafter be owned by them," has been held to cover all such *lands* as were taken by the company for railroad purposes, which they could take by compulsory proceedings under their charter, but did not extend to lands owned by the company which were purchased for other purposes.<sup>3</sup> So, a mortgage embracing "the road of said

<sup>1</sup> Mullanphy Sav. Bank v. Schott, 135 Ill. 655; s. c. 25 Am. St. Rep. 401.

<sup>2</sup> Eldridge v. Smith, 34 Vt. 484. Compare Brainerd v. Peck, 34 Vt. 496.

<sup>3</sup> Seymour v. Canandaigua &c. R. Co., 25 Barb. (N. Y.) 284. A similar ruling was made in Vermont in determining what lands of a railroad company were exempt in their charter

company and its branches, made or to be made, in the State of Ohio, including the right of way and the land occupied thereby, together with the superstructure and the tracks thereon, and all the bridges, viaducts, culverts, fences, depot grounds and buildings thereon, and all appurtenances belonging thereto, and all franchises, rights, and privileges of the company in or to the same; also all locomotives, tenders, cars, and machinery, tools, implements, fixtures, wood, fuel, oil, waste, and other materials or property then owned or thereafter to be acquired and owned by said company, for the purposes of use or repairing of said road, or any other property of said company,"—includes *office furniture*, suitable in kind and necessary in amount for the use of the employés of the company in the performance of their daily duties, and for the directors in the transaction of their business.<sup>1</sup> So, a deed purporting to convey all the present and *in-future-to-be-acquired property* of a railway company, which included, in express terms, "the road of the company, made and completed, including the right of way and the land occupied thereby, with the superstructure and track thereon, and all the rails and other materials used and to be used therein, and all engines, cars, tools, machinery, and all other personal property then owned, or which might be afterwards acquired by the company, together with all franchises, rights and privileges,"—has been held to include *cars, car-wheels, firewood* intended for use in the engines, and *coal* intended for use in the machine shops, as things incidental and indispensable to the enjoyment of the thing expressly conveyed.<sup>2</sup>

§ 6195. **The Same Subject Continued.**—Where a railroad company accepted certain bonds issued under an act of the legislature, which declared that they should constitute a first lien and mortgage upon the road *and property* of the company, it was held that the word "property" included all the *lands* of the company, and that a valid lien upon them was created by

from taxation. Vermont &c. R. Co. v. Burlington, 28 Vt. 193.

<sup>1</sup> Ludlow v. Hurd, 1 Disney (Ohio), 552.

<sup>2</sup> Phillips v. Winslow, 18 B. Mon. (Ky.) 431, 446; s. c. 68 Am. Dec. 729.

the act.<sup>1</sup> A mortgage by a railroad company of all its property, real and personal, including its roadbed, *rails*, etc., has been held to cover *old iron rails* taken up and removed from the road because unfit for further use, and the trustees in the mortgage are entitled to have them sold and the proceeds applied to the payment of interest upon the bonds, in preference to subsequent execution creditors of the company.<sup>2</sup> Such a mortgage of "all and singular its property, real and personal, of whatever nature and description, now possessed or hereafter to be acquired," will include after-acquired rolling stock; and repairs and improvements made on such rolling stock will be covered by the mortgage, as being in the nature of *accessions*; nor will the identity of such rolling stock be lost, so as to escape from being covered by the mortgage, by reason of being removed from use, for the purpose of so changing it as to adapt it to a *proposed change of gauge*.<sup>3</sup> The fund accruing from the sale of a property to foreclose a mortgage thereon, represents what passed under the mortgage, and not what was reserved or excepted out of it. Consequently, where a corporation made a mortgage of its property and income, excepting such parts as it might need to defray expenses of administration, etc., it was held that the *salaries of its officers* were not payable out of the fund produced by a sale for foreclosure of the mortgage, because these were a part of the expenses of administration, to meet which it had received sufficient income by the terms of the mortgage.<sup>4</sup> The *rolling stock* of a railroad company has been held a part of the *realty*, in such a sense as to pass by a mortgage of the railroad itself.<sup>5</sup>

<sup>1</sup> *Wilson v. Boyce*, 92 U. S. 320. The opinion, by Mr. Justice Hunt, contains (at page 325) the following language: "The generality of its language forms no objection to the validity of the mortgage. A deed 'of all my estate' is sufficient. So a deed 'of all my lands wherever situated' is good to pass title. *Jackson v. Delancey*, 4 Cow. (N. Y.) 427; *Pond v. Bergh*, 10 Paige (N. Y.), 140; 1 Atk. on Conv. 2. A mortgage 'of all my

property,' like the one we are considering, is sufficient to transfer title." To the same effect, see *Whitehead v. Vineyard*, 50 Mo. 30. Compare *Dillon v. Barnard*, 21 Wall. (U. S.) 430.

<sup>2</sup> *First Nat. Bank v. Anderson*, 75 Va. 250.

<sup>3</sup> *Hamlin v. Jerrard*, 72 Me. 62.

<sup>4</sup> *Sheaff's Appeal*, 55 Pa. St. 403.

<sup>5</sup> *Michigan &c. R. Co. v. Chicago &c. R. Co.*, 1 Ill. App. 399.

§ 6196. **What Descriptive Words Cover Branch Roads thereafter Built.**—A mortgage given by a railway company, embracing its existing line of railway “and *all the railways*,” etc., now held or acquired or hereafter to be held or acquired, will pass a *branch road afterwards built*, although not in contemplation at the date of the execution of the mortgage; but such branch road will pass subject to any burden put upon it by the company in the course of its acquisition and as incident thereto.<sup>1</sup> Where a mortgage was executed upon a railroad, as then made or to be made, and a later mortgage, under authority of a subsequent legislative enactment, was placed upon a *branch* of the original road, and the special act provided that the later mortgage should be a first lien upon the branch,—it was held that a sale under the original mortgage might be made exclusive of the branch.<sup>2</sup>

§ 6197. **What Does Not Pass.**—Where a mortgage deed of trust upon railway property embraced the *franchises and railroad* of the company, and *all property* connected therewith, present and prospective, but did not mention *subscriptions* made to *its capital stock by a county*, which were payable in the bonds of the county, it was held that the purchasers under the mortgage acquired no right to the *county bonds* issued under the subscription.<sup>3</sup> A railway mortgage, covering in terms the right of way and the other property of the company, its chattels and things appertaining thereto, its chartered rights, privileges, and franchises, and all its estate, right, title, interest, property, and possession, claims, and demands whatsoever,—has been held not to embrace an *unpaid balance due on a subscription to the capital stock* of the corporation.<sup>4</sup> A mortgage by such a company upon its “*property*,” then existing and thereafter to be acquired, with a specific description of the different kinds of such property, has been held not to in-

<sup>1</sup> Coe v. Delaware &c. R. Co., 34 N. J. Eq. 266; affirming s. c. 31 N. J. Eq. 105, 108.

<sup>2</sup> Randolph v. Wilmington &c. R. Co., 11 Phila. (Pa.) 502.

<sup>3</sup> Morgan County v. Thomas, 76 Ill. 120, 122; followed in Morgan County v. Allen, 103 U. S. 498, 513.

<sup>4</sup> Dean v. Biggs, 25 Hun (N. Y.), 122.



clude *municipal bonds* in aid of the road, not specifically mentioned therein.<sup>1</sup> Such a mortgage, conveying "all the income, rents, issues, tolls, profits, receipts, moneys, rights, benefits, and advantages had, received, or derived by the said railroad company, from its railroad or other property, or in any other way whatsoever,"—has been held not to pass such "moneys" as were *simply past income and earnings*.<sup>2</sup>

§ 6198. **The Same Subject Continued.**—In like manner, a mortgage executed by a railroad company on "the road" of the company, "whether made or to be made, acquired or to be acquired, and *all property*, real or personal," of the company, "whether now owned or hereafter to be acquired, *used, or appropriated for the operating or maintaining the said road*,"—has been held not a lien upon *real estate* of the company, then owned or afterwards acquired, which had not been used or appropriated for operating or maintaining the road.<sup>3</sup> The charter of a railroad company empowered it to acquire and hold such real property as might be necessary therefor, and to obtain any steamboat, piers, "*wharves*," and the appurtenances thereunto belonging, that the directors might deem necessary, profitable, and convenient, to use and manage in connection with said railroad. The corporation executed certain deeds of trust of "the *lands* occupied by said railroad," etc., "*in connection with* said portion of said railroad situate within the limits of said cities," etc., or on the "line thereof," and also of "all depots, station-houses, *wharves*," etc., "*used in connection with* its said railroad, together with all steamboats and personal property," etc., "*used exclusively for constructing, maintaining, operating or conducting the business of said railroad*." It was held that property acquired and owned, and not used or to be used *in connection with* the railroad, and in the promotion of the direct and proximate purposes of its construction, did not pass. It was also held that certain property bought of an opposition steamship line, not with a

<sup>1</sup> Smith v. McCullough, 104 U. S. 25. Fed. Rep. 768; s. c. reversed on another ground, 124 U. S. 652.

<sup>2</sup> Dow v. Memphis & c. R. Co., 20

<sup>3</sup> Walsh v. Barton, 24 Ohio St. 28.

view of employing it in the business of the railroad, but with the view of withdrawing it from business and preventing competition, was not lawfully acquired by the company under its charter, and did not pass.<sup>1</sup> The court proceeded upon the view that all the words of conveyance employed in the mortgages spoke of property to be owned, occupied, and used in the construction and operation of the road, or *in connection therewith*; and the conclusion was that property, real or personal, not wanted or used for one of these purposes, or *in connection with one of these purposes*, was not covered by any clause in either of the mortgages.<sup>2</sup>

### § 6199. Whether Property Acquired Ultra Vires will Pass.

While a corporation which has purchased property in excess of its corporate powers, and then mortgaged it to secure a lawful debt, will not be heard to set up, in opposition to the title of its mortgagee, that the purchase was *ultra vires*,<sup>3</sup>—yet the fact that the property was purchased and held in excess of the powers of the mortgaging corporation may be an *important circumstance* in determining, upon a true construction of the mortgage, whether it was intended that the property should pass thereunder.<sup>4</sup> So, where a railroad mortgage covered, by its terms, the real estate, railroad, engines, ferries, locomotives, cars, tenders, shops, tools, and machinery, and “all other personal property whatsoever, in any way belonging or appertaining to the railroad of said company,” and the company had, in excess of its powers, purchased certain *canal boats*, it was held that these did not pass under the mortgage, because they did not belong or appertain to the railroad of the company.<sup>5</sup> So, where a railroad mortgage covered the railroad of the mortgagor corporation, with its corporate privileges and appurtenances, together with its locomotives, engines, cars, and seven tracts of land, which tracts of land were not those in controversy,—it was held that this did not,

<sup>1</sup> Morgan v. Donovan, 58 Ala. 241.

<sup>2</sup> *Ibid.* 261.

<sup>3</sup> Parish v. Wheeler, 22 N. Y. 494;  
*anté*, § 5797, *et seq.*

<sup>4</sup> See, for instance, Morgan v. Donovan, 58 Ala. 241.

<sup>5</sup> Parish v. Wheeler, 22 N. Y. 494, 499, 512.

as matter of law, include certain *town lots* adjoining the road-bed, and ostensibly used to connect the road with river navigation, but that it was not error to *submit to a jury* the question whether such lots were *appurtenant* and *necessary* to the railroad, as a matter of *fact*.<sup>1</sup> So, a railroad mortgage which, after describing the specific property which should pass thereunder, used the expression "*and all other appurtenances, made or to be made,*" and used in two other places the word "*appurtenances,*"—it was held that this did not pass a tract of 285 acres of *wood land*, subsequently acquired by the company, situated seven miles from its road, although the land was purchased and used by the company for the purpose of supplying its road with timber and fuel.<sup>2</sup> The mortgage last considered granted "their railroad, with its superstructure, track, and all other appurtenances, made or to be made," and "also all and singular their railroad furniture, including engines, tenders, cars of every description, tools, *materials*, machinery, and every other kind of personal property which shall be used for operating said railroad." It was held that this did not pass certain *railroad chairs*, afterwards acquired by the company, but never used in the construction of its road.<sup>3</sup> After the execution of the same mortgage, A. and B. purchased certain land for the use of the company for depot grounds, and took a *written contract* of sale and *for a deed* upon payment of the

<sup>1</sup> Shamokin Valley R. Co. v. Livermore, 47 Pa. St. 465; s. c. 86 Am. Dec. 552.

<sup>2</sup> Dinsmore v. Racine & C. R. Co., 12 Wis. 649. In Farmers' Loan & C. Co. v. Cary, 13 Wis. 110, the same mortgage was held not to cover the *income* or *earnings* of the railroad, nor did a deed of surrender under the mortgage carry with it a claim for money due to the railroad for carrying the mails. That *property acquired by a railroad company, but not necessarily used in connection with its road*, does not pass under the designation of *appurtenances*, or under the usual de-

scriptive terms employed in railroad mortgages,—Seymour v. Canandaigua & C. R. Co., 25 Barb. (N. Y.) 284. See also Meyer v. Johnston, 53 Ala. 237. As to the meaning of the word "*appurtenances,*" see Harris v. Elliott, 10 Pet. (U. S.) 25. That the word "*appurtenances*" may, *under circumstances*, be held to include outside lands, see Whitehead v. Vineyard, 50 Mo. 30.

<sup>3</sup> Farmers' Loan & C. Co. v. Commercial Bank, 11 Wis. 207; s. c. on a subsequent appeal, 15 Wis. 424; 82 Am. Dec. 689.

purchase-money, and assigned the contract to the company, which took possession of the land and used it for depot purposes, and paid a part of the purchase-money. It was held that the lien of the mortgage attached to this land the moment the interest of the company therein was acquired, and that no subsequent alienation by the company could displace or impair such lien.<sup>1</sup>

**§ 6200. Rights of Attaching Creditors as against the Mortgage.**—The mortgage being *recorded* in compliance with the recording laws of the State within which it is executed and within which the property covered by it is situated, subsequent *attaching creditors* will, at most, seize, under their attachments, only the company's *equity of redemption*, and no title can be acquired under their attachments which will be good against the mortgagees; and this principle will apply to *personal property* covered by the mortgage which was situated within the State at the time when the mortgage was executed, but which is subsequently *attached in another State*, in an action against the mortgagor by a general creditor; and this is so, although the mortgage has not been recorded in the State where the property is attached. This is in accordance with the principle or rule of comity that the validity of conveyances of personal property will be determined according to the *law of the place of the contract*.<sup>2</sup> If the attaching creditor would impeach the validity of the bonds issued under the mortgage, they being valid on their face and conformable to the law of the State under which they were issued, the *burden* rests upon him.<sup>3</sup>

**§ 6201. Liability for Fraudulent Assignment of Mortgages.** Where the treasurer of a savings bank, who had been author-

<sup>1</sup> Farmers' Loan & Trust Co. v. Fisher, 17 Wis. 114.

<sup>2</sup> Nichols v. Mase, 94 N. Y. 160, 166. In the opinion of the court by Miller, J., the following decisions are cited as affirming the principles on which the court proceed: *Ætna Ins. Co. v. Aldrich*, 26 N. Y. 92, 96; *Martin v. Hill*,

12 Barb. (N. Y.) 631; *Langworthy v. Little*, 12 Cush. (Mass.) 109; *Jones v. Taylor*, 30 Vt. 42; *Ferguson v. Cliford*, 37 N. H. 86; *Hoyt v. Thompson's Executor*, 19 N. Y. 207, 224; *Edgerly v. Bush*, 81 N. Y. 199, 203.

<sup>3</sup> Nichols v. Mase, 94 N. Y. 160.

ized by a vote of the trustees to discharge and release mortgages, fraudulently interpolated in the record of the vote the word "assign" between the words "discharge" and "release,"—it was held that, as between the bank and one who, misled by the record, took an assignment of a mortgage for value and in good faith, the bank must bear the loss.<sup>1</sup>

§ 6202. *Equitable Liens and Mortgages.*—An *equitable lien* is created where the parties in fact intend and engage that such lien shall exist in behalf of a creditor advancing money, although they fail to put their intention into formal language, so as to make a contract valid in law,—in which case a court of equity, the evidence being clear, will give effect to the engagement which the parties really made and intended, regard being always had to the rights of subsequent creditors and purchasers without notice. When, therefore, a company, or its directors, have power in a given case to create a mortgage, or pledge of the company's property to secure a debt, and the instruments, by which it is sought to carry into effect this intention, are imperfectly executed, equity will give effect to them and hold them a valid pledge upon the property, on the familiar principle that what is agreed to be done is considered as done.<sup>2</sup> An obvious exception to this doctrine is, that it cannot be invoked to the prejudice of subsequent creditors and *bona fide* purchasers without notice. But the *mere fact* that the money advanced by a creditor was to meet the most pressing necessities of the corporation, and was used for the most meritorious corporate purposes, does not necessarily create an equitable lien in favor of such creditor as against prior mortgagees. It was so held, where a creditor had advanced moneys for the payment of interest on the debentures of the corporation, and for taxes, and for the purchase of its right of way.<sup>3</sup>

<sup>1</sup> Holden v. Phelps, 141 Mass. 456.  
See ante, § 4929, et seq.

<sup>2</sup> Coe v. Columbus &c. R. Co., 10 Ohio St. 372, 405; s. c. 75 Am. Dec. 518, 543.

<sup>3</sup> Ex parte European &c. Co., 3 De Gex, J. & S. 147.

§ 6203. **Equity will Give Effect to an Informal Mortgage, as against Subsequent Incumbrancers with Notice.**—A mortgage made *by the president* of a corporation, in pursuance of authority thereto, and executed *by him* without the formality of the *corporate seal*, will receive effect in equity, as against the holders of bonds under subsequent mortgages, who have *notice*, through their respective trustees, of the first incumbrance.<sup>1</sup> Thus, a railroad company, being in want of funds to build its road, the directors authorized the president to issue bonds secured by a mortgage on its road and franchises. The president executed an instrument reciting his authority, and which proceeded, in his name as president, to mortgage the road and franchises; but he signed the instrument with his own name simply. Bonds were issued and negotiated under this mortgage, and the making of it was afterwards ratified by the stockholders. At a later period, the company issued two sets of bonds, secured by second and third mortgages, made in due form. The first bonds not having been paid when due, the trustees in that mortgage filed a bill to foreclose it. It was held that, although the first instrument, by reason of its defective execution, could not operate as the deed of the corporation, yet in a court of equity it was to be regarded as an *equitable mortgage*, and that the holders of the bonds thereby intended to be secured were entitled to the rights which it was intended to give them, unless the rights of subsequent purchasers without notice had intervened; that the trustees under the second and third mortgages were the *agents* of the holders of the bonds secured by those mortgages, and hence, actual *notice* to such trustees was notice to such bondholders, who therefore took their bonds subject to all the legal consequences of the first equitable mortgage; and that the first mortgage took effect upon the road and its franchises, as they existed at the time when the beneficiaries under it should succeed to the rights of the corporation by virtue of its foreclosure.<sup>2</sup> So, where a railroad

<sup>1</sup> *Miller v. Rutland &c. R. Co.*, 36 Vt. 452; *Mobile &c. R. Co. v. Talman*, 15 Ala. 472, 488.

<sup>2</sup> *Miller v. Rutland &c. R. Co.*, 36 Vt. 452.

company, by a resolution, authorized an agent to pledge all the real and personal estate of the company, for the purchase of iron, locomotives, etc., and a contract was entered into by the agent for the purchase of railroad iron, reciting his authority to pledge the real and personal estate of the company, which contract was *not signed or sealed by the company itself*, but was simply signed with the agent's own name, and that of the other contracting party,—it was held that an equitable mortgage was thereby created in favor of the creditor, good as against the company itself, and against all persons claiming through it with notice.<sup>1</sup> So, the power which courts of equity possess to *reform a deed* to make it conform to the agreement of the parties, will be exercised to reform a deed of trust of corporate property intended to be the deed of the corporation, but executed by its officers in their own names.<sup>2</sup> Accordingly, where a corporate mortgage was not executed in the corporate name, but showed on its face that it was the mortgage of the corporation, a decree foreclosing it was sustained.<sup>3</sup>

<sup>1</sup> Mobile &c. R. Co. v. Talman, 15 Ala. 472, 488.

<sup>2</sup> West v. Madison County Agric. Board, 82 Ill. 205. In this case it was held that a bill which prayed for a ref-

ormation of such deed, and a foreclosure of it, presented a clear case for equitable relief.

<sup>3</sup> Ottawa &c. Plank Road Co. v. Murray, 15 Ill. 336.

## CHAPTER CXXXV.

### FORECLOSURE OF CORPORATE MORTGAGES.

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6249. Other holdings touching such schemes of reorganization.

6250. Equities of stockholders who have purchased their shares in view of an approaching sale of the corporate property.

§ 6208. **Power and Duty of the Trustees to Proceed to Foreclose.**—The trustees in such a mortgage deed of trust may, of course, take possession of the property, advertise it for sale, and sell it so as to pass a good title to the purchaser, provided such a power is conferred upon them in the instrument, and they proceed in strict conformity therewith;<sup>1</sup> and if the trustees refuse so to execute their trust, they may be *compelled to do so* by a court of equity, on a petition of the bondholders.<sup>2</sup> And although the mortgage provides that the trustees, on request of *one-half in amount* of all the holders of the bonds thereby secured, shall proceed to sell the property and apply the proceeds of the sale to the payment of the bonds, yet the trustees, unless the language is restrictive, have the power to take possession and foreclose, without the request of one-half the bondholders; and circumstances may arise, endangering the security of the bondholders, under which a court of equity will compel the trustees so to proceed on the petition of a *small minority* of the bondholders, in the particular case *one-sixth* in amount.<sup>3</sup> Nor will it be any excuse for them to urge that, if the bill is sustained, they will be required to take possession of the mortgaged road and manage it, whereby a great burden of labor and responsibility, moral and financial, will be imposed upon them, in that they will be personally liable for all injuries done, and debts incurred to others, in managing the property. "This burden and responsibility," said the court, "are incident to the trust which they assumed in taking the mortgage, and it is not for them to say that the *cestuis que trust* must suffer, because it is

<sup>1</sup> Macon &c. R. Co. v. Georgia R. Co., 63 Ga. 103.

<sup>2</sup> First Nat. Fire Ins. Co. v. Salisbury, 130 Mass. 303.

<sup>3</sup> *Ibid.*

inconvenient, disagreeable, or burdensome for them to do their duty as trustees.”<sup>1</sup> On the other hand, although there is a statute requiring the consent of a certain amount in value of the bondholders to the foreclosure proceeding, yet such consent may well be presumed where the proceeding takes place, and the bondholders, having full notice, do not in any manner express their *dissent*.<sup>2</sup>

§ 6209. **Action to Foreclose Regularly brought by the Trustee in the Mortgage.** — The most usual form of corporate mortgages, — and this is especially true of *railroad mortgages*, — is that of a conveyance to a trustee, who is either an individual or a corporation—upon certain trusts named in the deed. The *bonds* issued under the mortgage, and which are secured by it, are generally *negotiable* securities, passing from hand to hand, and the owners of them are in many cases unknown. The trustee is, therefore, the proper person to bring the action to foreclose the mortgage; and it is not in general necessary to make the bondholders *parties* to the foreclosure suit, but they are bound, by *representation*, by whatever steps may be taken by the trustee in the progress of the action, in the absence of fraud or collusion.<sup>3</sup>

§ 6210. **When the Bondholders may Sue to Foreclose.** The position of the *bondholders*, as beneficiaries under the trust expressed in the mortgage deed of trust, is somewhat analogous to that of *stockholders*, in respect of their rights of action to redress grievances arising in the management of the affairs of the corporation.<sup>4</sup> Ordinarily, such bondholders have no right to bring an action to foreclose the mortgage, but the trustee in the mortgage, as stated in the preceding section, is the proper person to sue. But if he neglects to sue, after the happening of the condition which entitles the bondholders to

<sup>1</sup> First Nat. Fire Ins. Co. v. Salisbury, 130 Mass. 311.

<sup>2</sup> Barnes v. Chicago &c. R. Co., 122 U. S. 1.

<sup>3</sup> Post, §§ 6213, 6214; Shaw v. Railroad Co., 100 U. S. 605, 612; Shaw v.

Norfolk County R. Co., 5 Gray (Mass.), 162. See also Swift v. Stebbins, 4 Stew. & P. (Ala.) 447; Alexander v. Cana, 1 De Gex & Sm. 415.

<sup>4</sup> Ante, § 4479, et seq.

a foreclosure, and after being requested by them so to do, they may bring the action to foreclose, making him a party defendant.<sup>1</sup> If the mortgage deed of trust provides that, upon the written request of the holders of a majority of the bonds, the trustees shall proceed to collect the principal and interest of all the bonds, by foreclosure and sale or otherwise,—a request by the holders of a *majority* of the bonds for them so to proceed will be necessary to support an action for foreclosure.<sup>2</sup> And they may so proceed where the trustees have acquired an interest adverse to them, and stand in a hostile position to them.<sup>3</sup> But if the bondholders proceed, it is indispensable that the *trustee* should be made a *party*,<sup>4</sup> and if he is not served with process, and does not voluntarily appear, the suit will fail.<sup>5</sup> Where, by the terms of the mortgage, the conveyance is declared to be for the purpose of securing the payment of the *interest*, as well as the *principal*, of the bonds, and where, by another article of the same instrument, the mortgagor's right of possession terminates upon a default in the payment of *interest* as well as *principal*, on any of the bonds,—then it is held that, independently of any other provisions in the mortgage, the trustees, or, on their failure to do so, *any bondholder*, upon the non-payment of any installment of interest on any bond, *may file a bill* for the enforcement of the security

<sup>1</sup> Owens v. Ohio &c. R. Co., 20 Fed. Rep. 10; Beekman v. Hudson River &c. R. Co., 35 Fed. Rep. 3.

<sup>2</sup> Chicago &c. R. Co. v. Fosdick, 106 U. S. 47, 76. Compare Farmers' Loan &c. Co. v. Chicago &c. R. Co., 27 Fed. Rep. 146. It has been held that the original holder of the bonds of a railroad and telegraph company, payable to bearer, with interest semi-annually, secured by the *income* arising from the sale of its lands and the operation of its road and line, which land and road have passed by *consolidation* to another railroad company,—is a creditor having a specific lien on the income of the property, which has gone from his debtor into the

hands of the other company, and that this gives him the right to file a bill in equity to foreclose such lien, after default in the payment of the principal and interest of such bonds according to their terms. Rutten v. Union Pacific R. Co., 17 Fed. Rep. 480.

<sup>3</sup> Webb v. Vermont Cent. R. Co., 20 Blatchf. (U. S.) 218.

<sup>4</sup> Barry v. Missouri &c. R. Co., 27 Fed. Rep. 1.

<sup>5</sup> Morgan v. Kansas Pac. R. Co., 15 Fed. Rep. 55. Circumstances under which bondholders may sue to prevent a diversion of the property covered by the mortgage: Weetjen v. St. Paul &c. R. Co., 4 Hun (N. Y.), 529.

by the foreclosure of the mortgage and sale of the mortgaged property. "This right," continues the court, "belongs to each bondholder separately, and its exercise is not dependent upon the co-operation or consent of any others, or of the trustees. It is properly and strictly enforceable by, and in the name of, the latter, but, if necessary, may be prosecuted without and even against them. It follows from the nature of the security, and arises upon its face, unless restrained by its terms."<sup>1</sup>

§ 6211. **Concurrent Foreclosure Suits in State and Federal Courts.**—A common and lamentable illustration of human selfishness is found in the rule which is established in the Federal courts, and, it seems, in a majority of the State courts, that it is no bar to the prosecution of an existing action, that an action for the same cause between the same parties has been previously commenced in a tribunal of another State or sovereignty, having jurisdiction.<sup>2</sup> Roundly stated, the rule is that dependence of a former action between the same parties for the same cause is pleadable in *abatement* to the second action, provided the action be in the *same State*, and this rule holds in equity as well as in law. But, on the other hand, the plea of a *former suit pending* in equity for the same cause, in a foreign jurisdiction, will not abate an action at law, or authorize an injunction against the prosecution of

<sup>1</sup> *Chicago &c. R. Co. v. Fosdick*, 106 U. S. 47, 68.

<sup>2</sup> Speaking with reference to this subject, in *Stanton v. Embrey*, 93 U. S. 548, 554, and citing the following authorities, it was said in the Supreme Court of the United States by Mr. Justice Clifford: "Repeated attempts to maintain the negative of that proposition have been made, and it must be admitted that such attempts have been successful in a few jurisdictions; but the great weight of authority is the other way. *Bowne v. Joy*, 9 Johns. (N. Y.) 221; *Hatch v. Spoffard*, 22 Conn. 485, 497; *s. c.*

58 Am. Dec. 433; *Maule v. Murray*, 7 T. R. 470; *Imlay v. Ellefsen*, 2 East, 453; *Colt v. Partridge*, 7 Met. (Mass.) 570, 572; *Smith v. Lathrop*, 44 Pa. St. 326, 328; *s. c.* 84 Am. Dec. 448; *Cox v. Mitchel*, 7 C. B. (N. S.) 55; *Wood v. Lake*, 13 Wis. 85, 91; *Wadleigh v. Veasie*, 3 Sumn. (U. S.) 167; *Loring v. Marsh*, 2 Cliff. (U. S.) 322; *White v. Whitman*, 1 Curtis (U. S.), 494; *Salmon v. Wootton*, 9 Dana (Ky.), 422; *Yelverton v. Conant*, 18 N. H. 123; *Walsh v. Durkin*, 12 Johns. (N. Y.) 99; *Davis v. Morton*, 4 Bush (Ky.), 442, 444; *s. c.* 96 Am. Dec. 309."

an action in the foreign tribunal.<sup>1</sup> Out of the rule produced by this greed of jurisdiction has grown the rule that the dependency of a suit in a state court, for the foreclosure of a mortgage, will not bar a subsequent suit in a court of the United States between the same parties for the foreclosure of the same mortgage.<sup>2</sup> Equally bad is the rule that the fact that a suit is brought by the trustee in a railway mortgage in a State court, to foreclose the mortgage, will not be a bar to a similar suit in a court of the United States, by a holder of bonds secured by the mortgage.<sup>3</sup> But the evils which necessarily flow from such a rule are mitigated by another rule, to the effect that the court which *first obtains jurisdiction of the res*, by seizing it and taking it into its custody through its receiver or otherwise, thereby acquires full and complete jurisdiction over it, with the right to grant any proper relief prayed for in the bill.<sup>4</sup> This rule is applicable to the case where actions have been brought to foreclose a railway mortgage in two different courts of the United States situated in different circuits. Here the court which first gains jurisdiction by service of process and by a seizure of the property upon which the mortgage rests, acquires the right to proceed with the foreclosure suit, administering all proper equitable relief, notwithstanding the bill to foreclose the mortgage may have been filed in another circuit.<sup>5</sup> So, where a bill was filed in a State court to restrain the foreclosure of a mortgage, and to have the same set aside and declared void, and subsequently, but on the same day, a bill was filed in a Federal court for a foreclosure of the same mortgage, and the process of the Federal court was served prior to the time of service of process of the

<sup>1</sup> Insurance Co. v. Brune, 96 U. S. 588.

<sup>2</sup> Weaver v. Field, 16 Fed. Rep. 22.

<sup>3</sup> Beekman v. Hudson River & C. R. Co., 35 Fed. Rep. 3.

<sup>4</sup> Buck v. Colbath, 3 Wall. (U. S.) 334, 341; Union Trust Co. v. Rockford & C. R. Co., 6 Biss. (U. S.) 197; Owens v. Ohio Cent. R. Co., 20 Fed. Rep. 10. These cases recognize and follow the

broad rule laid down by Chief Justice Marshall, that "in all cases of concurrent jurisdiction, the court which first has possession of the subject must decide it." Smith v. McIver, 9 Wheat. (U. S.) 532. Compare Riggs v. Johnson County, 6 Wall. (U. S.) 166.

<sup>5</sup> Ohio v. Central R. Co., 20 Fed. Rep. 10.

State court, — it was held that the Federal court acquired jurisdiction to proceed to the decision of all questions legitimately growing out of the subject-matter in controversy.<sup>1</sup>

§ 6212. **Right to Foreclose for Non-payment of Interest.** This will depend, of course, upon the construction of the instrument of mortgage. Where a railway mortgage deed of trust prohibited the trustee, without the consent of a *majority in value* of the bondholders, from declaring the principal due before maturity, or from taking possession, or maintaining a foreclosure action *for the principal*, before the maturity of the bonds, — it was held that this did not preclude the trustee from maintaining an action to foreclose the mortgage for the *non-payment of interest* at the suit of a single bondholder.<sup>2</sup> Where such a mortgage provided for an entry by the trustee after twelve months' default in the payment of interest, it was held that this did not bar an action for a foreclosure, or an action to recover the interest, at any time after default.<sup>3</sup>

§ 6213. **How Far the Action of a Majority of the Bondholders will Control.** — Aside from the distinct terms of the mortgage deed of trust, it is to be observed that a court will very often, in conflicting and doubtful matters, incline to the decision of a majority of the bondholders. Speaking with reference to this subject, it was said by Mr. Chief Justice Waite: "Railroad mortgages are a peculiar class of securities. The trustee represents the mortgage, and, in executing his trust, may exercise his own discretion, within the scope of his powers. If there are differences of opinion among the bondholders as to what their interests require, it is not improper that he should be governed by the voice of the majority, act-

<sup>1</sup> Union Mut. Life Ins. Co. v. University, 6 Fed. Rep. 443.

<sup>2</sup> Farmers' Loan & Co. v. Chicago & C. R. Co., 27 Fed. Rep. 146.

<sup>3</sup> Central Trust Co. v. New York City & C. R. Co., 33 Hun (N. Y.), 513. Compare Chicago & C. R. Co. v. Fos-

dick, 106 U. S. 47, where, under a construction of such a mortgage and a peculiar state of facts, it was held that a holder of a minority of the defaulted coupons, a majority of them having been funded, could not maintain an action for a foreclosure.

ing in good faith and without collusion, if what they ask is not inconsistent with the provisions of his trust.”<sup>1</sup> A disposition to yield assent to the views of a majority of the bondholders has resulted in the conclusion that, with the concurrence of a majority of the bondholders, of the trustee in the mortgage, and of the corporation itself, the court may not improperly proceed to a *speedy foreclosure*, leaving conflicting claims and equities to be thereafter settled.<sup>2</sup>

§ 6214. **Parties to Suits of Foreclosure.** — In a proceeding to foreclose a *first mortgage*, or to compel the trustees thereunder to take possession of the mortgaged property under the terms of the mortgage deed of trust, the *bondholders* under the *second mortgage* are not necessary parties, and it is not necessary to go into any investigation of their rights. “The rights of the plaintiffs are the same that they would be if the second mortgage had not been made, and there is no reason why they should not enjoy those rights, in the fact that the mortgagor has done something, since their rights attached to the property, which will render litigation necessary to define, limit, and enforce them.”<sup>3</sup> On the other hand, it has been held that *senior mortgagees* will not be permitted to become parties to a suit for the foreclosure of *junior mortgages* to secure railroad bonds, nor will they be allowed to contest the accuracy of the judgment entered in such suit, providing for a reorganization of the road, their rights not having been affected.<sup>4</sup> The governing principle is that the *decree* of foreclosure binds not only the *parties* but *privies*, and that it binds all second mortgagees, and all others claiming rights in the property subject to the mortgage which is foreclosed; and they are bound by representation through their mortgagor, although not made parties.<sup>5</sup> But it has been held competent

<sup>1</sup> Shaw v. Railroad Co., 100 U. S. 605, 612; repeated in First Nat. Bank v. Shedd, 121 U. S. 74, 86.

<sup>2</sup> First Nat. Bank v. Shedd, 121 U. S. 74.

<sup>3</sup> First Nat. Fire Ins. Co. v. Salisbury, 130 Mass. 303, 311.

<sup>4</sup> Ex parte McHenry, 9 Abb. N. Cas. (N. Y.) 256.

<sup>5</sup> Haven v. Grand Junction &c. R. Co., 12 Allen (Mass.), 337, 340.

for the trustees in such a mortgage, after they have acquired possession under the decree of foreclosure, to bring an action against subsequent lien-holders, for the purpose of securing their rights, if the lien-holders set up claims of right inconsistent with the title of the trustees;<sup>1</sup> and, of course, in such a case the subsequent lien-holders would have to be made parties. As elsewhere seen,<sup>2</sup> the *corporation*, in its artificial character, is an indispensable party.<sup>3</sup> And, as above stated, if the bondholders proceed by reason of the failure or refusal of the trustee in the mortgage so to do, the *trustee* is an indispensable party.<sup>4</sup> It also seems clear that prior creditors, having liens upon the property, or rights against it, which take precedence over the mortgage which is sought to be foreclosed, are not necessary parties to the foreclosure proceeding, unless they were in some way, either by affirmative action or adoption, parties to the mortgage in suit. The reason is that the foreclosure proceeding does not divest their rights at all, but that the purchaser thereunder merely acquires the equity of redemption of the mortgagor, as against them.<sup>5</sup> In conformity with a rule of chancery practice discussed in other relations,<sup>6</sup> where the bill is brought by bondholders, as it is generally impracticable to join them all on account of their number, it is allowed to be brought by one or more of them, for themselves and for the benefit of such others as may choose to come in and share the expense of the litigation; and the same rule obtains in regard to creditors' bills in equity, where the purpose is not the foreclosure of a mortgage. In such cases, as has been well observed, the rule of chancery practice has never been interpreted to be violative of any principle of Magna Charta, or of any bill of rights embodied in American State constitutions. "This rule is that, when

<sup>1</sup> *Haven v. Grand Junction &c. R. Co.*, 12 Allen (Mass.), 337, 340.

<sup>2</sup> *Post*, § 6874.

<sup>3</sup> See *Herring v. New York &c. R. Co.*, 63 How. Pr. (N. Y.) 497.

<sup>4</sup> *Ante*, § 6210.

<sup>5</sup> *Allen v. Knight*, 5 Hare, 272; *Shaw v. Norfolk County R. Co.*, 5 Gray (Mass.), 162, 171.

<sup>6</sup> *Ante*, § 4565, *et seq.* Compare *ante*, § 3483, *et seq.*



the parties to a cause are numerous, or some of them are unknown, or beyond the jurisdiction of the court, so as not to be subject to its process, but they all belong to a class whose rights are analogous to those of parties actually before the court, because dependent on the same principles of law, the court will often proceed to adjudge the rights of the class as such, and, in the absence of all collusion, the decree will be considered binding upon the whole class who are in like situation.”<sup>1</sup> “This,” continues the court, “is especially true of a creditor’s bill, which is usually filed not only in behalf of parties complainant actually before the court, but also in behalf of all persons of the same class, who afterwards elect to come in under the decree and make proof of their claims before the register or master. Issues thus fairly tried, and equities thus adjudged, between the parties served with process, are held binding upon those absent, because of this vicarious representation in the person of litigants of the same class to which they belong.”<sup>2</sup>

§ 6215. **Position of Parties with Reference to Federal Jurisdiction.**—The position of the *trustee* in the mortgage, as a party in the foreclosure suit, has been made an important one, upon the question of the jurisdiction of courts of the United States as depending upon *adverse citizenship*. The Supreme Court of the United States held that the condition of jurisdiction in the act of 1875<sup>3</sup> that “there shall be a *controversy* between citizens of different States,” requires the court to ascertain whether there is, in a suit having numerous parties, a *real controversy between citizens of different States*; that for this purpose, the court will ascertain the real matter in dispute, and arrange the parties on the one side or the other of that dispute, according to their real relations to it, and not

<sup>1</sup> *Morton v. New Orleans &c. R. Co.*, 79 Ala. 590, 610; citing Story Eq. Pl., §§ 99–115; 1 Dan. Ch. Pr. 1911.

<sup>2</sup> *Morton v. New Orleans &c. R. Co.*, 79 Ala. 590, 611, —opinion by Somerville, J. That creditors, so

bound by representation, may come in after the decree has been made settling the rights of the parties, and establish their claims before the master, in conformity with the principles of the decree, see *post*, § 6217.

<sup>3</sup> 18 U. S. Stat. at Large, pt. 3, 470.

according to their nominal positions as parties to the record; and that, if it appears that those on one side are all citizens of different States from those on the other side, jurisdiction may be entertained and the cause proceeded with.<sup>1</sup> For the purpose of determining the question of jurisdiction, unless by reason of special circumstances the *trustee* in the mortgage occupies an adversary position to that of the *bondholders*, the court may arrange them on the same side of the litigation, and if there is a substantial controversy between them and another party, the court will have jurisdiction.<sup>2</sup> | But, as already seen,<sup>3</sup> cases may arise where the bondholders are demanding relief against the trustee, in which case it is supposed that they will occupy, for the purpose of determining the question of Federal jurisdiction, the adversary positions which they formally occupy upon the record.

§ 6216. **Intervening Petitioners.** — As elsewhere seen,<sup>4</sup> the foreclosure of a railway mortgage is generally attended with the appointment of a receiver *pendente lite*, whose office it is to operate the property and conserve it for the benefit of all having claims upon it. Parties having such claims, who have not been made parties to the bill, are, under the principles of equity, entitled to intervene *pro interesse suo*, present their claims, and have them examined before a master, and, on his report, adjudicated by the court. In some cases the intervening petitioner is remitted to his remedy at law. But this, where not prescribed or allowed by statute,<sup>5</sup> is unusual, because it subjects the foreclosure proceeding to delays which depend on the action of other tribunals, and which cannot be submitted to without great danger to public and private interests. According to the course of some courts, however, the right of a claimant to intervene will be denied where he has a plain remedy at law. For instance, it has been held in a

<sup>1</sup> Removal Cases, 100 U. S. 457; Fed. Rep. 1; *Arapahoe County v. Kansas Pac. R. Co.*, 4 Dill. (U. S.) 277. reaffirmed in *Pacific Railroad v. Ket-chum*, 101 U. S. 289, 298.

<sup>3</sup> *Ante*, § 6210.

<sup>2</sup> *Barry v. Missouri &c. R. Co.*, 27

<sup>4</sup> *Post*, ch. 173.

<sup>5</sup> *Post*, § 7131.

leading case that a land-owner, who has granted to a railroad corporation the right of way over his land, subject to a forfeiture of the right in case of failure to pay a stipulated compensation therefor, cannot, in a proceeding by a mortgage creditor to foreclose his mortgage on the property of the company, intervene and have his forfeiture enforced by a remedy so extraordinary as an injunction. In the view of the court, he was properly remitted to his *remedy at law*; and it was suggested that the only application he could probably make with any propriety in a foreclosure proceeding, would be for permission to proceed in an action against the receiver to recover the possession of the property.<sup>1</sup> But it is believed that the courts of the United States would, in such a case, according to their usual practice, permit an intervention, and adjust the rights of such a claimant in the foreclosure suit. In some cases, what is called an "*intervention*," is not an intervention *pro interesse suo*, but is merely the addition of *new parties*. The parties permitted to be joined indeed come in for the protection of their own interests, but not merely for that: they become principal parties to the suit, with liberty to take part in its conduct, not only for the protection of their own interests, but for the protection of the interests of other parties interested in common with them.<sup>2</sup>

§ 6217. **Creditors Coming in under the Decree and Proving their Claims before a Master.**—"The other creditors," as Mr. Justice Story observes, "may come in *under the decree*, and prove their debts before the master to whom the cause is referred, and obtain satisfaction of their demand, equally with the plaintiffs in the suit; and under such circumstances they are treated as parties to the suit."<sup>3</sup> "And while

<sup>1</sup> *Coe v. Columbus &c. R. Co.*, 10 Ohio St. 372, 411, 412; *s. c.* 75 Am. Dec. 518, 548.

<sup>2</sup> For illustration, see *Farmers' Loan & Trust Co. v. Texas Western R. Co.*, 32 Fed. Rep. 359, where the joining of the new parties was probably called an "*intervention*" by anal-

ogy to the use of the word in the Code of Civil Procedure of Texas, which is understood to be derived chiefly from the Civil Law. See also *Ex parte Betz*, 9 Abb. N. Cas. (N. Y.) 246.

<sup>3</sup> Story's Eq. Pl., § 99; quoted and doctrine affirmed in *Morton v. New*

it is true, generally, that each creditor, who may afterwards appear and prove his claim, may contest the claim of every other creditor, this right is subject to the exception, that it must be exercised in conformity to the principles settled by the decree under which the reference was had, and nothing settled by this decree is allowed to be re-examined by the register, who, under our practice, discharges the functions of a master.”<sup>1</sup>

§ 6218. **Settling Conflicting Equities.**—It is seldom, in modern chancery practice, especially in the case of *railway mortgages*, that a bill in equity to foreclose such a mortgage proceeds with the mere object of establishing the rights of the mortgagees against the property; but, as was said by Somerville, J., “the common practice has always been, to permit the chancellor to render a decree settling all the equities in the case, which are disclosed by the bill, prior to making a reference.”<sup>2</sup> “These equities,” continues he, in the language of the same court in a preceding case, “embrace the substantial merits of the controversy—the material issues of fact and law litigated, or necessarily involved in the cause, which determine the legal rights of the parties, and the principles by which such rights are to be worked out.”<sup>3</sup> But while it is *usual*, it is *not necessary*, to settle conflicting equities before making the decree of foreclosure and sale.<sup>4</sup> Where a railway mortgage deed of trust provided for a sale in case of a default in any of the bonds, and made it the duty of the trustees to sell on the request of the majority in interest of the bondholders, it was held that the court would not *restrain* a sale by the trustees until it should be ascertained how many of the bonds were due.<sup>5</sup>

Orleans &c. R. Co., 79 Ala. 590, 611.  
See *post*, § 7022, *et seq.*

<sup>1</sup> Morton v. New Orleans &c. R. Co., 79 Ala. 590, 611.

<sup>2</sup> Morton v. New Orleans &c. R. Co., 79 Ala. 590, 612.

<sup>3</sup> *Ibid.*; citing to the rule of practice Adams v. Sayre, 76 Ala. 509, 517;

Cochran v. Miller, 74 Ala. 50; Malone v. Marriott, 64 Ala. 486; Walker v. Crawford, 70 Ala. 567; Jones v. Wilson, 54 Ala. 50; Garner v. Prewitt, 32 Ala. 13, 18.

<sup>4</sup> First Nat. Bank v. Shedd, 121 U. S. 74.

<sup>5</sup> State v. Brown, 64 Md. 199.

§ 6219. **When Court will Order an Appraisement Prior to Sale.** — It has been held in such a case in Ohio that, proceeding under the rules prescribed by *statute* affecting the foreclosure of ordinary mortgages of real estate, the court would order an appraisement of the property prior to sale; and the court intimated that this would be done, in the exercise of a discretion if there were no statute.<sup>1</sup> But where, by the terms of the mortgage, the right to a sale is *absolute*, it is difficult to see how a court can interpose, and make a new contract for the parties by saying that there shall be no sale, except at a valuation ascertained by the court.

§ 6220. **When Property and Franchises Sold as an Entirety and when Divided.** — As a general rule, where the *property* and *franchises* of a *railroad company* have become the subject of a general mortgage, upon a foreclosure of that mortgage, such property and franchises will be sold as an entirety; since to allow a railroad to be cut up into fragments, and separate portions to be sold at different sales, in the different counties through which it passes, to different purchasers, would not only sacrifice the rights and interests of creditors, but defeat the object and intention of the legislature, in granting the charter.<sup>2</sup> But, after all, it seems a matter to be *determined by the contract*; so that the above principle would obtain only where the contract is silent.

§ 6221. **Superintending Power of the Court over the Sale.** — The court in which a proceeding to foreclose a mortgage has been brought possesses a superintending power over the sale, on the principle that every court possesses a general control over its own process to prevent *abuses* thereof. It has been reasoned that, in respect of the personal property covered by a railway mortgage, the court may, in its discretion, take such steps as will properly lead to an advan-

<sup>1</sup> Coe v. Columbus &c. R. Co., 10 Ohio St. 372, 407; s. c. 75 Am. Dec. 518, 545.

<sup>2</sup> Macon &c. R. Co. v. Parker, 9 Ga. 377; Coe v. Columbus &c. R. Co., 10 Ohio St. 372; s. c. 75 Am. Dec. 518.

tageous sale and to prevent a sacrifice.<sup>1</sup> It has also been laid down that, "there will also be a discretion to guard against the failure of a sale and the consequent expense and delay, by requiring a *deposit of money*, or other satisfactory security, that the terms of the sale will be complied with."<sup>2</sup>

§ 6222. **Creditors may Combine to Purchase.** — There is, obviously, no principle upon which *fraud* can be imputed to the *creditors* of an insolvent corporation, who combine and form an association for the purpose of protecting themselves by purchasing its property, when legally brought to sale, provided it is no part of the agreement to stifle competition at the sale, or to obtain any unfair advantage.<sup>3</sup> The *bondholders* and *stockholders* of a railroad company may therefore unite for the purchase of the property, at a sale made in good faith, to prevent a sacrifice of it.<sup>4</sup>

§ 6223. **Trustee may Purchase for the Bondholders.** — We have seen that the trustee in a railway or other corporate mortgage represents the bondholders in such a sense that he may bring an action to foreclose the mortgage without joining them as parties.<sup>5</sup> His duty, as their trustee, does not end with the proper institution and prosecution of a foreclosure suit; but it is obviously his duty to attend to the foreclosure sale and exercise the right, as a bidder, for the purpose of protecting them, which every creditor may lawfully exercise at a judicial sale, although made in a proceeding in which he is plaintiff, for the protection of his own interests. This right, it has been well reasoned, exists, independently of the terms of the mortgage. So that, where an order was entered in a foreclosure suit, directing the trustee to bid up to the extent of \$450,000, "for the benefit of all the bondholders," this did not prevent him from bidding \$750,000, although not re-

<sup>1</sup> *Coe v. Columbus &c. R. Co.*, 10 Ohio St. 372, 407; *s. c.* 75 Am. Dec. 518, 545.

<sup>2</sup> *Ibid.* 408.

<sup>3</sup> *Kitchen v. St. Louis &c. R. Co.*, 69 Mo. 224, 259.

<sup>4</sup> *Pennsylvania Transp. Co.'s Appeal*, 101 Pa. St. 576.

<sup>5</sup> *Ante*, § 6209.

quested so to do by a *majority* of the bondholders. The order of the court was justly construed as fixing only a *minimum* bid, or rather as naming a minimum sum, below which he should not allow the property to be sacrificed to others.<sup>1</sup>

§ 6224. **Power of the Trustee to Deal with the Property so Purchased.** — But where a trustee bids in the property for the benefit of all the bondholders, he still holds it as *trustee*, and subject to the terms of the mortgage, and he has no power to deal with it as *general owner*. When, therefore, such a trustee, after having purchased the property at a foreclosure sale, assumed to sell it to another railroad company for \$100,000, it was held that this sale was unlawful and voidable at the suit of any objecting bondholder, and that if the execution of the trust recited in the mortgage, which provided for the organization of a new corporation, proved to be impracticable, it was the duty of the trustee to seek the direction of the court.<sup>2</sup> It has been held, in such a case, where a dissenting bondholder brought an action against the trustee to recover damages for a breach of trust committed in the manner above described, that the *measure* of the plaintiff's *damages* was the value of his proportional part of the property thus wrongfully sold.<sup>3</sup>

§ 6225. **Trustees under Corporate Mortgage Interested in Purchase.** — Whether the trustees in a railway or other corporate mortgage, who have an interest as holders of the bonds secured by the trust deed, are precluded from being members of an association formed for the purchasing of the trust property, at a sale made by them in pursuance of the terms of the trust deed, is a question the solution of which has been referred to a well-settled rule. That rule is this: "That a mortgagee with power of sale, is a trustee, as well as a creditor, and that, at his own sale, he cannot become a purchaser, either directly or indirectly, so as to cut off the equity of redemption. But such a sale is not void; it is good as to all the world, and for all

<sup>1</sup> James v. Cowing, 82 N. Y. 449.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

purposes, excepting only that the mortgagor still has the right to pay the debt and redeem the land.”<sup>1</sup> When, therefore, the property of a corporation is sold by the trustees under a mortgage, who are also interested as holders of some of the bonds secured by the mortgage, and as members of an association formed for the purpose of purchasing the property at a foreclosure sale, such sale is not void, but the company or its stockholders are restricted to their right to redeem, and this right must be exercised within a reasonable time, and before the intervention of new equities. Nor, under well-established principles of equity,<sup>2</sup> will such a sale be void from the mere fact that the trustees in the mortgage are interested in the purchase; but no matter how fair and honest it may have been, it will be set aside on the application of any of the parties in interest, provided such application is made within a reasonable time after the sale, which is to be judged of by the court, under all the circumstances of the case.<sup>3</sup>

**§ 6226. Application to Set Aside Sale must be Timely.** The rule announced in many cases is, that while a *cestui que trust* has a right to come into a court of equity and ask that a sale of trust property made by the trustee to himself, be set aside, his coming must be timely. He has no right to lie idly by until new equities arise, and speculate on the success or non-success of the investment or transaction of which he complains, and see others in good faith, and without fraud, by large expenditures of money, make that valuable which was before valueless, and then come and ask the aid of a court of equity to enable him to appropriate to himself such

<sup>1</sup> Allen v. Ranson, 44 Mo. 263, 267; s. c. 100 Am. Dec. 282; Gaines v. Allen, 58 Mo. 537, 543; Reddick v. Gressman, 49 Mo. 389, 392; Thornton v. Irwin, 43 Mo. 153. Compare ante, § 4071, et seq.

<sup>2</sup> In Campbell v. Walker, 5 Ves. 678, the Master of the Rolls said: “I will lay down the rule as broad as this, and I wish trustees to understand it, that any trustee pur-

chasing the trust property is liable to have the purchase set aside, if in any reasonable time the *cestui que trust* chooses to say, he is not satisfied with it.” To the same principle see Hawley v. Cramer, 4 Cow. (N. Y.) 717; Cumberland Coal Co. v. Sherman, 30 Barb. (N. Y.) 553, 563.

<sup>3</sup> Kitchen v. St. Louis &c. R. Co., 69 Mo. 224, 256, 261.



benefits and advantages.<sup>1</sup> This rule applies to applications made by *stockholders* or *bondholders* to set aside trust sales of the corporate property; and where, in such a case, the *stockholders acquiesced* for eighteen months, having means of knowledge of the acts complained of, it was held that, "by not coming earlier, they had precluded themselves from asking for the exercise of the extraordinary jurisdiction of the court."<sup>2</sup> So, where a *stockholder*, having knowledge of all the facts connected with a railway mortgage, stood by for three years, made no attempt to restrain the negotiation of the bonds, made no objection to the sale under the mortgage, accepted a hundred shares of the stock in the purchasing company in lieu of a part of his interest in the selling company, which stock he sold at a profit, agreed to let all of his stock in the old company go into the new organization, under the scheme of reorganization which had been agreed upon, and thereafter waited for nearly two years before bringing suit to set aside the sale, which he asked for on the ground that the trustees were interested in the sale and purchase,—it was held that he had, by his conduct and his *laches*, disabled himself from having the aid of a court of equity.<sup>3</sup> Under similar circumstances a delay by stockholders of *five years*,<sup>4</sup> and by a bondholder for the same length of time,<sup>5</sup> was held such *laches* as precluded the party complaining from maintaining a bill in equity to set aside the sale,—although he might have been successful if he had proceeded promptly.<sup>6</sup> In all

<sup>1</sup> *Kitchen v. St. Louis &c. R. Co.*, 69 Mo. 224, 264; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 591; *Samuel v. Holladay*, 1 Woolw. (U. S.) 415; *Follansbe v. Kilbreth*, 17 Ill. 522; *s. c.* 65 Am. Dec. 691; *Jones v. Smith*, 33 Miss. 216; *Wade v. Pettibone*, 11 Ohio, 57; *s. c.* 37 Am. Dec. 408; *Tash v. Adams*, 10 Cush. (Mass.), 252; *Hodgson v. Earl Porris*, 15 Jur. 1022; *Peabody v. Flint*, 6 Allen (Mass.), 52; *Graham v. Birkenhead &c. R. Co.*, 20 L. J. Ch. (N. s.) 445; *s. c.* 2 Macn.

& G. 146, 156; *Harwood v. Railroad*, 17 Wall. (U. S.) 78; *Badger v. Badger*, 2 Wall. (U. S.) 87.

<sup>2</sup> *Graham v. Birkenhead &c. R. Co.*, 2 Macn. & G. 146, 156.

<sup>3</sup> *Kitchen v. St. Louis &c. R. Co.*, 69 Mo. 224, 263.

<sup>4</sup> *Harwood v. Railroad Co.*, 17 Wall. (U. S.) 78.

<sup>5</sup> *Credit Co. v. Arkansas Cent. R. Co.*, 15 Fed. Rep. 46.

<sup>6</sup> In *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, the bill was filed by the

these cases the governing principle is that stated in the opinion of Mr. Justice Miller in a leading case, — that “no delay, for the purpose of enabling the defrauded party to speculate upon the chances which the future may give him, of deciding, profitably to himself, whether he will abide by his bargain, or rescind it, is allowed in a court of equity.”<sup>1</sup>

§ 6227. **Trustees and their Counsel not Allowed Compensation out of the Fund.** — In Ohio, it has been laid down, contrary, it is believed, to the usual practice in the Federal courts,<sup>2</sup> that in the distribution of the funds arising from the sale of the properties of a railroad corporation in a foreclosure proceeding under a mortgage, the court has no authority to allow compensation to the trustees in the mortgage and to their solicitors.<sup>3</sup>

§ 6228. **Proceeds of Sale, to Whom Paid and how Credited on the Bonds.** — The Supreme Court of Ohio, proceeding to state, for the guidance of the Court of Common Pleas, the manner in which such a mortgage should be foreclosed and the fund distributed, laid down the procedure as follows: “They [the *mortgagees* — meaning the *trustees* in the mortgage deed] are entitled to receive the money coming to those for whose benefit they hold the securities; and with them, and not with the bondholders, any contest as to the amount due upon those securities must be made, and must be made upon an issue in the action. The bondholders are not necessary, or even proper, parties to the action, and the order requiring them to appear and prove their claims before the receiver is erroneous. It is true that the bondholders might have a right to intervene if the mortgagee, acting for them, was not responsible, or was likely to prove unfaithful to his trust; but that is a matter entirely between them and the mortgagee.

corporation, and the court denied relief on the ground of laches, there having been a delay of *four years*.

<sup>1</sup> *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 592.

<sup>2</sup> *Post*, Ch. 166.

<sup>3</sup> *Coe v. Columbus &c. R. Co.*, 10 Ohio St. 372, 408; *s. c.* 75 Am. Dec. 518, 546.

The only concern of the company, after the amount due upon the security has been ascertained, is that, at the time or before any payment is made, the bonds, being negotiable and not due, should be produced and canceled if paid in full, or credited on their face with the amount paid. It would be the duty of the court to secure this protection against further liability to the company. This protection does not require that all the bonds should be produced, or that an account should be taken of the claims of those who hold them. Each bond, by the terms of the security, stands as an independent claim, entitled to its proper proportion of any fund which may be realized. Payment, therefore, may and ought to be made to the extent the bonds are produced and canceled or credited. If there be a question as to the title to any of the bonds, or a question as to the proportion of the fund coming to any bond lost or destroyed, or any question between the mortgagee and any bondholder, the contest between those interested may be settled in a supplementary proceeding, or in another action, and such difficulties need not be anticipated.”<sup>1</sup>

**§ 6229. Further as to the Distribution of the Proceeds.**

If some of the bonds secured by the mortgage have been issued in *pledge* as *collateral security* for a debt, the pledgee will be entitled to prove the whole amount of the bonds, but he will share in the distribution only to the extent of his debt.<sup>2</sup> Bonds issued to a stockholder as a mere *bonus* cannot be proved at all.<sup>3</sup> The *proportionate interest of each bondholder* in the proceeds of the sale is to be determined by the contract of hypothecation which is embraced in the mortgage and in the bonds, when read together as one contract. Under ordinary railroad mortgages, which are issued as a security for the whole number of a series of bonds, which number is definitely stated in the mortgage, each bond carries with it only a frac-

<sup>1</sup> Coe v. Columbus &c., R. Co., 10 Ohio St. 372, 410; *s. c.* 75 Am. Dec. 518, 547.      leans &c. R. Co., 79 Ala. 590; Rice's Appeal, 79 Pa. St. 168.

<sup>2</sup> Duncomb v. New York &c. R. Co., 84 N. Y. 190; Morton v. New Or-      <sup>3</sup> Duncomb v. New York &c. R. Co., 84 N. Y. 190.

tional interest in the proceeds of the sale of the property, to be determined by the proportion which its amount bears to the whole amount secured by the mortgage, whether the whole amount has been issued or not. Thus, if the mortgage is created to secure a series of bonds of the sum of \$1,000 each, amounting in the aggregate to \$10,000,000, upon a distribution of the proceeds arising from a sale to foreclose the mortgage, each bondholder will be entitled to the same proportion which he would receive, whether \$1,000 or \$5,000, if the whole 10,000 of the bonds had been in fact issued.<sup>1</sup> This theory, as expressed in a *per curiam* opinion of the Supreme Court of Pennsylvania, is that such a mortgage is a security for the whole number, and for each and every bond recited in it; that, by the terms of the instrument, the bonds stand in equal protection; that each bond carries only a fractional interest of the property mortgaged; and that the fund arising from the sale of the property is the representative of the property itself, and is owned by the bondholders in the same proportion.<sup>2</sup> On the same basis of reasoning, where a railroad company entered upon a scheme for retiring a series of its secured income bonds, and for issuing new bonds in exchange for them, the surrendered bonds to be held by the trust company uncanceled until all should be retired,—it was held that a bondholder, who did not consent to surrender his bonds, was not entitled, in an accounting under the mortgage, to claim, for interest due him, more of the income than his share would have been if no bonds had been surrendered.<sup>3</sup>

§ 6230. Continued.—In another case a railroad company had executed a mortgage to secure a limited number of bonds, and afterwards executed another mortgage on the same property to secure a larger number of bonds, which latter mortgage recited that the holders of the bonds secured by the first mortgage had agreed to surrender the same, and to receive, in substitution therefor, new bonds to be secured by the first

<sup>1</sup> Barry v. Missouri &c. R. Co., 34 Fed. Rep. 829.

<sup>2</sup> Hodge's Appeal, 84 Pa. St. 359, 362.

<sup>3</sup> Barry v. Missouri &c. R. Co., 34 Fed. Rep. 829.

mortgage, as modified by the second mortgage. All the bonds secured by the first mortgage, except twenty, were exchanged for bonds secured by the second mortgage. Upon a foreclosure of the second mortgage, the holders of these twenty bonds claimed that they were entitled to be paid out of the proceeds of the mortgaged property, in preference to the holders of the new bonds who had surrendered their old ones in exchange for the new; so that the proceeds, which would have been divided among 2,825 bonds, the number originally secured by the first mortgage, should be first appropriated to pay the twenty bonds which had not been surrendered, so far as necessary to effect such payment. But the court held that, while those holders who had not surrendered their bonds were entitled to have their rights preserved, unaffected by what had taken place, yet equity would be done by giving them such part of the proceeds of the sale as they would have been entitled to if the new bonds and mortgage had never been executed. In other words, they were entitled to  $\frac{20}{2825}$  of the proceeds of the sale, and no more. The court, however, laid stress upon the circumstance that there was an express understanding between the corporation and those bondholders who had consented to the exchange, that the first mortgage should stand as security for the new bonds.<sup>1</sup> But on the basis of reasoning previously stated, another Federal court has held that the result would be the same in the absence of such an understanding.<sup>2</sup> Upon this basis of reasoning, the conclusion was, in substance, that one bondholder has no interest such as will enable him to contest the title of another person claiming distribution as a bondholder under the same mortgage.<sup>3</sup> But this view does not seem to be sound. Is there any principle of equity, under which, where there is a fund for distribution by a court of equity between different persons having liens upon it, and there is not enough for all the claimants, one will not be permitted to enhance the amount

<sup>1</sup> Ames v. New Orleans &c. R. Co.,  
2 Woods (U. S.), 206.

<sup>2</sup> Barry v. Missouri &c. R. Co., 34  
Fed. Rep. 829, 833.

<sup>3</sup> *Ibid.*

which he will receive, by showing that other claimants have no title? Indeed, the contrary conclusion would seem to be obvious without any discussion. Nor is it perceived on what theory such contracts can be so construed as to result in the conclusion that, notwithstanding that each bond, which has been lawfully issued, is a promise on the part of the mortgagor to pay its full value with interest, yet this promise can be measurably defeated by the fraud of the mortgagor in issuing and delivering some of the bonds to third parties without any consideration, or by withholding them himself and sharing in the distribution of the proceeds of the sale.

§ 6231. **Rights of Holders of Bonds Called in by the Company and Reissued.**—It seems that, unless prohibited from so doing by its governing statute, a corporation may call in its bonds which have been issued, and reissue them, provided that it was not intended, at the time of the act of recalling them, that the transaction by which it re-acquired them should be a *payment* of them. As *payment* is generally a *question of fact and intent*,<sup>1</sup> the principle applies that if it was the purpose of the corporation to keep the bonds alive for the purpose of reissuing them if it should be deemed expedient so to do, there is no *merger*; but if reissued, the holder of them will be entitled to share *pro rata* in the proceeds of a sale foreclosing the mortgage securing them. Upon the power of a corporation thus to call in its bonds and to be the owner of them, the following observation has been made by a learned Federal judge: "There is no principle in the law of corporations or of mortgages which forbids a corporation that has issued a series of mortgage bonds from purchasing part of them back, and reissuing them again before their maturity, when the financial interests of the corporation will be thereby promoted, unless the organic law of the corporation prohibits the exercise of such a power. If it is lawful for the corporation to do this, it is wholly immaterial whether it pays money upon such a purchase, or exchanges other bonds instead.

<sup>1</sup> 1 Thomp. Trials, § 1251.

And if it should destroy the bonds purchased, and issue duplicates, not intending to extinguish the debt evidenced by the bonds, the lien of the mortgage would not be affected by the substitution of the new bonds.”<sup>1</sup> A similar view was taken by Chief Justice Waite, in a case where certain of its mortgage bonds had been acquired by a railroad company in refunding operations, and the question arose whether the company, after having acquired them, could keep them alive and reissue them, so that they would carry with them their original mortgage lien. In deciding this question in the affirmative, he said: “As against other bondholders secured by the same mortgage, I cannot believe there is a doubt of the power of the company to put out and keep out the entire issue up to the time the bonds become due. The contract with the individual bondholder is no more than that he shall have his due proportion of the security the mortgage on its face implies.”<sup>2</sup>

**§ 6232. Effect of an Appeal from the Decree of Foreclosure.**—A decree foreclosing a mortgage is a *final decree*, from which an appeal may be prosecuted, according to the usual practice of courts of chancery, and according to the practice of the Circuit Courts of the United States. The effect of such a decree has been very clearly stated, in a pertinent case, by Mr. Justice Harlan at circuit: “It is an established principle that, except upon bills of review in cases in equity, upon writs of error *coram vobis* in cases at law, or upon mo-

<sup>1</sup> Barry v. Missouri &c. R. Co., 34 Fed. Rep. 829, 833, *per* Wallace, J.

<sup>2</sup> Claffin v. South Carolina R. Co., 8 Fed. Rep. 118; *s. c.* 4 Hughes (U. S.), 12. There is a well-known class of cases holding that, where a mortgage is given to secure the payment of a note, and the assignee of the mortgage takes a new note from the mortgagor, in exchange for the old one, it not being intended as payment, the mortgage debt is not thereby paid, but the mortgage remains good as security for the amount due on the new note, as

against the mortgagor himself. Watkins v. Hill, 8 Pick. (Mass.) 522; Pomeroy v. Rice, 16 Pick. (Mass.) 22; Brinckerhoff v. Lansing, 4 Johns. Ch. (N. Y.) 65; *s. c.* 8 Am. Dec. 538; Dana v. Binney, 7 Vt. 493, 501. Circumstances under which the trustees in a railway mortgage were justified in purchasing overdue coupons, deposited with them for the purpose of securing scrip issued in lieu of payment when the coupons matured: Little Rock &c. R. Co. v. Huntingdon, 120 U. S. 160.

tions which, in practice, have been substituted for the latter remedy, no court can reverse or annul its own final decision or judgment for errors of fact or law, after the term at which they have been rendered, unless for clerical mistakes; from which it follows that no change or modification can be made, which may substantially vary or affect it in any material thing.”<sup>1</sup> The learned justice goes on to say: “It is equally well settled that, after the court has allowed an appeal, and a *supersedeas* bond is taken, either during or after the term, jurisdiction as to all matters—certainly those of substance—determined by the decree, is transferred to the court to which the appeal goes.”<sup>2</sup> To illustrate these principles,—if a decree is brought to establish an equitable lien upon the property of a railroad company in preference to certain mortgages thereon, and the trustee in the mortgage files a cross-bill to foreclose the same, and a receiver is appointed, who takes custody of the property, and a decree of foreclosure under the cross-bill is thereafter entered, and the plaintiff in the original bill appeals therefrom and gives a *supersedeas bond*,—it will not be competent for the court thereafter to take the property out of the hands of the receiver and deliver it to the trustee in the mortgage, plaintiff in the cross-bill, who is an interested party, not as an officer of the court, but in virtue of his right to take possession under the mortgage. After an appeal taken and thus perfected by the giving of a *supersedeas* bond, the court has no power to change the *status* of the property by placing it in the custody of one of the parties, to be managed and operated, not for the benefit of all interested in the result of the suit, but subject to the mortgages under which that party claims. “It had no more power to do that than to set

<sup>1</sup> *Morgan's Louisiana &c. R. Co. v. Texas Cent. R. Co.*, 32 Fed. Rep. 525, 530; citing *Sibbald v. United States*, 12 Pet. (U. S.) 488, 492; *Bank v. Moss*, 6 How. (U. S.) 31; *Bronson v. Schulten*, 104 U. S. 415; *Schell v. Dodge*, 107 U. S. 629; *Cannon v. United States*, 118 U. S. 355.

<sup>2</sup> *Morgan's Louisiana &c. R. Co. v. Texas Cent. R. Co.*, 32 Fed. Rep. 525, 530; citing *Draper v. Davis*, 102 U. S. 370; *Goddard v. Ordway*, 101 U. S. 745, 752; *Hovey v. McDonald*, 109 U. S. 150, 157; *Roemer v. Simon*, 91 U. S. 149; *Rubber Co. v. Goodyear*, 6 Wall. (U. S.) 153, 156.



aside the order appointing receivers and return the property, pending the appeal and after the decree was superseded, to the mortgagor company.”<sup>1</sup>

§ 6233. **Setting Aside the Foreclosure Sale.** — So long as the cause *remains in the possession of the court*, undoubtedly the court has power to set aside the sale, upon a mere motion filed in the cause by interested parties, and upon a showing of facts which render such a course proper or expedient. But clearly, *after an appeal* from the decree of foreclosure and sale, and a perfection of the appeal by the giving of a *supersedeas* bond, the court has no such power.<sup>2</sup> According to the practice of the English Court of Chancery, which, with some variations, is the practice of the Circuit Courts of the United States in equity, there are *no terms of court*; and consequently the power of the court to set aside such a sale is not determined, it is conceived, by the mere lapse of time, so long as the court retains possession of the cause generally. No general statement can, of course, be made as to the circumstances which will warrant the court in setting aside such a sale, because each case must rest upon the equities growing out of its own peculiar facts and circumstances. Where a suit to foreclose a corporate mortgage had been brought *before default*, by certain of the bondholders and one of the trustees, and a judicial sale of the property had taken place, the remaining trustees and bondholders were allowed to intervene for the purpose of objecting to a confirmation of the sale; and it was set aside, and they were made parties to the proceeding according to their request.<sup>3</sup>

§ 6234. **Rights of Purchasers Pendente Lite.** — In respect of this question a distinction must be taken between the *bond* and the *mortgage*, at least where the mortgage is a mortgage

<sup>1</sup> Morgan's Louisiana &c. R. Co. v. Texas Cent. R. Co., 32 Fed. Rep. 525, 532.

<sup>2</sup> *Ante*, § 6232.

<sup>3</sup> Coann v. Atlanta Cotton Factory Co., 14 Fed. Rep. 4. Circumstances

where an *agreement to delay foreclosure* proceedings was held not sufficient grounds for setting aside a foreclosure sale: South St. Louis R. Co. v. Plate, 92 Mo. 614; s. c. 5 S. W. Rep. 199.

of land. The common-law doctrine of *lis pendens* does not apply to *negotiable paper*, and therefore one who purchases the *negotiable bonds* of a corporation, pending a litigation affecting the same, is not affected with constructive notice of such litigation, in so far as it affects the securities themselves; though he will be affected with such notice, in so far as the litigation affects the *land* which is the subject of the mortgage.<sup>1</sup> Under the common-law doctrine of *lis pendens* a purchaser of realty, *pendente lite*, whether the action be at law or in equity, takes subject to any title or interest adverse to that of his grantor ultimately established in the pending litigation.<sup>2</sup> If, therefore, prior to a sale to foreclose a mortgage, a party, having an interest in the subject of the mortgage, commences a suit to assert his rights, and files a *statutory notice of lis pendens*, this notice will affect those who purchase at the foreclosure sale.<sup>3</sup> But where personal property, affected by a litigation, is, pending the litigation, removed from the jurisdiction and sold to a *bona fide* purchaser, the doctrine of *lis pendens* will not affect his title.<sup>4</sup> But while purchasers of negotiable securities are not chargeable with constructive notice of the pendency of a suit affecting the title to or validity of *such securities*, yet those who buy them from litigating parties, with *actual notice* of a pending suit, do so at their peril, and must abide the result, the same as the parties from whom they acquired their title.<sup>5</sup>

**§ 6235. What the Purchaser at the Foreclosure Sale Acquires.**—In the first place, a purchaser acquires only *such title* to the property conveyed in the mortgage and sold under the decree of foreclosure, *as the mortgagor company had*.<sup>6</sup> In

<sup>1</sup> Mullanphy Sav. Bank v. Schott, 135 Ill. 655; s. c. 25 Am. St. Rep. 401.

<sup>2</sup> Cheever v. Minton, 12 Colo. 557; s. c. 13 Am. St. Rep. 258.

<sup>3</sup> Randall v. Duff, 79 Cal. 115.

<sup>4</sup> Carr v. Lewis Coal Co., 96 Mo. 149; s. c. 9 Am. St. Rep. 328. See further, as to the application of this doctrine of *lis pendens*,—Hayes v. Nourse, 114 N. Y. 595; s. c. 11 Am.

St. Rep. 700, and note 707; Houston v. Timmerman, 17 Or. 499; s. c. 11 Am. St. Rep. 848, and note 856.

<sup>5</sup> Lytle v. Lansing, 147 U. S. 59. To the same effect, see Scotland County v. Hill, 112 U. S. 183, 185.

<sup>6</sup> Washington & C. R. Co. v. Lewis, 83 Va. 246; s. c. 30 Am. & Eng. Rail. Cas. 468; 2 S. E. Rep. 746.

the second place, he acquires no more property than that which was actually conveyed in the mortgage; and whether he acquired a given item of property will often involve a difficult construction of the language of that instrument.<sup>1</sup> In the third place he may acquire even less than this. The decree of foreclosure and sale may not require the sale of all the property embraced in the mortgage. Under no circumstances does the purchaser acquire more than was actually transferred to him under the decree of the court.<sup>2</sup>

§ 6236. **What Franchises Pass to Him.** — In the fourth place, no matter what the mortgage undertakes to convey, he acquires no more than the corporation had *power to convey*. Hence, where a mortgage purports to convey the property of a corporation, — *e. g.*, of a railroad company, — and also its *franchises*, this, on principles already stated,<sup>3</sup> operates to convey only its *secondary franchises*, — that is to say, such of its franchises as are *vendible*, — and does not operate to convey its franchise of *being a corporation*, unless there is a statute conferring upon it the faculty of conveying that franchise.<sup>4</sup> Generally, in the case of a railroad mortgage, not only the roadbed, the rolling stock, and other mortgaged property, but also the franchise to operate the road, passes to the purchasing company; and sometimes “the very corporate existence of the sold-out railroad passes to the new organization by virtue of the statute.” This was so where the governing statute provided that “the purchaser or purchasers at such sale, and their associates, shall be deemed and taken to be the *true owners* of

<sup>1</sup> *Ante*, § 6194.

<sup>2</sup> *Frank v. New York &c. R. Co.*, 122 N. Y. 197; *s. c.* 25 N. E. Rep. 332; 33 N. Y. St. Rep. 235; 8 Rail. & Corp. L. J. 470.

<sup>3</sup> *Ante*, § 5354.

<sup>4</sup> The decision of the Supreme Court of Tennessee to the effect that where, in consequence of the delinquency of a railroad company to pay interest on its bonds, the railroad is sold to satisfy a *lien of the State* on its

property, all its franchises and appurtenances pass to the purchaser, and unless such purchaser is the railroad company, it thereby becomes dissolved (*Rogersville &c. R. Co. v. Kyle*, 9 Lea (Tenn.), 691), is a decision which must be referred to the terms of the statute creating the lien of the State, and does not necessarily conflict with the principle of the above text.

said charter, and corporators under the same, and vested with all the powers, rights, privileges, and benefits thereof in the same measure and to the same extent as if they were the original corporation of said company.”<sup>1</sup>

§ 6237. **Takes Free from the Debts of the Mortgagor.**—In the fifth place, he acquires the title of the mortgagor company to the property which is conveyed to him under the decree of the court, free from the claims of its *general creditors*, and free from any liens or incumbrances inferior in time or in equity to the mortgage under which he is the purchaser.<sup>2</sup> As the mortgage does not transfer the franchise of being a corporation,<sup>3</sup> and as the purchaser at the foreclosure sale, in nearly all cases, organizes a new corporation, under enabling statutes, to hold and operate the railroad property, such new corporation takes it free from liability for all debts of the mortgagor corporation, which were not secured upon the property by a lien paramount to the mortgage which was foreclosed,<sup>4</sup>—unless the court has required the payment of such debts as the condition of granting a *receiver*,<sup>5</sup> or unless their payment is a part of the *scheme* or *arrangement* of foreclosure and reorganization.<sup>6</sup> It has been held that a decree of sale of the franchises, etc., of a railroad company, subject to all unpaid purchase-money for any of the lands or rights of way, as also all unpaid claims of land-owners for damages for property taken, injured, or destroyed in the construction of the road, does not include a debt of the old company on a general judgment for damages by trespass, so as to render the purchasing company liable for it.<sup>7</sup>

<sup>1</sup> *Houston &c. R. Co. v. Shirley*, 54 Tex. 125, 138, 139.

<sup>2</sup> For instance, a common-law action for a debt due by a railway corporation cannot be maintained against those who have obtained control of its franchises by a purchase of its track and appurtenances on foreclosure of a mortgage securing other in-

debtedness. *Cook v. Detroit &c. R. Co.*, 43 Mich. 349.

<sup>3</sup> *Ante*, §§ 257, 5353, 5354.

<sup>4</sup> *Ante*, §§ 263, 264, 265, 266.

<sup>5</sup> *Post*, § 6824, *et seq.*

<sup>6</sup> *Ante*, § 267.

<sup>7</sup> *Campbell v. Pittsburgh & W. R. Co.*, 137 Pa. 574; *s. c.* 46 Am. & Eng. Rail. Cas. 353; 20 Atl. Rep. 949.

§ 6238. **What Burdens He Assumes.**— But sixthly, on the other hand, he takes the property subject to any prior burdens in the nature of an *easement* or to any prior *covenants which run with the land*. For instance, where the mortgagor railroad company had constructed a *passway* under the road for the use of a land-owner as a part of the consideration paid to him for a grant of its right of way over his land, and he had used the passway for twenty years, a new corporation, coming into possession of the road under a judicial sale, was chargeable with the knowledge of the rights of the land-owner in respect of this passway, and took his right of way over his land subject thereto, and would not be allowed to stop it up.<sup>1</sup>

§ 6239. **Succeeds to What Liabilities.**— Where the properties and franchises of a railway company are sold under a mortgage, *in the absence of special circumstances*,<sup>2</sup> the purchaser, and consequently the corporation which is organized to receive and operate the property, or another purchasing railway corporation, will *not be bound by the executory contracts*

<sup>1</sup> *Swan v. Burlington &c. R. Co.*, 72 Iowa, 650; s. c. 34 N. W. Rep. 457.

<sup>2</sup> Such special circumstances may consist either of, — (1) a statute operative at the time of the mortgage, providing otherwise; (2) or a clause in the mortgage providing for a scheme of reorganization under which the reorganized company assumes obligations or liabilities of the old; (3) or an order of the court conducting the foreclosure in accordance with a scheme of reorganization, and based, it may be assumed, necessarily, on the consent of the parties in interest. See, for instance, *Catawissa R. Co. v. Titus*, 49 Pa. St. 277, where the new company, under a scheme of reorganization, as construed by the court, became liable for all reasonable and necessary *expenses* in carrying out the arrangement. Or (4), an executory contract of the precedent company,

the performance of which is secured by a *lien* or *charge* upon the properties and franchises conveyed in the mortgage, *superior* to the mortgage itself. This fourth exception is suggested in the opinion of the court in *Menasha v. Milwaukee &c. R. Co.*, 52 Wis. 414, 420. Or (5), where the new company, with knowledge of an unexecuted contract of the precedent company, *enters into the relation created by that contract* with the other contracting party, and continues in such relation, in which case it will be *estopped* from repudiating the obligations of the contract on its part. *Wiggins Ferry Co. v. Ohio &c. R. Co.*, 142 U. S. 396. Perhaps the better theory in such a case is that of a *new contract* or a *novation* by the adoption of the old contract as evidenced by the voluntary action of the parties.

of the mortgagor company,<sup>1</sup> — as, for instance, by the contract of such company with a particular town, not to extend its track through the town so as to connect with another road;<sup>2</sup> or by its contract with a town, which has subscribed for its stock and issued to it its bonds in payment thereof, that it will *erect a permanent depot* at a certain village in such town;<sup>3</sup> or by its agreement with a *land-owner* whose land has been taken for its right of way, as to the amount of *damages* to be paid him for his *land*.<sup>4</sup>

§ 6240. **Succeeds to All Public Duties.**— But the purchasing corporation succeeds to all the *public duties* which vested in the original corporation and which formed the consideration for the grant by the State of its franchises. Hence, although the purchasing corporation may not be bound by a *contract* made by the precedent corporation with a *town*, to *maintain a depot* within that town, yet it may be compelled to do so independently of any contract, if the public convenience or necessity requires it; because this may be regarded as one of the public duties assumed by the predecessor corporation in consideration of the grant of its franchises, and the predecessor corporation having made its election to establish a depot there, and property rights having been acquired on the

<sup>1</sup> *Ante*, §§ 263, 264. *Menasha v. Milwaukee &c. R. Co.*, 52 Wis. 414; *People v. Rome &c. R. Co.*, 103 N. Y. 95; *s. c.* 8 N. E. Rep. 369; *People v. Louisville &c. R. Co.*, 120 Ill. 48, 57; *s. c.* 10 N. E. Rep. 657; *Wright v. Milwaukee &c. R. Co.*, 25 Wis. 46, 53. In Michigan there was a statute declaring this principle of the common law (Mich. Laws 1859, Act 96, p. 252); so that, after a foreclosure, a common-law action for a debt of the precedent corporation could not be maintained against the purchaser at the foreclosure sale. *Cook v. Detroit &c. R. Co.*, 43 Mich. 349. Where an intervening petitioner, in a foreclosure suit, claiming for materials furnished to be used in

the construction of the road, stated that "no mechanic's lien is claimed," it was held that the purchaser at the foreclosure sale was not bound to take notice of any mechanic's lien which had been placed upon the road on account of such materials. *Hale v. Burlington &c. R. Co.*, 2 McCrary (U. S.), 558.

<sup>2</sup> *Menasha v. Milwaukee &c. R. Co.*, 52 Wis. 414.

<sup>3</sup> *People v. Rome &c. R. Co.*, 103 N. Y. 95.

<sup>4</sup> *Sennott v. St. Johnsbury &c. R. Co.*, 59 Vt. 226; *s. c.* 9 Atl. Rep. 554; *s. c.* 8 N. E. Rep. 369; *People v. Louisville &c. R. Co.*, 120 Ill. 48; *s. c.* 10 N. E. Rep. 657.

faith of that election, public policy forbids those rights being disturbed.<sup>1</sup> Besides, the purchaser of the *franchises* of the precedent corporation takes them subject to the *burdens* which inhere in them, — subject to the performance of the conditions upon which they were granted,—just as the purchaser of a leasehold estate takes it subject to the payment of *rent*. This is a necessary deduction from the principle that, in aliening its franchises, the mortgagor corporation cannot grant more than it has.

§ 6241. **Circumstances under Which Mortgagor Remains Liable for Torts of Mortgagee and Purchaser.**—On a principle already stated,<sup>2</sup> if the company executing the mortgage had received no grant of power from the State to *alien its franchises* and to *devolve its public duties* upon another person or corporation, then, after taking possession under the mortgage, it will remain liable for *negligence* committed in the operation of the railroad by the trustees;<sup>3</sup> and, by parity of reasoning, for the torts of the purchaser in so operating it.<sup>4</sup>

§ 6242. **Title of Strangers to the Record not Affected by Such Sale.**—The title of total strangers to the record,—those who are not bound by the *estoppel* which arises even against parties or privies, — to the property which is claimed by the purchaser under the foreclosure sale, is in no way affected by the sale, and they are not in any manner estopped by the decree of foreclosure and sale, and the deed issued in pursuance thereof, from setting up their rights in a future action as against any property affected by the proceeding.<sup>5</sup> Creditors of the mortgagor corporation are not, for instance, estopped from subjecting to the payment of their debts any property which may not have properly passed under the decree of foreclosure.<sup>6</sup>

<sup>1</sup> *People v. Louisville &c. R. Co.*, 120 Ill. 48; *s. c.* 10 N. E. Rep. 657.

<sup>2</sup> *Ante*, § 5884.

<sup>3</sup> *Naglee v. Alexandria &c. R. Co.*, 83 Va. 707; *s. c.* 5 Am. St. Rep. 308; 3 S. E. Rep. 369; 3 Rail. & Corp. L. J. 109. See also, as to the govern-

ing principle, *Braslin v. Somerville Horse R. Co.*, 145 Mass. 64; *s. c.* 13 N. E. Rep. 65.

<sup>4</sup> Compare *post*, § 7148, *et seq.*

<sup>5</sup> *Morgan County v. Allen*, 103 U. S. 498.

<sup>6</sup> *Ibid.*

§ 6243. **Barring the Equity of Redemption.**—In all the railway and other corporate mortgages with which the writer is acquainted, the equity of redemption of the mortgagor is *waived and released*. As an offset to this waiver and release, railway mortgages generally provide that the trustees may take possession after a *default* in the payment of interest or principal *for the period of six months*. Sometimes the qualification is added that they shall only do so upon the request of a majority in value of the bondholders. This last-named condition puts at hazard the security of the mortgage in this respect:—If the doctrine already adverted to<sup>1</sup> is sound that the mortgage inures to each bondholder to the extent of his aliquot interest in the property covered thereby, so that he has no right to question the title of any other bondholder, —then it becomes possible for the corporation to issue less than half of the bonds to *bona fide* investors, and to issue the rest to dummies or nominees of the managers of the corporation; and these dummies or nominees, being a majority in value of the bondholders, can, by withholding the request to the trustees to proceed to foreclose or take possession, render the mortgage practically inoperative. In such a case no court deserving of the name of a court of equity would refuse to open its doors to the minority bondholders, upon a bill and proofs showing the real state of facts. The difficulty in every such case in the way of the minority is to prove the real state of facts. The kind of rascality which will deal in this way with a corporate mortgage will be astute enough to cover its tracks. But the point to be stated in this section is that, when railroad and other corporate mortgages are foreclosed in courts of equity, Federal or State, the general rule is that sufficient time is allowed between the decree *pro confesso* or the decree *nisi*, and the final decree of foreclosure and sale, —*generally six months*, —to enable the mortgagor company to *redeem*, if to do so is its purpose or within its power. If there is no redemption within this period, the final decree of foreclosure goes, and the sale takes place; and while the mortgagor will

<sup>1</sup> *Ante*, §§ 6121, 6228.



be permitted to redeem at any time prior to an actual confirmation of the sale,<sup>1</sup> yet, after the *sale* has been *confirmed* and a *deed* thereunder has been made to the purchaser, actually transferring the title of the mortgagor, that terminates his equity of redemption.<sup>2</sup> In the absence of fraud or some statutory restriction, it is *absolutely necessary*, in a proceeding in equity to foreclose a mortgage, that a reasonable time

<sup>1</sup> Chicago &c. R. Co. v. Fosdick, 106 U. S. 47, 71.

<sup>2</sup> Brine v. Insurance Co., 96 U. S. 627; Chicago &c. R. Co. v. Fosdick, 106 U. S. 47, 71. See Turner v. Indianapolis &c. R. Co., 8 Biss. (U. S.) 380. "The sale," says Mr. Justice Matthews, "is made free from the equity of redemption of the mortgagor, and all holders of junior incumbrances, if made parties to the suit, and is of the whole premises when necessary to the payment of the amount due, or when the property is not properly divisible. It conveys a clear and absolute title, as against all parties to the suit, or their privies, and the proceeds of the sale are distributed after payment of the amount due, for non-payment of which the sale was ordered, in satisfaction of the unpaid debt remaining, whether due or not." Chicago &c. R. Co. v. Fosdick, 106 U. S. 47, 68; citing Olcott v. Bynum, 17 Wall. (U. S.) 44; Burrowes v. Molloy, 2 Jones & Lat. 521. The theory of the foreclosure of a mortgage, barring the equity of redemption, is understood by the writer to be this:—A mortgage at common law is a conveyance of the legal title subject to a defeasance. This defeasance takes place upon the performance of the condition named in the mortgage. That condition generally is the payment, on or before a date named, of a certain debt named, with interest. If that payment does not take place, the title of the mortgagor becomes abso-

lute at law: he has a right of entry and may maintain ejectment. But courts of equity, which frequently assume the office of relieving against forfeitures, allow the mortgagee to come in after the default and after the entry, and, upon payment of the principal and accrued interest of the debt, to redeem and require the mortgagee, upon the performance of these conditions, to reconvey the premises to the mortgagor. To obviate the inconvenience and uncertainty affecting titles, growing out of these bills for redemption, it became the practice, as early as the reign of Charles I., for the mortgagor to go into the court of chancery with a bill to foreclose the mortgage,—that is to say, to foreclose the equity of redemption,—unless payment were made before a short day to be named. Spence Eq. Jur. 603. The settled English practice is said to be "for the decree to order the amount due to be ascertained, and the costs to be taxed; and that, upon the payment of both within six months, the plaintiff shall reconvey to the defendant; but, in default of payment within the time limited, 'that the said defendant do stand absolutely debarred and foreclosed of and from all equity of redemption of and in said mortgaged premises.'" Clark v. Reyburn, 8 Wall. (U. S.) 318, 323, 324; citing 2 Dan. Ch. Prac. 1016; 1 Seton on Decrees, 346.

should be allowed to the mortgagor to redeem, before his equity of redemption is barred; and if, in the absence of these conditions, no time is allowed, the decree of foreclosure will be erroneous and will be reversed on appeal.<sup>1</sup> Not only has the mortgagor a right, then, to a reasonable time within which to pay the sum ascertained to be due, before his equity of redemption is foreclosed and barred,—but the decree of foreclosure, the sale, and all subsequent proceedings, will be erroneous and subject to reversal, if the *account is improperly stated*, and the *decree nisi* is improperly entered, so that he is required to pay a greater amount than is actually due. “The error is as vital where a larger amount than is actually due is ordered to be paid, as where there is a failure to find what amount is due.”<sup>2</sup>

**§ 6244. Course of Procedure Ordering Foreclosure but Permitting Redemption.**—In courts of the United States, where suits are for the most part prosecuted having for their purpose the foreclosure of railway mortgages, the practice on the equity side is the English chancery practice, as laid down in the work of Daniell, except so far as modified by the equity rules prescribed by the Supreme Court of the United States, by statutes, and by particular conditions. This practice has been very clearly outlined by Mr. Justice Matthews, in giving

<sup>1</sup> *Clark v. Reyburn*, 8 Wall. (U. S.) 318, 324. In this case it is said by Mr. Justice Miller: “We have been able to find no English case where, in the absence of fraud, a time for redemption was not allowed by the decree.” *Ibid.* 324. He also cited Chancellor Kent (*Perine v. Dunn*, 4 Johns. Ch. (N. Y.) 140), to the effect that while the time to be allowed for redemption is in the discretion of the chancellor, yet he nowhere intimates that such an allowance can be entirely withheld. He also cites, to the same effect, the practice in Illinois, where a separate

chancery system prevails: *Johnson v. Donnell*, 15 Ill. 97. The case of *Clark v. Reyburn*, *supra*, in so far as it holds that the right to have a reasonable time for redemption is an absolute right, was again cited with approval by the court in *Chicago & C. R. Co. v. Fosdick*, 106 U. S. 47, 71. That the right to redeem will not be taken away except in strict compliance with the steps necessary to divest it, see *Bigler v. Waller*, 14 Wall. (U. S.) 297; *Shillaber v. Robinson*, 97 U. S. 68.

<sup>2</sup> *Chicago & C. R. Co. v. Fosdick*, 106 U. S. 47, 71.

an opinion of the Supreme Court of the United States.<sup>1</sup> In every such case the first step is a *reference to a master*, to take and state an account of the amount due the bondholders under the mortgage. It may be assumed, from what has preceded, that this reference will also embrace the taking and stating of an account of any amounts due to such *intervening petitioners* as, under principles already considered,<sup>2</sup> take precedence of the mortgage, or are to be paid out of the fund *pari passu*. When this amount is ascertained, an *interlocutory decree*, sometimes called a *decree nisi*, is entered against the mortgagor, requiring the payment of the sum within such reasonable time as the court may give, generally *six months*, which period of grace is often called the *equity of redemption*. If, as is usually the case with actions to foreclose railway mortgages, the default of the mortgagor consists in the payment of *interest merely*, then the course of procedure is outlined by Mr. Justice Miller in an earlier opinion of the same court. That procedure is, first, to ascertain, in the manner already stated, the sum due from the railroad company to the plaintiff in respect of his overdue and unpaid coupons. "For this sum, whatever it may be, he has a right to a decree *nisi*, according to the chancery practice, — a decree which will ascertain the sum so due, and give the company a reasonable time to pay it, say ninety days or six months, or until the next term of the court, in the discretion of that court. If this sum is not paid, the court must then order a sale of the mortgaged property, with a foreclosure of all rights subordinate to the mortgage, with directions to bring the purchase-money into court. If the case proceeds thus far, the plaintiff will have a lien on the money thus paid into court, not only for his overdue coupons, but for his principal debt, and it must be provided for in the order distributing the proceeds of the sale. If, however, the company shall pay the sum found due in the decree *nisi*, no further proceeding can be had until another default of interest or of the principal."<sup>3</sup> "The de-

<sup>1</sup> Chicago &c. R. Co. v. Fosdick, 106 U. S. 47, 68.

<sup>2</sup> *Ante*, §§ 6216, 6217, 6218. See also *post*, ch. 168.

<sup>3</sup> Howell v. Western R. Co., 94 U. S. 463, 466; again quoted with approval in Chicago &c. R. Co. v. Fosdick, 106 U. S. 47, 68.

crea *nisi* mentioned in this extract," says Mr. Justice Matthews, in a subsequent case, "like that in a suit against an infant, in which a day is given him to show cause against it, after he attains full age, and like that, where the bill is ordered to be taken *pro confesso*,—is *preliminary* in its nature, requiring a *further order* to complete it. According to the practice of the English chancery, a decree of this nature in a foreclosure suit, after directing an account to be taken of the principal and interest due to the complainant upon the mortgage, orders, that upon the defendant's paying the amount ascertained and certified or found to be due, within six months, at such time and place as are appointed, the complainant shall reconvey the mortgaged premises; but that in default of such payment, the defendant shall thenceforth be absolutely debarred and foreclosed of his equity of redemption. It is necessary, however, for the complainant, in order to complete his title, to procure a final order confirming it; otherwise the decree of foreclosure will not be pleadable. This order of confirmation is procured on proof to the court of non-payment according to the terms of the decree."<sup>1</sup>

§ 6245. **Further of This Course of Procedure.**—In the case last referred to<sup>2</sup> Mr. Justice Matthews concludes his description of the course of procedure in foreclosing a railway mortgage, as follows:—"The time usually allowed by the decree to pay the mortgage debt, whether on a bill to redeem or to foreclose, was six months. But that was not regarded as an absolutely fixed period, but might be varied so as to be reasonable, according to the discretion of the court, and the particular circumstances of the case. The courts, however, were very liberal in cases of foreclosure, in extending and enlarging, from time to time, this period of redemption; though not in cases of bills to redeem, where the mortgagor came into court professing his readiness to pay the amount due, when ascertained; nor in cases of sales, where the mortgagor was not subjected to the severe and absolute forfeiture of his

<sup>1</sup> Chicago &c. R. Co. v. Fosdick, 106 U. S. 47, 69.

<sup>2</sup> *Ibid.*

right.<sup>1</sup> Where, according to the English practice, a sale, instead of foreclosure, was ordered, the form of the decree was the same, directing the sale, in the event of a default being made in payment of the amount found due, within the usual time of six months, or within the shorter period, or even immediately, if by consent, or where it was considered to be for the benefit of all parties.<sup>2</sup> In the early practice in Kentucky, the preliminary decree, finding the amount due, and giving day for payment, was interlocutory merely, and separate from the subsequent decree finding the default in not performing the former decree and directing a sale in consequence thereof.<sup>3</sup> The ground of this practice seems to have been that the mortgagor had the right to have the record show that he had failed to pay according to the decree *nisi*, before a sale of his property was ordered. But there seems to us to be no sufficient reason why, as it was according to the English practice, and generally in this country, all these matters may not be embraced in a single decree. What is indispensable in such a decree is, that there should be declared the fact, nature, and extent of the default which constituted the breach of the condition of the mortgage, and which justified the complainant in filing his bill to foreclose it, and the amount due on account thereof, which, with any further sums subsequently accruing and having become due, according to the terms of the security, the mortgagor is required to pay within a reasonable time, to be fixed by the court, and which, if not paid, a sale of the mortgaged premises is directed.<sup>4</sup> This is that final decree of foreclosure and sale, which determines and fixes the rights of the parties, and from which, on that account, an *appeal* lies.<sup>5</sup> But, as in cases of strict foreclosure, so

<sup>1</sup> Citing *Perine v. Dunn*, 4 Johns. Ch. (N. Y.) 140; *Harkins v. Forsyth*, 11 Leigh (Va.), 294.

<sup>2</sup> 2 Dan. Ch. Pr. 1266.

<sup>3</sup> Citing *Downing v. Palmateer*, 1 T. B. Mon. (Ky.) 64; *Oldham v. Halley*, 2 J. J. Marsh. (Ky.) 113; *Hanks v. Greenwade*, 5 J. J. Marsh. (Ky.) 249; *Champlin v. Foster*, 7 B. Mon. (Ky.) 104.

<sup>4</sup> Citing *Woodard v. Fitzpatrick*, 2 B. Mon. (Ky.) 61.

<sup>5</sup> Citing *Ray v. Law*, 3 Cranch (U. S.), 179; *Whitney v. Bank of United States*, 13 Pet. (U. S.) 6; *Forgay v. Conrad*, 6 How. (U. S.) 201; *Railroad Co. v. Swasey*, 23 Wall. (U. S.) 405.

in cases of sale, the equity of the mortgagor as against the mortgagee is not exhausted until sale actually confirmed; for if at any time prior he should bring into court, for the mortgagee, the amount of the debt, interest, and cost, he will be allowed to redeem. It is the *deed* made to the purchaser, actually transferring the title of the parties to the suit, that terminates the mortgagor's equity of redemption."<sup>1</sup>

§ 6246. **Reorganizing the Corporation.**—If, as in the case of a railway property, the property subject to sale under the mortgage is a property of such a nature that it cannot be conveniently used except by an incorporated company, then the purchaser or purchasers will organize a new corporation, to which the property will be conveyed, and by which it will thereafter be owned and operated. Statutes have been enacted in many States providing for the organizing of new corporations to succeed to the franchises of old ones;<sup>2</sup> but where no such statute exists, the purchaser must appeal to the legislature for the passage of the necessary enabling act,<sup>3</sup> which enabling act would, under many constitutions, have to be in the form of a *general law*.<sup>4</sup> Subject to governing statutes, these reorganizations always take place either in pursuance of the directions contained in the mortgage, or under schemes devised and assented to by the parties in interest, which schemes are sometimes approved by the court and carried out under its orders, and sometimes sanctioned or validated by subsequent legislation. In so far as such schemes are a matter of *contract*, as they must be for the most part, the rights of the parties to them are whatever rights the contract gives them, no more and no less; and a court of equity will protect those

<sup>1</sup> Chicago &c. R. Co. v. Fosdick, 106 U. S. 47, 69–71; citing to the last statement, Brine v. Insurance Co., 96 U. S. 627.

<sup>2</sup> *Ante*, §§ 258, 259. See as to the construction of the Indiana Act of March 5, 1859, authorizing the purchasers of turnpike roads "under

mortgage sales, . . . to organize as incorporated companies," etc., Moore v. State, 71 Ind. 478.

<sup>3</sup> Coe v. Columbus &c. R. Co., 10 Ohio St. 372; *s. c.* 75 Am. Dec. 518, 545.

<sup>4</sup> *Ante*, §§ 539, 573, 578, 581.

rights.<sup>1</sup> But where a bondholder has, with full knowledge, approved a plan of reorganization and accepted his share of the bonds of the new company, he has no standing in equity to repudiate it and to have the proceedings under it annulled, no fraud or imposition being shown.<sup>2</sup> It is scarcely necessary to add that, where the bondholders commit the formation of the new company to a *committee* of their number, they will have a similar remedy to prevent a breach of trust by the committee.<sup>3</sup> Third parties advancing moneys upon the

<sup>1</sup> *Riker v. Alsop*, 27 Fed. Rep. 251; *Hitchcock v. Midland R. Co.*, 33 N. J. Eq. 86. For the construction of a railway mortgage providing for a scheme of foreclosure, under which it was held that, upon a foreclosure, the capital stock of the new corporation was to be determined by the *principal sum* of the mortgage debt without regard to the unpaid *interest*, and that a holder of certain interest warrants, guaranteed by another company, was not entitled to demand stock in the new company in exchange for them,—see *Child v. New York & C. R. Co.*, 129 Mass. 170. A scheme of reorganization under which certificates of *preferred stock* were to be issued to creditors and stockholders in payment of their interest in the road, which stock was “to be and remain a first claim upon the property of the corporation after its indebtedness,” was construed as referring to present indebtedness, and as not giving to stockholders a prior specific lien over subsequent mortgages: *King v. Ohio & C. R. Co.*, 9 Biss. (U. S.) 278. Plan of reorganization not *fraudulent and void* because it provides that holders of unsecured indebtedness shall receive second preferred income bonds, and also that stockholders shall receive stock in the new company, etc.: *Hancock v. Toledo & C. R. Co.*, 11 Biss. (U. S.) 148. That a *rule* to foreclose a lien reserved on the property and franchises of a

railroad company for deferred payments of purchase-money is properly *served* upon a *corporation* into which the purchasers incorporated themselves subsequent to the sale, although they purchased the road and gave their bonds, to secure which the lien was given, as *individuals*, and not as a corporation,—see *Holland v. Lee*, 71 Md. 338; *s. c.* 18 Atl. Rep. 661. Construction of a contract under which the purchasers agreed to organize a new corporation and *assume* the burden of a certain *depending litigation* with one V., with the conclusion that the agreement imposed *no personal liability* upon the purchasers to V., but was a contract of indemnity merely: *Vilas v. Page*, 106 N. Y. 439; *s. c.* 13 N. E. Rep. 743; 11 N. Y. St. Rep. 416; 2 Rail. & Corp. L. J. 435. That a plan of reorganization of a railroad company whose mortgage is foreclosed, by which the bondholders agree that the property shall be bought in trust for them, and *new bonds* issued in an amount greater than the old issue, is not void, though it does not appear that the new issue is to be used for the purposes of the corporation,—see *Cushman v. Bonfield*, 36 Ill. App. 436.

<sup>2</sup> *Matthews v. Murchison*, 15 Fed. Rep. 691.

<sup>3</sup> See, for illustration, *White v. Wood*, 38 N. Y. St. Rep. 338; *s. c.* 13 N. Y. Supp. 631.

faith of an agreement for the reorganization of a railroad property, after a sale to foreclose a mortgage thereon, may thereby acquire equities which will be protected by a court of equity.<sup>1</sup>

§ 6247. **Effect of Delay in Coming into Scheme of Reorganization.**—Delay on the part of bondholders or stockholders in coming into the scheme of reorganization *within the time prescribed* will, in the absence of fraud, or of equitable circumstances, preclude them from coming in afterwards. For instance, if the scheme of reorganization agreed upon, involves the issuing of *new bonds* by the new corporation to be *exchanged with the bondholders* under the mortgage foreclosed for their bonds, within a stated time, those who do not surrender their bonds for exchange before the expiration of that time will have no right to have the exchange made thereafter.<sup>2</sup> So, if it involves the distribution of new shares of stock to the stockholders in the old company, upon the *payment* by them, within a specified time, *of a certain percentage of cash*, those who do not pay the cash within that time cannot claim the benefits of the scheme and maintain an action to have the new shares issued to them.<sup>3</sup> So, where an option is given to certain dissenting stockholders to take stock in the new company within thirty days, one who fails to avail himself of that option within the prescribed time has no right of action against the new company, grounded on a refusal to issue such stock to him, although he had *no notice* or *knowledge* of the agreement until after the thirty days had expired.<sup>4</sup>

<sup>1</sup> See, for illustration, *Dester v. Ross*, 85 Mich. 370; s. c. 48 N. W. Rep. 530.

<sup>2</sup> *Carpenter v. Catlin*, 44 Barb. (N. Y.) 75. See *ante*, § 269.

<sup>3</sup> *Van Alstyne v. Houston & C. R. Co.*, 56 Tex. 373.

<sup>4</sup> *Thornton v. Wabash R. Co.*, 81 N. Y. 462. So, where a suit to foreclose the mortgage was brought by some of the bondholders in behalf of themselves and all other bondholders

who might choose to come in and be made parties, and where the property was bought in by a trustee for the benefit of the bondholders, under a scheme, by which, with the aid of a legislative act subsequently passed, a new corporation was organized, to which the property was transferred by the trustees, and whereby shares of stock in the new corporation were to be distributed to the bondholders in exchange for their bonds, — a bond-



But where a bondholder *offers* to deposit his bonds and to pay his assessment toward the expenses of the foreclosure, in pursuance of the scheme of foreclosure and reorganization, but his offer is *refused*, and thereafter the new corporation refuses to recognize his rights, he will be entitled to equitable relief.<sup>1</sup>

**§ 6248. Reorganizing by a Majority of the Bondholders.**

We have seen that a railway mortgage is a security of such a peculiar kind, that a court of equity, in dealing with it in a suit for foreclosure or otherwise, will, in many cases, while being careful to prevent a sacrifice of the rights of a *minority* of the bondholders, *defer to the views of the majority*.<sup>2</sup> There is one holding to the effect that, after a railway company has mortgaged its property and franchises and has made default in payment of the debt thereby secured, so that a foreclosure of the mortgage has become inevitable,—it is competent for the legislature to intervene, and to pass an enabling act authorizing a majority of the bondholders, provided an equal opportunity is afforded to all, to organize a new corporation, with the rights of the old one. The theory is that the mortgagees of the property take it subject to the

holder, who *never became a party* to the suit nor contributed anything to the expense of it, could not, nearly *twenty years afterwards*, demand of the new corporation the issue of stock to him in exchange for his bonds and coupons in the old corporation, and maintain an action in *assumpsit* for damages on refusal of the new corporation so to do. The decision seems to proceed on the view that he was required to exercise his option while the foreclosure suit was depending, or at least within the period of the statute of limitations. *Landis v. Western Pa. R. Co.*, 133 Pa. St. 579; *s. c.* 19 Atl. Rep. 556.

<sup>1</sup> *Hitchcock v. Midland R. Co.*, 33 N. J. Eq. 86. It has been held that *where no time is fixed* in the scheme of reorganization within which stock-

holders may exchange their shares in the old company for shares in the new, a stockholder is entitled to have the exchange made without regard to the date of his offer. *Vatable v. New York & C. R. Co.*, 9 Abb. N. Cas. (N. Y.) 271. That the provision of New York Laws, 1853, ch. 502, § 2, permitting a stockholder of a railroad company, *within six months* after a foreclosure sale, to acquire stock of the company purchasing, upon payment of a proportional share of the price, was repealed by the act of 1854, amending the general railroad act, and by the act of 1874, "to facilitate the reorganization of railroads sold under mortgages,"—see *Pratt v. Munson*, 84 N. Y. 582.

<sup>2</sup> *Ante*, § 6213; *Shaw v. Railroad Co.*, 100 U. S. 605, 611, 612.

paramount *public trust* with which it is impressed, and that the power of the legislature to pass such an act rests upon the principle that the property was, prior to the mortgage, charged with the execution of this paramount public trust.<sup>1</sup> But whatever may be the view of the extent to which a court will defer to the wishes of a majority of the bondholders, it remains true that it will be sedulous to protect the rights of a dissenting minority, and, upon a showing made by them that the majority, and the trustees under the mortgage concurring with the majority, are taking a course subversive of the rights of the minority, will allow the minority to intervene as parties to the suit for the purpose of having their rights protected.<sup>2</sup>

§ 6249. **Other Holdings Touching Such Schemes of Reorganization.**—It has been noted elsewhere,<sup>3</sup> that prohibitions contained in the constitutions and statute laws of some of the States against the *issuing of stock or bonds* of corporations, *except for moneys received or labor done*, and against all *fictional increase of stock or indebtedness*, do not apply to an agreement among the mortgage bondholders of an embarrassed railroad company that the trustees under the mortgage shall buy in the property at a foreclosure sale, and convey it to a new corporation to be organized, which shall issue new mortgage bonds, to be delivered to the old bondholders in exchange for their old bonds without the payment of money.<sup>4</sup> If, after a foreclosure and reorganization, certain *judgment creditors* bring suits in equity, and succeed in having the decree of foreclosure set aside and the property subjected to the payment of their judgments, this will render invalid the decree of foreclosure only so far as their rights are concerned: the bondholders who voluntarily took stock in the new company cannot again claim under the mortgage, nor can the trustee thereunder maintain a new bill of foreclosure for

<sup>1</sup> *Gates v. Boston &c. Air Line R. Co.*, 53 Conn. 333.

<sup>2</sup> *Ex parte De Betz*, 9 Abb. N. Cas. (N. Y.) 246.

<sup>3</sup> *Ante*, §§ 2105, 2106.

<sup>4</sup> *Memphis &c. R. Co. v. Dow*, 120 U. S. 287; affirming *s. c.* 19 Fed. Rep. 388.

their benefit.<sup>1</sup> Companies reorganized by the purchasers of railway property at foreclosure sales are, in almost every case, *new corporations*, and the old corporation may be still existent;<sup>2</sup> though, of course, such a scheme of reorganization *may* embrace a mere reorganization and revival of the old corporation, such as will continue its liability to pay its floating debts.<sup>3</sup>

**§ 6250. Equities of Stockholders Who have Purchased their Shares in View of an Approaching Sale of the Corporate Property.**—A suitor, to have the extraordinary aid of a court of equity, must come before the court with clean hands; and these courts have frequently repelled suitors, where the foundation of their claim for relief, while not involving *maintenance* under the strict definition of the common law, yet involved conduct which *savored of maintenance*. Such, to some extent, is the position of one who purchases at a trifling value the shares of stock of an insolvent corporation, whose assets have been advertised for sale under a deed of trust, for the purpose of subsequently prosecuting a suit in equity to set aside the sale. Such persons are regarded as possessing a very doubtful equity, and unless they appeal promptly for the aid of the court, and exhibit conduct otherwise entirely clear, they will be repelled.<sup>4</sup>

<sup>1</sup> Barnes *v.* Chicago &c. R. Co., 8 Biss. (U. S.) 514.

<sup>2</sup> *Ante*, § 261.

<sup>3</sup> See *ante*, § 256. For a scheme of reorganization under which the officers of the new company were held to have power to execute mortgages to

secure advances made to the old and the new corporation under a continuing contract, by its president,—see Baker *v.* Harpster, 42 Kan. 511; *s. c.* 22 Pac. Rep. 415.

<sup>4</sup> Kitchen *v.* St. Louis &c. R. Co., 69 Mo. 224, 266.

## CHAPTER CXXXVI.

### PRIORITIES AMONG CREDITORS IN SUCH FORECLOSURE SUITS.

SECTION	SECTION
6256. Priorities among creditors.	6263. Rights of execution purchaser of bonds which have never been delivered.
6257. Principles on which priorities adjusted.	6264. Trustees cannot charge the trust with subsequent debts.
6258. Further of this subject.	6265. Priority of bonds issued as collateral security.
6259. Priorities of equitable mortgages.	6266. Priority of second mortgage to which first mortgagees have consented.
6260. Priorities of mortgages over floating debts.	6267. Priorities of attorneys' fees.
6261. Creating liens on the property which take precedence over prior mortgages.	6268. Further of this subject.
6262. Priorities of bonds under the same mortgage where the issue is limited.	

§ 6256. **Priorities among Creditors.** — Chief among the *equities adjusted* in a foreclosure proceeding<sup>1</sup> will be questions of *priorities among different creditors* and among different classes of creditors.<sup>2</sup> Where some of the bondholders assert, under the governing statute, a priority over the others, the chancellor must, of necessity, determine the order in which claims shall be paid, and he may do this without any motion or petition for that purpose; and consequently it is immaterial that the holders of the bonds asserting a priority have proceeded by *petition*, and that the chancellor has acted upon the petition without notice.<sup>3</sup>

§ 6257. **Principles on Which Priorities Adjusted.** — It is impossible to follow the thread of any governing principle upon which the chancellor will proceed in adjusting priorities

<sup>1</sup> *Ante*, § 6218.

<sup>2</sup> *Morton v. New Orleans &c. R. Co.*, 79 Ala. 590.

<sup>3</sup> *Colt v. Barnes*, 64 Ala. 108.

among different classes of creditors, outside of certain general statements; because the question of such priorities depends upon conditions as variant as different statutes, different contracts, and different collections of fact can make them. It may be stated generally, however, that creditors *equal in class* are *equal in right*. Thus, where the fund is to be distributed in equity between the first and second mortgage bondholders in a railway mortgage, the distribution will be *pro rata among each class*, without regard to the time at which the liens of the several members of each class accrued. In such a case, the rule applied at law in distributing among execution creditors does not obtain, but the governing principle is that equity is equality.<sup>1</sup> Statutory liens, it has been held, take precedence of mortgage bonds, and equitable liens payable from earnings are postponed to mortgage bonds.<sup>2</sup> But it is to be observed that *statutory liens* take whatever precedence the statute, by a fair interpretation, gives them.<sup>3</sup> It has been held that where railway bonds are issued, secured by a statutory lien so as to be entitled to a priority over bonds secured by a mortgage, and the interest due on the bonds secured by the statutory lien is funded by the issuing of new bonds to be secured by an extension of the lien, — these latter bonds are entitled to the same priority over other mortgage bonds.<sup>4</sup> Where the property of a railroad company had been sold

<sup>1</sup> Morton v. New Orleans &c. R. Co., 79 Ala. 590; Atwood v. Shenandoah Valley R. Co., 85 Va. 966; s. c. 13 Va. L. J. 333; 9 S. E. Rep. 748.

<sup>2</sup> Blair v. St. Louis &c. R. Co., 25 Fed. Rep. 232.

<sup>3</sup> As to the statutory lien of the State of Alabama, under Ala. Act Feb. 21, 1870, upon *railway bonds indorsed by the State*, see Colt v. Barnes, 64 Ala. 108. That the holders of such indorsed bonds have a right of *subrogation* to the rights of the State, is adjudged in the same case. That the statutory lien created by 12 South Carolina Stat. 885, cannot be post-

poned by the State in favor of a subsequent mortgage, — see Gibbes v. Greenville &c. R. Co., 13 S. C. 289. That the lien in favor of the State of Tennessee, under the improvement law of 1851–52, is paramount to the rights of the holder of a tax certificate under Tennessee Act 1851–52, ch. 117, and that the purchaser of the State's interest cannot be compelled to accept such certificates for freight and passage, — see State v. Nashville &c. R. Co., 7 Lea (Tenn.), 15.

<sup>4</sup> Gibbes v. Greenville &c. R. Co., 13 S. C. 289.

under a decree of foreclosure, and the money had been brought into court to await a further order of distribution, saving the rights of all persons in the fund for future determination, — which course, we have seen,<sup>1</sup> the chancellor is at liberty to take without settling the rights of the parties before the decree, — the *president* of the company, who has advanced his own means to save the property from levy and sale for unpaid taxes, may intervene, and, on the principle of *subrogation*, may enforce a lien on the fund, paramount to that of other creditors. In other words, the court will advance him to the paramount lien of the State, whose demand he has satisfied.<sup>2</sup>

§ 6258. **Further of This Subject.**—Where interest had been paid for some years upon a portion of certain railroad bonds, while, on other bonds of the same class, held by other parties, it had remained unpaid, and a foreclosure sale could have been compelled at any time after default in the payment of interest by any holder of the bonds on which interest had not been paid, — it was held that, upon a distribution of the fund arising from the subsequent foreclosure, the holders of bonds who had received no interest were entitled to no priority over those who had received interest.<sup>3</sup> The power of the court to authorize the issue by its *receiver*, holding the property *pendente lite*, of certificates to take up certain *preferred demands*, which certificates become a lien paramount to all others except the lien for the public taxes, — will be hereafter considered.<sup>4</sup> The hardship of allowing existing liens to be thus displaced has been already observed upon, but arguments

<sup>1</sup> *Ante*, § 6218.

<sup>2</sup> *Humphreys v. Allen*, 100 Ill. 511. Thus, where a first mortgage has been laid upon a railroad property, and the proceeds of certain of the bonds have been expended entirely upon one division of the road, and other of the bonds have been issued as collateral security to raise funds for constructing the remainder, the holders of the former class have *no priority* over the

latter. *Atwood v. Shenandoah Valley R. Co.*, 85 Va. 966; *s. c.* 9 S. E. Rep. 748; 13 Va. L. J. 333. Circumstances under which the *president* of the company was held not authorized to create, by an admission, a trust in favor of the holders of *floating debts*: *Merchants' Bank v. Goddin*, 76 Va. 503.

<sup>3</sup> *Humphreys v. Morton*, 100 Ill. 592.

<sup>4</sup> *Post*, ch. 171.

grounded on such hardship are sometimes met by the principle of *estoppel*, by holding that the bondholders cannot lie by and see the certificates issued without objection, and see third parties invest their money in them without other security, and afterward come forward and claim that the holders of them should not have priority; and it has been held that persons purchasing the bonds of the corporation when overdue, with knowledge of the condition of the litigation, are in like manner estopped.<sup>1</sup> We have already seen that the effect of a *consolidation* of two railroad companies, under a statutory authorization, is not to displace the rights of existing creditors, or their liens upon or equities in respect of the properties of either company. If, therefore, the consolidated company issues bonds purporting to be first mortgage bonds, these will be postponed to the debts of the old company, where the statute provides that outstanding debts of the old company shall not be affected by the consolidation; because purchasers of the bonds issued by the consolidated company are affected with *notice* of the provisions of the statute authorizing the consolidation.<sup>2</sup>

§ 6259. **Priorities of Equitable Mortgages.** — It has been held, *arguendo*, that, upon principles applicable to mortgages of real estate, even notice of a prior equitable mortgage will not make it valid as against a subsequent mortgage, formally executed and recorded.<sup>3</sup> But it will appear from what has preceded<sup>4</sup> that this cannot be accepted as the law, but that equitable mortgages are prior in right to subsequent incumbrancers

<sup>1</sup> *Humphreys v. Allen*, 101 Ill. 490.

<sup>2</sup> *Spence v. Mobile &c. R. Co.*, 79 Ala. 576. Want of equity of one who has *exchanged old bonds for new*, under an agreement of which the purchasers of the new bonds had no *notice*, — the exchange being made under an arrangement by which first, second, and third mortgage bondholders exchanged their bonds for new ones secured by a new mortgage which was subsequently foreclosed: *Ex parte*

*White*, 2 S. C. 469. Relative rights of the bondholders and the beneficiaries under a mortgage, in the *distribution of the capital stock* of a new corporation organized after foreclosure, determined upon a construction of the mortgage: *Child v. New York &c. R. Co.*, 129 Mass. 170.

<sup>3</sup> *Coe v. Columbus &c. R. Co.*, 10 Ohio St. 372, 406; *s. c.* 75 Am. Dec. 518, 543.

<sup>4</sup> *Ante*, § 6145.

having *notice* of them.<sup>1</sup> Where such a lien is established by an enabling act of the legislature, authorizing a county to issue its bonds in aid of a railway, all subsequent purchasers of the bonds of the company are conclusively charged with notice of it.<sup>2</sup> Under either theory, it is not the law that a *railway mortgage* will, *in every case*, take precedence of a prior mortgage of the same property which has not been formally executed or recorded. To give it such effect might be to do violence to the expressed intention of the parties. It was so held where a third mortgage, in terms, recited that it was *subject to a second mortgage* which had been previously placed upon the property: a defect in the execution of the second mortgage did not, it was held, give the third mortgage a priority over it.<sup>3</sup> And, on principles already stated,<sup>4</sup> the same effect would be given to a prior equitable mortgage in case of *actual notice* of it, although it were not mentioned in a subsequent formal mortgage. But it is to be constantly kept in mind, in dealing with the subject of equitable mortgages, that a mortgage will not be raised by a court of equity, except upon clear proof that there was an agreement or understanding between the parties at the time, that the party advancing the money or rendering the benefit should be secured by a lien upon the property of the corporation. For instance, it has been held that one who, at the request of the bondholders, pays a debt of a railroad company, due for construction, cannot claim a superior equity to theirs, unless he can prove inducements and dealings of such a character as to estop them from asserting their liens as superior to his claim.<sup>5</sup>

**§ 6260. Priorities of Mortgages over Floating Debts.**—A mortgage would be of no value as a security unless it took precedence over debts due to *general creditors*, whether created before or subsequent to the mortgage. As to antecedent debts, the mortgage will have priority in all cases, it is believed, save

<sup>1</sup> *Ketchum v. St. Louis*, 101 U. S. 306.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Coe v. Columbus &c. R. Co.*, 10 Ohio St. 372, 406; *s. c.* 75 Am. Dec. 518, 543.

<sup>4</sup> *Ante*, § 6145.

<sup>5</sup> *Kelly v. Green Bay &c. R. Co.*, 10 Biss. (U. S.) 151.



three:—1. Where the antecedent debts consist of claims for labor, materials, and supplies furnished to a *railway company* to keep its road in operation; and this equally applies to debts of this species contracted subsequently to the mortgage, provided they are *recent* at the time the action is brought to foreclose the mortgage.<sup>1</sup> 2. In cases where the court, as a condition precedent to the granting of a receiver, in a suit in equity to foreclose the mortgage, requires the payment of floating debts.<sup>2</sup> 3. In cases where a statute exists at the date of the execution of the mortgage, under which such mortgages are postponed to existing debts owing by the corporation.<sup>3</sup> The terms of the mortgage itself may, of course, make a *fourth* exception. But, in the absence of any of these exceptions, floating debts, although contracted for the purpose of paying interest on the bonds, or for supplies and repairs for which persons interested in the road have become individually liable, must be postponed to mortgages; and the court foreclosing a mortgage has no right, without the consent of the bondholders, to direct the application of the income of the road to the payment of the floating debt, although it is made to appear that it can be paid on favorable terms, and that it is in a sense equitable, and that it is probably for the interest of the bondholders, that such application should be made.<sup>4</sup> When the *earnings* of a railroad, pledged to secure the interest on certain outstanding bonds, become insufficient to pay the interest as it accrues thereon, such revenues are not subject to *attachment* or *execution* by other judgment creditors of the corporation; and an attachment or execution of the same will be restrained by injunction.<sup>5</sup> In such a mortgage the following provision was inserted: "All of the rights of the bondholders' trustees are subject to the possession, control, and management of the directors of such company till default," etc. It was held that this did not give

<sup>1</sup> *Post*, § 7114, *et seq.*

<sup>2</sup> *Post*, § 6824, *et seq.*

<sup>3</sup> *Traders' Bank v. Lawrence Man. Co.*, 96 N. C. 298.

<sup>4</sup> *Duncan v. Mobile & Ohio R. Co.*,

2 Woods (U. S.), 542.

<sup>5</sup> *Dunham v. Isett*, 15 Iowa, 284.

creditors of the corporation, who became such after the execution of the mortgage but before default under it, a priority over the lien of the mortgage.<sup>1</sup> Where such a mortgage exists, and the directors have allowed money to accumulate for the purpose of paying the interest on the bonds secured by it, and also for the purpose of providing a sinking fund to liquidate the principal, such moneys cannot be taken by subsequent general creditors.<sup>2</sup> Claims for *personal injuries* are postponed to prior and subsequent mortgages, in the absence of special considerations such as will be adverted to in a future title.<sup>3</sup>

**§ 6261. Creating Liens on the Property Which Take Precedence over Prior Mortgages.** — We shall hereafter see<sup>4</sup> that in the foreclosure of railway mortgages the practice has sprung up, sanctioned, within certain limits, by judicial decisions, of authorizing the *receiver* to make certain expenditures to preserve the property and keep it in operation, empowering him to issue *receiver's certificates* therefor, and charging the cost of such expenditures and such certificates, if issued, upon the property as a first lien, taking precedence over all prior liens, — or at least over the mortgage which is the subject of the foreclosure. This power has been exercised so as to validate a lien made upon a railway property by its receiver in the purchase of rolling stock, and to make the expenditure a charge upon the *corpus* of the property, and not merely upon the proceeds of the foreclosure sale.<sup>5</sup>

**§ 6262. Priorities of Bonds under the Same Mortgage where the Issue is Limited.** — If, by the terms of the contract

<sup>1</sup> Dunham v. Isett, 15 Iowa, 284.

<sup>2</sup> Galena &c. R. Co. v. Menzies, 26 Ill. 121, 148.

<sup>3</sup> Post, §§ 6823, 6824, 6825, 7123. Central Trust Co. v. East Tenn. &c. R. Co., 30 Fed. Rep. 895; s. c. 30 Am. & Eng. Rail. Cas. 450.

<sup>4</sup> Post, § 7168, et seq.

<sup>5</sup> Vilas v. Page, 106 N. Y. 439; s. c. 13 N. E. Rep. 743; 12 N. Y. St. Rep.

416; 2 Rail. & Corp. L. J. 435. The case also holds that an agreement by which the bonds involved in the foreclosure suit were turned over to the associates organizing the new corporation, and by which they agreed to take the property subject to the claim of the person claiming the lien for the rolling stock, did not impose upon them a personal liability to him. *Ibid.*

under which a series of mortgage bonds is issued, the number which may be issued is limited, and if, in violation of the contract, other such bonds are issued, the purchasers of those which were issued within the contract limit will be entitled to priority over the purchasers of the others, unless the latter took them as innocent purchasers for value; and where none of the bonds of the excessive issue were negotiated for cash, but all were issued to persons who held pre-existing claims or demands against the company, or against the directors, or against the original taker of the prior issue, which had been assumed by the company, or claims for services rendered or to be rendered to the company,—it was held that none of them occupied the position of innocent purchasers for value.<sup>1</sup>

**§ 6263. Rights of Execution Purchaser of Bonds Which have never been Delivered.** — Bonds which have never been delivered are *no bonds*; since delivery is essential to the creation of the obligation recited therein. A *delivery*, in order to be effectual to create a *contract*, must, of course, be *voluntary*; otherwise nothing proceeds from the mind of the obligor and there can be no *consensus*, because the minds of two contracting parties do not meet and concur upon the taking effect of the obligation recited in the instrument. It follows that bonds which have been *prepared for issue* by a corporation, but which never have been issued, cannot acquire life, as obligations against the corporation, by being *levied upon under an execution* by one of its creditors and sold. The purchaser gets no title to them as bonds, though perhaps he gets a title to the paper on which they are printed, as so much waste paper.<sup>2</sup>

<sup>1</sup> Union Trust Co. v. Nevada &c. R. Co., 20 Fed. Rep. 80. But, although there has been a *fraudulent overissue* of the bonds of a corporation, an *estoppel* will arise against one who holds a majority of the shares of the corporation, as assignee of the shareholder who, as president of the corporation, was guilty of making the fraudulent overissue, in favor of the purchaser of bonds,—and this although he may

take them with notice of the circumstances under which they were issued. Neither the fraudulent stockholder nor his assignee can claim the aid of a court of equity to secure the cancellation of the bonds and of the mortgage securing them. Des Moines Gas Co. v. West, 50 Iowa, 16.

<sup>2</sup> See on this subject, Sickles v. Richardson, 23 Hun (N. Y.), 559.

§ 6264. **Trustees cannot Charge the Trust with Subsequent Debts.** — No arrangement among the trustees in a corporate mortgage and the corporation and third parties, not assented to by the beneficiaries thereunder, will be allowed to have the effect of charging the trust with the payment of subsequent debts. Neither the trustees, nor any agent appointed by them, is competent to create such a charge.<sup>1</sup>

§ 6265. **Priority of Bonds Issued as Collateral Security.** — Where a corporation has not exhausted its power to issue bonds under a first mortgage, it has been held that it may make a second mortgage, intended as a sort of blanket mortgage, to take up the bonds issued under the first mortgage, and also other indebtedness, and that it may make an additional issue of bonds under the first mortgage, as collateral security for the bonds issued under the second mortgage, and that the holders of these collateral first-mortgage bonds will be entitled, in a foreclosure, to share *pro rata* with the holders of prior bonds issued under the same mortgage.<sup>2</sup> Where some of the bonds under a mortgage are issued as collateral security merely, the holder of the bonds will nevertheless be permitted to prove them up to the extent of their face value, though he can have distribution out of the funds, accruing from the sale of foreclosure, only to the extent of the amount of his original *loan with interest*.<sup>3</sup>

§ 6266. **Priority of Second Mortgage to Which First Mortgagees have Consented.** — Where the beneficiaries under a first mortgage give their consent to the execution by a corporation of a second mortgage, this will have the effect of making the second mortgage take precedence over the first.<sup>4</sup>

<sup>1</sup> The above truism is illustrated by the following cases, in which one judge dissented: *Kahn v. Hamilton*, 2 Utah, 115; *Matthews v. Hamilton*, 2 Utah, 35; *Woolf v. Hamilton*, 2 Utah, 121.

<sup>2</sup> *Atwood v. Shenandoah Valley R. Co.*, 85 Va. 966; *s. c.* 9 S. E. Rep.

748; 13 Va. L. J. 333. And see *Claflin v. South Carolina R. Co.*, 4 Hughes (U. S.), 12.

<sup>3</sup> *Morton v. New Orleans & c. R. Co.*, 79 Ala. 590; *Rice's Appeal*, 79 Pa. St. 168.

<sup>4</sup> *Sinking Fund Comm'rs v. Northern Bank & c.*, 1 Met. (Ky.) 174.

When, therefore, the State, having a first lien upon a railroad, gave its consent to the execution of a mortgage in favor of a municipal corporation for aid advanced to the railroad company, and afterwards foreclosed its lien in disregard of such mortgage, and, as the result of the foreclosure, received an interest-bearing bond which was turned over to its sinking fund commissioners, — it was held that such bond became no part of the sinking fund, as against the rights of the second mortgagee. Such mortgagee became equitably entitled to a decree appropriating the interest on the bond to the liquidation debt secured by the mortgage.<sup>1</sup>

§ 6267. **Priorities of Attorneys' Fees.** — This question is one which, to the credit of the legal profession, has been generally adjusted without contentious litigation. The principles applicable in determining it belong to principles established in the general practice of courts of chancery, rather than to anything peculiar to corporate mortgages. It may be stated, however, that the legal principle governing the subject is that the services of solicitors and counselors, in the *creation or preservation of a fund*, are justly deemed, in equity, *as a first charge upon that fund*. The principles upon which courts of equity proceed in allowing such fees were stated with clearness in an important case by Somerville, J.: "The fundamental principle on which such allowances are justified is, that a trust estate should bear the expenses of its administration in a court of equity. Where a trustee, acting with fairness and impartiality, resorts to necessary litigation in order to rescue a trust estate from waste or destruction, and succeeds by his efforts in doing so, he is entitled to reimbursement out of the fund itself, for reasonable expenses incurred in prosecuting such suits, including a proper sum for attorney's fees. A like rule is applicable where a creditor institutes a suit in equity, not exclusively for his own benefit, but for the joint benefit of himself and other creditors of the same class to which he belongs. It will be observed that the

<sup>1</sup> Sinking Fund Comm'rs v. Northern Bank &c., 1 Met. (Ky.) 174.  
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co-complainants, in suits of this nature, all have a similar interest in the subject-matter of litigation — a common, and not an antagonistic, interest in the trust fund which has been brought under the control of the court. The necessary expenses of the original complainant incurred in litigation may very well, under these circumstances, be made payable out of the common fund; or else all, who are permitted to come in and avail themselves of the benefit of his labor, be required to contribute proportionately to such expense, as a condition of receiving such benefit. It would be inequitable for one alone to bear the burden, and others to come in and reap the fruits. The fruits of the litigation inuring equally to the benefit of the whole class concerned, they are equally taxable with the costs and expenses. The services of the counsel employed constitute a necessary part of such expenses. The attorneys for the original complainant are also the attorneys for all who unite with him in the suit, or who afterwards are permitted by the courts to come in and participate in the fruits into which the proceeding may ripen.”<sup>1</sup> But it is also added that, “unless this relation exists, the court will not be justified in making counsel fees a burden on the trust fund, merely because the services rendered by such counsel incidentally inure to the benefit of all the creditors who succeed in establishing their claims.”<sup>2</sup> Upon this principle the services rendered by the solicitors and counsel of the complainants, in the foreclosure of a railway or other corporate mortgage, will be *chargeable as a first lien*, or at least as a lien next after the ordinary court costs, upon the proceeds of the foreclosure sale.

§ 6268. **Further of This Subject.**—It is also believed to be the constant practice of courts of equity powers to make payment out of the fund for the services rendered in behalf of *intervening claimants*,—though, where they are successful, they are generally left to reimburse themselves out of the fund

<sup>1</sup> *Morton v. New Orleans &c. R. Co.*, 79 Ala. 590, 624. The same principle is also stated and illustrated in *Grimball v. Cruse*, 70 Ala. 534.

<sup>2</sup> *Ibid.* 624.

which they succeed in recovering for their clients. The fees of solicitors and counsel in this connection are often dealt with as being in the nature of *costs* in the case, and are hence paid out of the funds arising from the use of property in the hands of a receiver *pendente lite*, or from the proceeds of the sale of foreclosure, before any other distribution is made. It is within the *discretion* of the chancellor, unless his discretion is restrained by statute, to award costs in favor of either party to a contentious litigation, according to the merits of the contest; and, in the exercise of this discretion, the Federal judges have often awarded costs to intervening petitioners, having meritorious claims which could not be paid out of the funds in the hands of the court under the strict principles of law,—of which the writer could cite numerous instances within his own experience. But where, under the local law, an attorney has *no lien* upon the money of his client, not in his possession, superior to the claim of a creditor of the client who is seeking to subject it to his debt by legal proceedings, such a lien will be denied to the attorney of a corporation who has unsuccessfully prosecuted an action in its behalf to cancel certain bonds, and the mortgage securing them, on the ground of their having been fraudulently issued, and the attorney's fees will not be allowed to be paid out of the income accruing from the operation of the property in the hands of a receiver pending the litigation.<sup>1</sup> Under a bill in equity filed for the settlement of an assignment executed by an insolvent corporation, and to secure the distribution of the assets among creditors, counsel who represent the corporation, and resist the claims of creditors, have no lien on the fund in court, and the court cannot give them a preference over other general creditors.<sup>2</sup> In this case it was said that the jurisdiction of the court to charge the fund with the reasonable compensation of counsel depends upon the *lien* of attorneys and solicitors for their fees, and where there is no lien as between counsel and client, no such

<sup>1</sup> Des Moines Gas Co. v. West, 50 Iowa, 16.

<sup>2</sup> Lehman v. Tallahassee Man. Co., 64 Ala. 567.

charge can be made.<sup>1</sup> On the same principle, one who held certain bonds of a corporation as collateral security for a debt, was denied the right to charge his counsel fees as a part of the debt for which he held the bonds, on proving them up in a foreclosure suit.<sup>2</sup> And so, a judgment creditor, who attacked unsuccessfully the validity of the mortgage, was denied counsel fees out of the fund, he having rendered no services beneficial to the fund.<sup>3</sup>

<sup>1</sup> *Lehman v. Tallahassee Man. Co.*, 44 Miss. 513; *s. c.* 7 Am. Rep. 64 Ala. 603; citing *Guinn v. Nelson*, 707.

<sup>2</sup> *Morton v. New Orleans &c. R. Co.*, 79 Ala. 590.  
<sup>3</sup> *Ibid.*





## **TITLE FOURTEEN.**

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**TORTS AND CRIMES OF CORPORATIONS.**



## TITLE FOURTEEN.

### TORTS AND CRIMES OF CORPORATIONS.

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#### CHAPTER CXXXVII.

##### CIVIL LIABILITY OF CORPORATIONS FOR TORTS.

###### SECTION

- 6275. General rule.
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§ 6275. **General Rule.** — It was formerly supposed that a corporation aggregate could not commit an actionable tort, and that no action sounding in tort would lie against such a corporation. This conclusion rested upon the idea that a corporation is an artificial being, created by the sovereign, and endowed by the sovereign with power to do certain things, and none other. As a corporation, it could exercise no powers except those which the sovereign had conferred

upon it. This conclusion seems to have been a logical result of the fiction, so often dwelt upon in earlier judicial decisions, that a corporation is an intangible, ideal person, incapable of doing anything which the power creating it has not authorized it to do. The judges were accustomed to reason that a corporation can act only in the mode pointed out in its charter; that when it so acts, it acts in pursuance of an authorization of the power creating it, which is in this country the legislature; that consequently its acts, however hurtful, are necessarily lawful, and the hurt resulting from them is *damnum absque injuria*; and that when those who have its management or control, or who act for it in a given particular, step beyond the authorization of the charter in doing an act, it is not the act of the corporation, but is their own individual act. This doctrine, it will be perceived, may be extended, with the like conclusion, to the acts of agents of natural persons, so as to abolish the rule of *respond-eat superior* in respect of all acts of such agents not done in pursuance of the commands of their principals. Unless the agent, as between himself and his principal, could justify the doing of an act by the command or the authority of his principal, it would be his own act merely, and not the act of his principal; and in no case would the principal be liable for the act of his agent where the agent acted against his orders. But such has never been the modern law with regard to the responsibility of natural persons for the acts of their agents. A more sensible and practical juridical conception of a corporation would have been that it is an organized body of men, acting for certain purposes, within certain prescribed limits and through a certain agency. The question would then have been more simple and easy of solution. It would then have been, How far shall this body of men be held responsible for wrongs committed by their agents, when acting or pretending to act about the business for which the organization was formed, and for which they were appointed agents? As corporations multiplied, it was seen that intolerable wrongs would be done, if men could, by clothing themselves with

the immunities of corporate organization, commit wrongs without being answerable for them, for which they would be answerable if they had committed them in their natural capacities. The courts, therefore, while not denying or repudiating this fiction, and in the full face of its logical results, have been obliged to find their way out of the difficulty as best they could; and the result is, that it is now well-settled, within certain limits, both as to private and municipal corporations, that whenever the agent of a corporation, proceeding within the general scope of its powers and of the powers delegated by it to him, commits a wrong, the corporation must pay damages to the person injured, just as a natural person would be compelled to do under like circumstances.<sup>1</sup> The only exception which remains to this rule, in its application to private corporations, relates to those wrongs which involve *bad motive* or *evil intent*,—a subject which will be considered hereafter.<sup>2</sup>

**§ 6276. Application of the Rule of *Respondet Superior* to Private Corporations.**—This rule is but an application of the rule of *respondet superior* to corporations. The rule of

<sup>1</sup> *Yarborough v. Bank of England*, 16 East, 6; *Smith v. Birmingham &c. Gas Light Co.*, 1 Ad. & El. 526; *Clark v. Washington*, 12 Wheat. (U. S.) 40; *Baker v. Boston*, 12 Pick. (Mass.) 184; *s. c.* 22 Am. Dec. 421; *Thayer v. Boston*, 19 Pick. (Mass.) 511; *s. c.* 31 Am. Dec. 157; *Bigelow v. Randolph*, 14 Gray (Mass.), 541, 544; *Moore v. Fitchburg R. Co.*, 4 Gray (Mass.), 465, 467; *Oliver v. Worcester*, 102 Mass. 489, 500; *s. c.* 3 Am. Rep. 485; *Hawks v. Charlemont*, 107 Mass. 414, 418; *Haskell v. New Bedford*, 108 Mass. 208, 211; *Riddle v. Proprietors of Locks & Canals*, 7 Mass. 169; *s. c.* 5 Am. Dec. 35; *Chestnut Hill &c. Co. v. Putter*, 4 Serg. & R. (Pa.) 6; *s. c.* 8 Am. Dec. 675; *Goodloe v. Cincinnati*, 4 Ohio, 500; *s. c.* 22 Am. Dec. 764; *Scovil v. Geddings*, 7 Ohio, 211; *Rhodes v. Cleveland*, 10 Ohio, 159,

161; *s. c.* 36 Am. Dec. 82; *Crawford v. Delaware*, 7 Ohio St. 460, 463; *Western College v. Cleveland*, 12 Ohio, 375, 378; *Cincinnati v. Penny*, 21 Ohio, 499, 503; *s. c.* 8 Am. Rep. 73; *New York &c. R. Co. v. Schuyler*, 34 N. Y. 30, 49; *Alexander v. Relfe*, 74 Mo. 495, 517; *Chicago &c. R. Co. v. Dickson*, 63 Ill. 151; *s. c.* 14 Am. Rep. 114; *Northwestern &c. R. Co. v. Hack*, 66 Ill. 238; *Chicago &c. R. Co. v. Sykes*, 96 Ill. 162, with which compare *Chicago &c. R. Co. v. Casey*, 9 Ill. App. 632; *Arasmith v. Temple*, 11 Ill. App. 39; and *Illinois Cent. R. Co. v. Downey*, 18 Ill. 259. The scope of the liability and the reasons supporting it are clearly stated by Shaw, C. J., in *Thayer v. Boston*, 19 Pick. (Mass.) 511; *s. c.* 31 Am. Dec. 157, 160.

<sup>2</sup> *Post*, § 6298, *et seq.*

*respondeat superior* is not a rule of *logic*, but of *public policy*. The meaning of it is that whenever a man employs an agent or servant to act for him in a given particular, and the agent or servant, when so acting, commits an actionable wrong against a third person, the principal or master must answer in damages for that wrong, — and this wholly irrespective of the question whether he has been guilty of negligence or other fault in the employment of the agent or servant, or in instructing him with regard to his duties. As the agent or servant is generally irresponsible, unless the principal or master were held liable in damages for the wrongs committed by the agent or servant when so acting, the injured party would be remediless; and therefore, upon rough conceptions of justice, such as meet with the general approval of mankind, but which nevertheless cannot be defended on strictly logical grounds, and which must therefore be thrown into that vague category of reasons called *public policy*, — the law identifies the principal or master with the servant or agent, and holds the latter liable in damages for the wrongs of the former, or holds both of them liable as joint wrong-doers.<sup>1</sup> It is but another way of stating the doctrine under consideration to say that private corporations, in respect of their liability for the acts of their agents or servants, stand before the law on the same footing as individuals.<sup>2</sup>

<sup>1</sup> As to their joint liability, see *post*, § 6288.

<sup>2</sup> *Donaldson v. Mississippi &c. R. Co.*, 18 Iowa, 280; *s. c.* 87 Am. Dec. 391; *Rex v. Medley*, 6 Car. & P. 292; *Bath v. Caton*, 37 Mich. 199; *s. c.* 6 Reporter, 335; *Louisville &c. R. Co. v. Collins*, 2 Duv. (Ky.) 114; *s. c.* 87 Am. Dec. 486; *Pittsburgh &c. R. Co. v. Ruby*, 38 Ind. 294; *s. c.* 10 Am. Rep. 111; *St. Louis &c. R. Co. v. Dalby*, 19 Ill. 353; *Illinois &c. R. Co. v. Read*, 37 Ill. 484; *s. c.* 87 Am. Dec. 260; *Bloodgood v. Mohawk R. Co.*, 18 Wend. (N. Y.) 9; *s. c.* 31 Am. Dec. 313; *Wilson v. Rockland Man. Co.*, 2 Harr.

(Del.) 67; *Merchants' Bank v. State Bank*, 10 Wall. (U. S.) 604, 645; *Booth v. Farmers' &c. Bank*, 50 N. Y. 396, 400; *New York &c. R. Co. v. Schuyler*, 34 N. Y. 30; *Peebles v. Patapsco Guano Co.*, 77 N. C. 233; *s. c.* 24 Am. Rep. 447; *First Baptist Church v. Schenectady &c. R. Co.*, 5 Barb. (N. Y.) 79; *Little Miami R. Co. v. Stevens*, 20 Ohio, 415; *Redding v. South Carolina R. Co.*, 3 S. C. 1; *s. c.* 16 Am. Rep. 681; *Wheeler &c. Co. v. Boyce*, 36 Kan. 350; *s. c.* 59 Am. Rep. 571; *Pittsburg &c. R. Co. v. Slusser*, 19 Ohio St. 157; *Atlantic &c. R. Co. v. Dunn*, 19 Ohio St. 162; *s. c.*

§ 6277. Act must have been Done within the Scope of the Employment or Agency. — A leading and governing principle, in the application of the rule of *respondeat superior*, is that, in order to render the principal or master liable, the act of the agent or servant must have been done within the general scope of his agency or employment. In other words, the wrong-doer must have been acting for his principal or master, and not for himself or for someone else; and therefore, as we shall hereafter see,<sup>1</sup> the principal or master is not liable where the agent or servant, though in the general employment of the principal or master, *steps outside of the scope of his employment to accomplish some purpose of his own*. But where the

2 Am. Rep. 382; *Goddard v. Grand Trunk R. Co.*, 57 Me. 202; *s. c.* 2 Am. Rep. 39; *Philadelphia &c. R. Co. v. Quigley*, 21 How. (U. S.) 202, 213; *Milwaukee &c. R. Co. v. Arms*, 91 U. S. 489; *New Orleans &c. R. Co. v. Bailey*, 40 Miss. 395; *Railroad Co. v. Blocher*, 27 Md. 277; *Hopkins v. Atlantic Railroad*, 36 N. H. 9; *s. c.* 72 Am. Dec. 287; *Illinois &c. R. Co. v. Hammer*, 72 Ill. 347, 353; *Reed v. Home Sav. Bank*, 130 Mass. 443; *s. c.* 39 Am. Rep. 468; *Fenton v. Sewing Machine Co.*, 9 Phila. (Pa.) 189; *Boogher v. Life Association*, 75 Mo. 319; *s. c.* 42 Am. Rep. 413; *Wheless v. Second Nat. Bank*, 1 Baxt. (Tenn.) 469; *s. c.* 25 Am. Rep. 783; *Jordan v. Alabama Great Southern R. Co.*, 74 Ala. 85; *s. c.* 49 Am. Rep. 800; *Williams v. Planters' Ins. Co.*, 57 Miss. 759; *s. c.* 34 Am. Rep. 494; *Vance v. Erie R. Co.*, 32 N. J. L. 334; *s. c.* 90 Am. Dec. 665; *Leavenworth &c. R. Co. v. Rice*, 10 Kan. 426, 437; *Missouri &c. R. Co. v. Weaver*, 16 Kan. 456, 459; *Kansas &c. R. Co. v. Kessler*, 18 Kan. 523; *Kansas &c. R. Co. v. Little*, 19 Kan. 267, 269; *Western News Co. v. Wilmarth*, 33 Kan. 510; *Cooley on Torts*, 119; 3 *Suth. Dam.* 270, and cases cited; 2 *Wait's Act. & Def.* 447, and cases cited; *Meares v.*

*Commissioners*, 9 Ired. L. (N. C.) 73; *s. c.* 49 Am. Dec. 412; *Thayer v. Boston*, 19 Pick. (Mass.) 511; *s. c.* 31 Am. Dec. 157; *Moore v. Fitchburg R. Co.*, 4 Gray (Mass.), 465, 467; *s. c.* 64 Am. Dec. 83; *Oliver v. Worcester*, 102 Mass. 489, 500; *s. c.* 3 Am. Rep. 485; *Hawks v. Charlemont*, 107 Mass. 414, 418; *Haskell v. New Bedford*, 108 Mass. 208, 211; *Yarborough v. Bank of England*, 16 East, 6; *Smith v. Birmingham Gaslight Co.*, 1 Ad. & El. 526; *Clark v. Washington*, 12 Wheat. (U. S.) 40; *Ware v. Barataria &c. Co.*, 15 La. 169; *s. c.* 35 Am. Dec. 189, *per Morphy, J.*; *Lowell v. Boston &c. R. Corp.*, 23 Pick. (Mass.) 24; *s. c.* 34 Am. Dec. 33; *Goodspeed v. East Had-dam Bank*, 22 Conn. 530; *s. c.* 58 Am. Dec. 439; *Vinas v. Merchants' &c. Ins. Co.*, 27 La. An. 367; *Hays v. Houston &c. R. Co.*, 46 Tex. 272; *Lee v. Sandy Hill*, 40 N. Y. 442; *Maund v. Monmouthshire Canal Co.*, 2 Dowl. (N. S.) 113; *s. c.* 4 Man. & G. 452; 5 *Scott (N. R.)*, 457; 1 *Car. & M.* 606; 3 *Railw. Cas.* 159; 6 *Jur.* 932; *Lyman v. White River Bridge Co.*, 2 Aik. (Vt.) 255; *s. c.* 16 Am. Dec. 705; *Main v. North Eastern R. Co.*, 12 Rich. L. (S. C.) 82; *s. c.* 75 Am. Dec. 725.

<sup>1</sup> *Post*, § 6299.



act is done within the scope of the employment, then it is quite immaterial whether the principal or master previously authorized it or subsequently ratified it: he is liable although he may have done neither.<sup>1</sup> It is therefore immaterial that in doing the particular act the agent or servant *acted without orders or against orders*;<sup>2</sup> the principal or master is none the less liable, unless the agent or servant, in doing the act, abandoned his employment to accomplish some purpose of his own.<sup>3</sup> Nor is it at all material,—assuming that the agent or servant was acting within the general scope of his powers,—that he was acting *in fraud of his own principal*, provided the other party to the transaction was *innocent*.<sup>4</sup> Thus, where the general manager of a corporation who was authorized to collect its checks, etc., presented a check belonging to it to a bank for payment, and the bank overpaid him by mistake,—it was held that the corporation, whose agent he was, was liable to the bank for the over-payment, without regard to whether he accounted to the corporation for the amount or not.<sup>5</sup> Whether an act done by an agent or servant is within or without the general scope of his employment, is in general a *question of fact for a jury*, as stated by Chief Justice Shaw in a decision already quoted from.<sup>6</sup> But in many cases where the agents of corporations performing public duties, act habitually in the face of the public, and pursue a uniform course of action, the courts take *judicial notice* of the general scope of their agencies or employment.<sup>7</sup> It must have been upon this conception that a court held that the driver or brakeman of a horse-car acts in the line of his duty in assisting the young and infirm on and off the car; and consequently that the company was liable to a passenger who was injured while the driver was so assisting him, through the

<sup>1</sup> Indianapolis &c. R. Co. v. Anthony, 43 Ind. 183.

<sup>2</sup> Post, § 6283.

<sup>3</sup> Redding v. South Carolina R. Co., 3 S. C. 1; s. c. 16 Am. Rep. 681.

<sup>4</sup> Ante, § 4824, 4841; with which compare post, § 6331, et seq.

<sup>5</sup> Kansas Lumber Co. v. Central Bank, 34 Kan. 635.

<sup>6</sup> Ante, § 4893. So held in Redding v. South Carolina R. Co., 3 S. C. 1; s. c. 16 Am. Rep. 681.

<sup>7</sup> Ante, §§ 4741, 4877, 4882.

negligence of the driver in not stopping the car.<sup>1</sup> It must have been on the same conception that another court held that railroad companies have the right to make a complete separation between their freight and passenger business; that, where this is done, the conductor of a freight train has such general authority only as is incidental to the business of moving freight, and no power whatever as to the transportation of passengers; and that notice of this limited authority will be *implied* from the nature and apparent division of the business.<sup>2</sup> On the other hand, it may be *proved as a fact* that the corporation has made an *unusual delegation* of power to a particular agent; and this, as in other cases of agency, may be proved by the principal's *habit of acting*.<sup>3</sup> Thus, where it is proved that a railroad company permits its engineers to allow their firemen to handle the locomotives, and damages are caused by the incompetency of the firemen, when temporarily so acting, the company will be liable therefor.<sup>4</sup> In determining whether a tort, committed by the agent or servant of a corporation, was done within the scope of his employment so as to charge the corporation, it is not necessary to prove that the agent had *authority under the corporate seal*, nor is it necessary to prove an *order entered on the books* of the corporation.<sup>5</sup>

### § 6278. Not Liable for Torts of Independent Contractors.

If we keep in mind the principle that a corporation can be liable for a tort committed in two ways only,—either by its organized action through its board of directors, or by the act of its agent or servant on the principle of *respondeat superior*,<sup>6</sup> we shall be prepared for the further conclusion that a corporation, like a natural person, is not liable for the negligence or other wrongs of an *independent contractor or undertaker of work*, who employs his own servants, proceeds by his own

<sup>1</sup> Drew v. Sixth Avenue R. Co., 1 Abb. App. Dec. (N. Y.) 556.

<sup>2</sup> Eaton v. Delaware &c. R. Co., 57 N. Y. 382; s. c. 15 Am. Rep. 513.

<sup>3</sup> Thayer v. Boston, 19 Pick. (Mass.) 511; s. c. 31 Am. Dec. 157, 160, per Shaw, C. J.

<sup>4</sup> Harper v. Indianapolis &c. R. Co., 47 Mo. 567; s. c. 4 Am. Rep. 353.

<sup>5</sup> Hooe v. Alexandria, 1 Cranch (U. S.), 90; ante, § 4881, et seq.; post, §§ 6302, 6303.

<sup>6</sup> Sherman v. Rochester &c. R. Co., 15 Barb. (N. Y.) 574.

methods, and is not under the orders of the corporation as to *details and methods*, though he is under a contract with it to produce certain *results*. There is often great difficulty in applying this principle so as to determine whether the corporation or other proprietor is to be charged or exonerated; but it may be stated generally that, where the person contracting to do work for a corporation or other proprietor agrees to submit to the supervision of one of its officers or agents and to do the work to the satisfaction of such officer or agent, he becomes, as to third persons, the agent of the corporation, and it becomes responsible for injuries occurring through the negligence of those in his employ.<sup>1</sup>

§ 6279. **Liable for Ultra Vires Torts.**—A moment's reflection will show that the doctrine of *ultra vires* has no application to the question of the liability of a corporation for torts committed by its agents in the scope of their employment. Power to do wrong is never, in theory, conferred upon a corporation by the legislature; for whatever the legislature empowers a corporation to do is, for that reason, *lawful*, and hence in a legal sense *right*, provided the statute is not unconstitutional. A corporation, therefore, is not endowed by its creator with the *faculty* of committing wrong. If, therefore, a corporation could never be liable for a tort except committed *intra vires*, it could never be liable for a tort at all. It could wield its great powers, through individuals, to injure and oppress, and the only civil remedy of the injured and oppressed would be actions against its instruments or agents, in most cases insolvent. The rule which has ascribed to corporations the power of committing torts, irrespective of the question of *ultra vires*, is therefore a rule of *public policy and necessity*. Certainly it is not a rule of logic; since if the company was disabled from *authorizing* its agent to transact the particular business, or from *ratifying* it after it had been transacted, there appears to be no *logical* ground on which the relation of principal and agent, or master and servant, can be deemed to have subsisted

<sup>1</sup> Railroad Co. v. Hanning, 15 Wall. (U. S.) 649.

between them.<sup>1</sup> But, in the face of this undeniable logic, nothing is now better settled in American law than that, in order to charge a corporation aggregate, with liability for a tort committed by its agent or servant, it is not necessary to show that the act out of which the tort sprung was *intra vires*; but on the other hand, that the corporation cannot prove, by way of defense, that it was *ultra vires*, — that is to say, that it grew out of an act, transaction, or operation upon which the

<sup>1</sup> "Agents," says Sir N. Lindley, "cannot have a more extensive authority than their principals can legally confer upon them; and this principle at once limits the authority of all agents of incorporated companies. The capacity of such companies is itself limited, and they cannot be legally bound by any acts of their directors or officers in which the companies themselves are legally incompetent to engage." Lind. Comp. Law (5th ed.), 161. The same eminent writer further expresses the law of England in the following language: "Although companies are never created to do what is wrong, and can seldom be said to have in fact authorized the wrongful acts of their directors or servants, it is plain that the ordinary principles of agency apply to such cases; and on these principles, companies are liable for the negligence of their servants, and for torts committed by them in the course of their employment; and it never has been admitted, as a sufficient reason for non-liability on the part of the company, that it did not in fact authorize the very act complained of. All that is necessary to charge the company is that the act complained of should be *intra vires*, and not *ultra vires*, and should be committed by the agent or servant of the company in the course of the business to which it is his duty to

attend, or, as it is sometimes expressed, in the course and as part of his employment." *Ibid.* 208, 209; citing *Poulton v. London & C. R. Co.*, L. R. 2 Q. B. 534. Dr. Brice, in the first edition of his work on *Ultra Vires*, was able to cite but three cases, and these, it seems to us, do not touch the question directly. *Harman v. Tappenden*, 1 East, 555; *Maund v. Monmouthshire & C. Canal Co.*, 2 Dowl. (N. S.) 113; *Mill v. Hawker*, L. R. 9 Ex. 309; and L. R. 10 Ex. 92. The entire ground upon which the responsibility of corporations, both civil and criminal, for the torts of their agents, rests, was thus stated by Mr. Binney in his argument, in *Chestnut Hill Turnp. Co. v. Rutter*, 4 Serg. & R. (Pa.) 6, 12; s. c. 8 Am. Dec. 675. "According to the doctrine contended for, if they do an act within the scope of their powers it is legal, and they are not answerable for the consequences. If the act be not within the range of their legitimate powers, they had no right by law to do it: it was not one of the objects for which they were incorporated, and therefore it is no act of the corporation at all. This doctrine leads to absolute impunity for every species of wrong, and can never be sanctioned by any court of justice." Quoted with approval in the opinion of the court in *State v. Morris & C. R. Co.*, 23 N. J. L. 360, 369.

corporation had no power, under its charter or governing statute, to enter.<sup>1</sup>

§ 6280. **Further of This Doctrine.**—Indeed, the whole argument comes to an end, when it is considered that *every corporate tort is*, in a strict sense and from its very nature, *ultra vires*; since the legislature can never be presumed to have clothed a corporation with authority to do wrong; and, on the other hand,

<sup>1</sup> National Bank v. Graham, 100 U. S. 699; Hussey v. Norfolk &c. R. Co., 98 N. C. 34; s. c. 2 Am. St. Rep. 312; Gruber v. Washington &c. R. Co., 92 N. C. 1; Philadelphia &c. R. Co. v. Quigley, 21 How. (U. S.) 202; State v. Morris &c. R. Co., 23 N. J. L. 360, 369; Alexander v. Relfe, 74 Mo. 495, 517; South &c. R. Co. v. Chappell, 61 Ala. 527. "Corporations are liable for every wrong of which they are guilty, and in such cases the doctrine of *ultra vires* has no application. Corporations are liable for the acts of their servants while engaged in the business of their employment, in the same manner and to the same extent that individuals are liable under like circumstances." Merchants' Bank v. State Bank, 10 Wall. (U. S.) 604. An action may be maintained against a corporation for its malicious or negligent torts, however foreign they may be to the object of its creation or beyond its granted powers. It may be sued for assault and battery, for fraud and deceit, for false imprisonment, for malicious prosecution, for nuisance, and for libel. In certain cases it may be indicted for misfeasance or non-feasance touching duties imposed upon it in which the public are interested. Its offenses may be such as will forfeit its existence. National Bank v. Graham, 100 U. S. 699, 702, opinion of the court by Mr. Justice Swayne. In an earlier and leading case on this subject, it was said:

"If a corporation has itself no hands with which to strike, it may employ the hands of others; and it is now perfectly well settled, contrary to the ancient authorities, that a corporation is liable *civiliter* for all torts committed by its servants or agents by authority of the corporation, express or implied. . . . The result of the modern cases is, that a corporation is liable *civiliter* for torts committed by its servants or agents, precisely as a natural person; and that it is liable as a natural person for the acts of its agents done by its authority, express or implied, though there be neither a written appointment under seal, nor a vote of the corporation constituting the agency or authorizing the act." State v. Morris &c. R. Co., 23 N. J. L. 360, 367, 368, *per* Green, C. J.; quoted with approval in Denver &c. R. Co. v. Harris, 122 U. S. 597, 608, *per* Harlan, J. In another leading case it was said: "A corporation is liable to the same extent and under the same circumstances as a natural person for the consequences of its wrongful acts, and will be held to respond in a civil action at the suit of an injured party, for every grade and description of forcible, malicious, or negligent tort or wrong which it commits, however foreign to its nature, or beyond its granted powers the wrongful transaction may be. . . . No court would hear the corporation assert that its wrongful act was beyond its chartered

whenever the legislature does, by a valid statute, clothe a corporation with power to do an act, it is, for that reason, not wrong.<sup>1</sup> Besides, it is wrong for any corporation to exceed its granted powers. Every *ultra vires* act is therefore wrong, and wrong because it is *ultra vires*. To concede that a corporation cannot be made liable to pay damages for *ultra vires* wrongs, is to concede, in the most pointed manner, that a corporation can take advantage of its own wrong. Besides, if the doctrine that a private corporation cannot be made liable for an *ultra vires* wrong were once conceded, it would come to this, that the most flagrant wrongs might be authorized by the whole body of shareholders in general meeting, every share of the stock voting for it, and yet the corporation as such would not be liable for the damages; the person injured would be obliged to pursue his remedy against each separate corporator wherever he could find him. It is apprehended that such a doctrine would present too many obstacles to the attainment of practical justice ever to become the settled law.

§ 6281. **Illustrations of the Doctrine.** — If then, a corporation, in a clear and explicit manner, recognizes an act as done in its business, as by employing agents to superintend certain work, or by receiving the profits from it, it will be no defense to an action for a

powers, and therefore ineffective to charge it with the injurious consequences of the fraud." New York &c. R. Co. v. Schuyler, 34 N. Y. 30, 49; quoted with approval in Alexander v. Relfe, 74 Mo. 495, 517. The case of New York &c. R. Co. v. Schuyler, *supra*, to which frequent reference has been made in former titles of this work (*ante*, §§ 1500, 1501), must be accepted as overruling, on most points at least, a former case growing out of the same frauds, known in New York as "the Schuyler frauds": Mechanics' Bank v. New York &c. Co., 13 N. Y. 599. In this last case Comstock, J., wrote a long and powerful opinion, the purpose of which was to show that a railroad company was not liable for the

frauds committed by its president, whom it had appointed its agent to issue and transfer its shares, to innocent third persons damaged by fraudulent *over-issues of shares* made by him for his own gain. If the reader cares to pursue that part of his argument which was directed to the proposition that a corporation cannot, in the nature of things, be held liable for torts because they are *ultra vires*, he will find it in 13 N. Y. at page 639, *et seq.* As the case is overruled on the particular point, and as the doctrine is now so decisively settled the other way, the author will not consume space in quoting it.

<sup>1</sup> Northern Transp. Co. v. Chicago, 99 U. S. 635; *s. c.* 11 Chic. L. N. 255; 19 Alb. L. J. 298; 2 Thomp. Neg. 692.

negligent injury done by one of its servants in the prosecution of the work, that the work itself was *ultra vires*.<sup>1</sup> Further to illustrate this doctrine, let us suppose that a corporation, chartered only as a *railroad* and banking company, has no authority to run a steamboat. Nevertheless, if it undertakes to *run a steamboat*, it is liable to a passenger negligently injured by its servants while so operating it.<sup>2</sup> So, when damage is done to real estate held by a corporation, the party, by whose negligence such injury was caused, cannot escape responsibility by showing that the corporation was not permitted by its charter to acquire title to the property, or that it acquired it for purposes unauthorized by law.<sup>3</sup> So, if a corporation *converts the property* of a third person to its own use, it will be no defense, when sued for the conversion, that it was carrying on a business outside of its charter powers, in which business it committed the wrong. It cannot keep the plaintiff's property and plead its want of power to get it and keep it.<sup>4</sup> If, for instance, a *national bank* loans money upon a *pledge of a warehouse receipt*, under such circumstances that the bank, if an individual, would become liable to a person having grain stored in the warehouse for a conversion of his grain, it will not lie in the mouth of the bank to set up that its charter only authorizes it to do a banking business, and does not authorize it to engage in or carry on the business of a warehouseman, and that the receipt, storage, and handling of grain is *ultra vires*, — wherefore it cannot be held liable. It cannot keep the plaintiff's grain, and plead its inability to convert it. "Suppose," said Walker, C. J., "a person to make a special deposit in a bank of a sum of money, and the envelope should be broken, the money taken, and placed with the funds of the bank, and its profit account credited by the amount, and it should be paid out in the course of its business, — could the bank, when sued, escape liability by saying that the bank is not authorized to receive special deposits for safe-keeping only, and the act was *ultra vires*? We presume no one would contend for such a defense."<sup>5</sup>

<sup>1</sup> *Hutchinson v. Western &c. R. Co.*, 6 Heisk. (Tenn.) 634.

<sup>2</sup> *Central R. &c. Co. v. Smith*, 76 Ala. 572; s. c. 52 Am. Rep. 353.

<sup>3</sup> *Farmers' Loan & Trust Co. v. Green Bay &c. R. Co.*, 11 Biss. (U. S.) 334.

<sup>4</sup> *German Nat. Bank v. Meadow-*

*croft*, 95 Ill. 124; s. c. 35 Am. Rep. 137; 2 Nat. Bank. Cas. 462. See also *Rich v. State Nat. Bank*, 7 Neb. 201; s. c. 29 Am. Rep. 382; 2 Nat. Bank. Cas. 284.

<sup>5</sup> *German Nat. Bank v. Meadowcroft*, 95 Ill. 124; s. c. 35 Am. Rep. 137; 2 Nat. Bank. Cas. 462.

§ 6282. **Liable for Torts Ultra Vires in the Sense of being Gratuitous.** — Obviously, the mere fact that the act was *ultra vires* in the sense of being *gratuitous*, — something which, though not prohibited, was *more than* the corporation was required by its charter or governing statute to do, — will not relieve the corporation from liability to pay damages for any wrong committed in the doing of it. If, therefore, in building a bridge, turnpike, or other public work, the corporation voluntarily assume to do more than required by its charter, it will be answerable for any damages happening through the negligent doing of it. Thus, where a turnpike company was required by its charter to construct its road *thirty* feet wide, but constructed it *wider*, it was held liable for an injury sustained in consequence of an obstruction within the road *as made*, but outside the road if its width had been limited to the width designated by the statute.<sup>1</sup> So, a turnpike company, crossing a public bridge, became liable for an injury happening in consequence of a non-repair of one of the sidewalks of the bridge, by reason of having once or twice repaired such sidewalk.<sup>2</sup> So, if a railway company obtains permission from the public authorities to build a bridge, in order to pass over its tracks a highway which for many years has passed them on a level, it is bound to keep such bridge and its approaches in repair, and is responsible for any damages which may happen in consequence of non-repair.<sup>3</sup> The English books, however, disclose cases where persons, not obliged to do so, have constructed bridges for the public use, and the public has, in effect, accepted them, and the public, and not the builder, has been held bound to repair, — as, where the inhabitants of a town, with the aid of a donation from the funds of a county, built a bridge for carriages, to replace a foot-bridge;<sup>4</sup> or where a miller, whose dam had deepened the

<sup>1</sup> Franklin Turnp. Co. v. Crockett, 2 Sneed (Tenn.), 263.

<sup>2</sup> Wayne County Turnp. Co. v. Berry, 5 Ind. 286.

<sup>3</sup> Hayes v. New York & C. R. Co., 9 Hun (N. Y.), 63.

<sup>4</sup> Rex v. West Riding of Yorkshire, 5 Burr. 2594. See the remarks of Nelson, J., in Heacock v. Sherman, 14 Wend. (N. Y.) 58, 60.



waters of a ford, built a bridge over it.<sup>1</sup> But, where a statute authorized a navigation company to destroy fords, or alter such bridges or highways as hindered navigation, and they deepened a river and thus destroyed a ford, and erected a bridge over it, they, and not the county, were held bound to repair, for this was a condition precedent to their right to destroy the ford.<sup>2</sup>

§ 6283. No Defense that the Tort was Ultra Vires the Agent. — Upon like grounds, it is no defense whatever, on the part of the corporation, to an action seeking to charge it with damages for a tort, that the act complained of was beyond the powers conferred on the agent who committed it, unless in the sense already stated,<sup>3</sup> — that is to say, unless the agent, when he did the act, was acting outside of his known or apparent authority, to accomplish some purpose of his own, or of someone other than the corporation. Such a defense would, if admitted, substantially destroy the liability of corporations for torts; since it could seldom be shown that authority had been conferred by the corporation upon the agent to commit the particular wrong. Where the principal is a natural person, it is no defense whatever to an action for a tort, committed by his agent or servant, that the latter *exceeded his orders*,<sup>4</sup> or that he *acted without or against orders*,<sup>5</sup>

<sup>1</sup> *Rex v. Kent*, 2 Maule & Sel. 513. *Contra*, *Mulholland v. Brownrigg*, 2 Hawks, 349, where it was held that the mill-owner, in such a case, was liable in damages for an injury by a non-repair, and the question was left to the jury whether the mill or the road was the more ancient. See *Rex v. Oxfordshire*, 4 Barn. & C. 194.

<sup>2</sup> *Rex v. Kent*, 13 East, 220. To the same effect is *Rex v. Lindsey*, 14 East, 317; *Rex v. Kerrison*, 3 Maule & Sel. 526; *Regina v. Ely*, 15 Ad. & El. (N. S.) 827.

<sup>3</sup> *Ante*, § 6277.

<sup>4</sup> *Leviness v. Post*, 6 Daly (N. Y.), 321; *Page v. Defries*, 7 Best & S. 137; overruling *Lamb v. Falk*, 9 Car. & P. 629.

<sup>5</sup> *Garretzen v. Duenckel*, 50 Mo. 104; s. c. 11 Am. Rep. 405; *Limpus v. London & C. Omnibus Co.*, 1 Hurlst. & C. 526; s. c. 32 L. J. (Ex.) 34; *Oliver v. North. Pac. Transp. Co.*, 3 Or. 84; *Southwick v. Estes*, 7 Cush. (Mass.) 385; *Toledo & C. R. Co. v. Harmon*, 47 Ill. 298; s. c. 95 Am. Dec. 489; *Philadelphia & C. R. Co. v. Derby*, 14 How. (U. S.) 468; *Duggins v. Watson*, 15 Ark. 118; s. c. 60 Am. Dec. 560; *Higgins v. Watervliet & C. R. Co.*, 46 N. Y. 23; s. c. 7 Am. Rep. 293; *Powell v. Deveney*, 3 Cush. (Mass.) 300, 304; s. c. 50 Am. Dec. 738; *Paulmier v. Erie R. Co.*, 34 N. J. L. 151. See *Haack v. Fearing*, 5 Robt. (N. Y.) 528; s. c. 35 How. Pr. (N. Y.) 459; *Whatman v. Pearson*, L. R. 3

and, as will be seen by the cases just cited, it is applied indifferently whether the principal or master is a natural person or a corporation.

**§ 6284. Liability of Private Corporations for a Nuisance.**

The liability of private corporations for public and private nuisances rests upon the same ground as that of individuals, but with this difference: Corporations frequently attempt to justify on the ground that the doing of the act which is charged to be a nuisance is *authorized by their charter or governing statute*,—in which case there are two theories: 1. The theory of the ancient common law that whatever the legislature (in America within the limits of its constitutional power) authorizes a corporation to do, is for that reason lawful, and, being lawful, cannot be regarded as a nuisance, public or private, and is hence neither indictable nor actionable.<sup>1</sup> 2. The other is, that a general legislative authorization to a corporation, to do a given act for its own emolument, although incidentally for the public benefit, is never construed as a license to do the act without paying damages to individuals, if individuals are damnified by the doing of it; and that, while the grant of power to do the act will *estop the State* from prosecuting an indictment against the corporation for a public nuisance consisting of the doing of the act, there is always an implication or reservation, founded on the principles of justice, that, in case a private individual is damnified by the doing of the act, the corporation will make compensation.<sup>2</sup> Between the limits of these two doctrines a wide field is left open for speculation and casuistry, and cases are not wanting where the same court, without any wide interval of time, has

C. P. 422; *Reg. v. Stephens*, L. R. 1 Q. B. 701; *Rex v. Medley*, 6 Car. & P. 292; *Betts v. De Vitre*, L. R. 3 Ch. 429, 441.

<sup>1</sup> *Northern Transp. Co. v. Chicago*, 99 U. S. 635.

<sup>2</sup> *Trenton Water Power Co. v. Raff*,

36 N. J. L. 335; *McAndrews v. Collier*, 42 N. J. L. 189; *s. c.* 36 Am. Rep. 508; *Tinsman v. Belvidere & c. R. Co.*, 26 N. J. L. 148; *s. c.* 69 Am. Dec. 565; *Baltimore & c. R. Co. v. Fifth Baptist Church*, 108 U. S. 317.

come to widely opposite conclusions, while professing to adhere to a uniform principle.<sup>1</sup>

**§ 6285. Corporations not Included in General Statutes Giving Penalties.**—There is some authority justifying the conclusion that corporations aggregate are not included in general statutes forbidding the doing of particular acts under penal sanctions, except where they are included in express language. This conclusion may be regarded as a deduction from the rule of statutory interpretation that statutes giving penalties are strictly construed; but it must, in every case, yield to an inquiry as to what the legislature properly intended, as disclosed in the language of the particular statute, when construed in comparison with other statutes, *in pari materia*. Where the statute imposed a penalty upon "the owner, agent, or superintendent of any manufacturing establishment," for employing any child under twelve years of age, and gave a private action for the penalty, it was held that the action thus given could not be maintained against the

<sup>1</sup> Examine, for instance, the case of *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316; s. c. 56 Am. Rep. 1, where a decision of a vice-chancellor of New Jersey was affirmed by the Court of Appeals of that State (though in form reversed) enjoining a railroad company from the use of certain side-tracks for switching purposes, at the suit of the owner of an adjacent dwelling-house, who was annoyed thereby,—the final decision restraining the company from the use of such tracks except "in extraordinary emergencies," and where the use would be "unavoidable"; and observe that the vice-chancellor (page 325) declared that a railroad company, in respect of private nuisances, stood on a footing no better than "the butcher, soapboiler, or tallow chandler." And compare this case with the subsequent decision of the Su-

preme Court of New Jersey, in *Beseman v. Pennsylvania R. Co.*, 50 N. J. L. 235, where, in an action for damages, the court came to a conclusion irreconcilably opposite, and attempted to distinguish the former case by the assertion of what was not a fact that the acts done by the railroad company, which the court enjoined, were "obviously *ultra vires*." There was no suggestion, in the statement of the facts of the former case, that the railroad company had laid its side-tracks on the street in question without authority. On the contrary, it attempted to justify under its chartered authority, and the authority was not disputed. If, therefore, its acts were *ultra vires*, they were *ultra vires* because they reached the grade of a private nuisance, and for no other reason,—which is begging the whole question.

manufacturing corporation,—the court saying: “The provisions of acts imposing penalties are not to be extended, by construction, beyond their obvious meaning and intent, as manifest upon the face of the statute. Corporations are not in terms included in the statute on which this action is brought.”<sup>1</sup> So, where the special act of the corporation provided that “if any person or persons shall willfully, maliciously, or contrary to law, take, remove, break down, dig under, or otherwise injure any part of said canal or canals,” etc., “such persons shall forfeit and pay to such corporation a sum not less than fifty dollars nor more than five thousand dollars,” etc.,—it was held that the canal company, for whose protection this statute had been enacted, could not maintain an action thereon, for the penalty, against a *municipal corporation*.<sup>2</sup> So, where a statute gave a penalty and a *qui tam* action therefor against “any person” who should take, carry away, etc., any *saw logs* without the consent of the owner, and another section of the same statute declared that the fraudulent and willful doing of the act should be *larceny*,—it was held that the act did not apply to corporations; for, although the word “person” may, for some purposes, be held to include corporations aggregate, yet such a corporation is incapable of the criminal intent denounced by the second section of the statute; and besides such statutes are not to be enlarged by construction.<sup>3</sup> The soundness of these decisions may well be doubted. The rule that laws are to be construed with such strictness as to restrain the real purpose of the legislature where they are *penal*, is believed to have no just principle on which to rest.<sup>4</sup> There is no reason why a corporation should be included in the word “person” for the purpose of jurisdiction, and be excluded from it for the purpose of being exempted from liability to penal actions for the commission of wrongs for which the statute law makes individuals so liable. On the contrary such an interpretation gives to an aggregated

<sup>1</sup> *Benson v. Monson &c. R. Co.*, 9 Met. (Mass.) 562.

<sup>2</sup> *Cumberland &c. Canal Corp. v. Portland*, 56 Me. 77.

<sup>3</sup> *Androscoggin Water-Power Co. v. Bethel Steam Mill Co.*, 64 Me. 441.

<sup>4</sup> *Ante*, § 4164.

body of wrong-doers an immunity from punishment which individuals do not enjoy. The sound rule is, that corporations are to be considered as "persons," when the circumstances in which they are placed are identical with those of a natural person expressly included in a statute, and where the statute can be as aptly applied to them as to corporations.<sup>1</sup> All these cases hold that, where the law-making power uses the word "person," it is to be assumed that the *legal*, and not the *social* or *ordinary*, meaning is intended. It has been accordingly held that a corporation, organized for the mutual benefit of its members, which *sells intoxicating liquors* contrary to the provisions of the statute, is liable in a civil action for the *penalty* thereby denounced, in like manner as a natural person.<sup>2</sup>

§ 6286. **Statutory Liability, when Cumulative.**—It is a general rule of statutory construction that, where a statute creates a duty, and prescribes the remedy for the non-performance of it, the *statutory remedy is exclusive*: a common-law remedy cannot, in such cases, be resorted to for the non-performance of a statutory duty. But where a statute enjoins the performance of a duty which was a duty at common law, or merely prescribes a remedy for the breach of a duty which was a duty at common law, the statutory remedy is *cumulative merely*, and the common-law remedy may still be resorted to at the election of the injured party. This principle applies in the case of *penalties* imposed upon corporations for the non-performance of a duty. Thus, if a statute, enjoining upon a railway company the duty of fencing its track, gives *double damages* to a person whose cattle are killed or injured by the non-performance of this duty, a corporation neglecting this duty will be liable in a common-law action to a party thus injured.<sup>3</sup>

<sup>1</sup> *Wales v. Muscatine*, 4 Iowa, 302, 308; *Stewart v. Waterloo Turn Verein*, 71 Iowa, 226; *s. c.* 60 Am. Rep. 786; *South Carolina R. Co. v. McDonald*, 5 Ga. 531.

<sup>2</sup> *Stewart v. Waterloo Turn Verein*, *supra*.

<sup>3</sup> *Iba v. Hannibal &c. R. Co.*, 45 Mo. 469, 474; *Norris v. Androscoggin R. Co.*, 39 Me. 273; *s. c.* 63

## § 6287. Corporations may Become Liable by Ratification.

It is a principle constantly applied with reference to *contracts* of corporations, that where a contract is procured to be entered into with a corporation through the *fraud* of its officer or agent, under circumstances which entitle the corporation to *disclaim* it, — yet if, after knowledge of the means by which it has been procured, the corporation concludes to keep the fruits of it, it will become liable to perform its conditions, on the principle of ratification.<sup>1</sup> This has been held even in respect of a *municipal corporation*,<sup>2</sup> and, for stronger reasons, the same doctrine would apply to a private corporation.<sup>3</sup> But this doctrine has not met with universal assent. Although it is sometimes said, when speaking of the liability incurred by a corporation for the tort of its agent or servant on the theory of ratification or adoption, that *slight acts of ratification* will be sufficient to charge the corporation,<sup>4</sup> — yet the better opinion is, that there must be some *affirmative act*, and that a mere omission to act will not have this effect, especially where to act might prejudice the rights of a party. Accordingly, it has been held that the mere failure of the corporation to *discharge the servant* committing the wrong will not have this effect.<sup>5</sup> Nor will the mere fact that a proprietor

Am. Dec. 621; *Calvert v. Hannibal &c. R. Co.*, 34 Mo. 242; *s. c.* 38 Mo. 467.

<sup>1</sup> *Ante*, § 5303; *post*, § 6323. We shall also see that some of the courts deny the liability of a corporation aggregate to pay *exemplary damages* for the torts of its agents or servants, except in the case of a previous authorization or subsequent ratification. *Post*, §§ 6387, 6389. There is, however, a view that while, by ratifying the act of his agent, a principal may expose himself to liability for *actual damages*, yet he does not thereby expose himself to vindictive damages, growing out of the malice of the agent, unless he caused the act to be done, or participated in the evil motive. So held

where an *attachment* had been sued out without authority in the name of another, and he had not repudiated the act. *Pollock v. Gantt*, 69 Ala. 373; *s. c.* 44 Am. Rep. 519.

<sup>2</sup> *Thayer v. Boston*, 19 Pick. (Mass.) 511; *s. c.* 31 Am. Dec. 157; *Ross v. Madison*, 1 Ind. 281; *M'Gary v. Lafayette*, 12 Rob. (La.) 668, 674. Compare *McGary v. Lafayette*, 4 La. An. 440.

<sup>3</sup> *Mitchell v. Rockland*, 52 Me. 118, 125; *Malecek v. Tower Grove &c. R. Co.*, 57 Mo. 17.

<sup>4</sup> *Perkins v. Missouri &c. R. Co.*, 55 Mo. 201.

<sup>5</sup> *Edelmann v. St. Louis Transfer Co.*, 3 Mo. App. 503.

accepts from a contractor a job of work and pays for it, knowing that the contractor, in performing the job, has inflicted an accidental or negligent injury upon a third person, make him liable to such third person on the ground of a ratification.<sup>1</sup> But it seems that the fact that the corporation, after knowledge of the tortious act of its servant has been brought home to its managing officer, elects to retain the servant in its employment, may, in connection with other circumstances, be regarded as *evidence* of an adoption or ratification of his wrongful act; and it seems that the *declarations* of such managing officer, expressing approval of the act of the servant, are admissible in evidence, to prove that the corporation adopted the act of the servant; and that, in such a case, the acts and declarations of the managing officer are to be regarded as those of the corporation.<sup>2</sup>

**§ 6288. When Corporation may be Sued Jointly with Agent.** — On well-understood grounds, all who join in furthering a wrongful act, injurious to another, are regarded in the law as *principals*, and are liable to be sued jointly as such. Upon this ground and contrary to an early misconception,<sup>3</sup> it is now settled that a corporation may be joined as a defendant with its agent in an action to recover damages for a tortious act, committed by the agent in the general line of his previously conferred *authority*, or where there has been a subsequent *ratification*, by the corporation, of his wrongful act, — as, for instance, where the wrong consists of the *negligence* of the servant,<sup>4</sup> or of an *assault and battery* committed by

<sup>1</sup> Coomes v. Houghton, 102 Mass. 211.

<sup>2</sup> Malecek v. Tower Grove &c. R. Co., 57 Mo. 17, 21.

<sup>3</sup> Orr v. Bank of United States, 1 Ohio, 36; s. c. 13 Am. Dec. 588 (Anno 1821).

<sup>4</sup> Wright v. Compton, 53 Ind. 337, 339; Holmes v. Wakefield, 12 Allen (Mass.), 580; s. c. 90 Am. Dec. 171. This is no more than an extension of

the well-understood principle which allows a principal and his agent, or a master and his servant, to be joined as defendants, in actions for wrongs committed by the agent or servant. 2 Thomp. Neg. (1st ed.), p. 890, § 11; Hewett v. Swift, 3 Allen (Mass.), 420; s. c. 10 Am. Law Reg. 505; Whitamore v. Waterhouse, 4 Car. & P. 383, per Parke, J. Compare Moreton v. Hardern, 6 Dowl. & Ry. 275; s. c. 4 Barn.

him,<sup>1</sup> or where he has, when acting for the corporation, become liable for the *malicious prosecution* of a criminal action.<sup>2</sup> Upon this principle, it has been held that a railroad corporation, by whose direction a *contractor* enters and builds its road, upon lands which it has acquired subject to an existing lease, is liable, as a joint tort-feasor with him and his servants, for the damages done to the crops of the lessee.<sup>3</sup>

§ 6289. **Circumstances under Which They cannot be Joined.**—It is not to be assumed from the foregoing that, in all cases where a corporation may be liable to a third person for the negligences or other wrong of its agent or servant, the person injured can have a *joint action* against the corporation and the agent or servant. The rule which makes them both liable is predicated only of that class of torts which consists of some *affirmative wrong action*, involving the commission of a *trespass*, either upon the person or property of another, which cases generally pass under the name of *malfeasance*. The rule does not extend to cases of the mere *omission*, on the part of the agent or servant, to perform duties which he owes to his principal, the corporation, although the corporation may have assumed the performances of those duties toward the third person. In other words, it does not extend to the class of omissions on the part of the agent or servant, which pass under the name of *non-feasance*. The distinction is that, for acts of malfeasance, the agent or servant may be made jointly liable with the principal, while in the case of non-feasance, the principal alone is liable to the third person for failing to perform the duty undertaken in his behalf; and the agent or servant, not being in privity

& C. 223. The case of *Losee v. Buchanan*, 61 Barb. (N. Y.) 86, which holds the doctrine of the text, was reversed on appeal on other points. 51 N. Y. 476; *s. c.* 10 Am. Rep. 623; affirming *s. c.* 42 How. Pr. (N. Y.) 385.

<sup>1</sup> *Moore v. Fitchburg R. Corp.*, 4 Gray (Mass.), 465; *s. c.* 64 Am. Dec. 83;

*Hewett v. Swift*, 3 Allen (Mass.), 420, *St. Louis & C. R. Co. v. Dalby*, 19 Ill 353, 374; *Brokaw v. New Jersey & C. R. Co.*, 32 N. J. L. 328; *s. c.* 90 Am. Dec. 659.

<sup>2</sup> *Hussey v. Norfolk & C. R. Co.*, 98 N. C. 34; *s. c.* 2 Am. St. Rep. 312.

<sup>3</sup> *Ullman v. Hannibal & C. R. Co.*, 67 Mo. 118.



with the third person,—not having assumed any duty toward him,—is liable to his principal or master only. To illustrate: If, as seen in the preceding section, the conductor of a railway passenger-train commits an unjustifiable assault and battery upon a passenger, the latter may have a joint action against the conductor and the railroad company whose servant he is; but if, through the negligence of a conductor in directing the train, the passenger fails to arrive at his destination within a reasonable time, he will have no action against the conductor, although he will have one against the company. On this principle, where a public corporation was authorized to improve a stream, which was a public highway, and was required to give *bond* for the payment of any damages sustained by property-owners along the stream, it was held that no action would lie against the servants of the corporation for an act, not being willful or malicious, which the corporation did under the authority of its statute; but this was rather on the ground that the governing statute had prescribed a mode of indemnity, by requiring the corporation to give a bond to indemnify property-owners, and that the remedy was a common-law action on the bond.<sup>1</sup> Similarly, in a statutory action for tort, with a prayer for relief in equity, against a corporation and A., for injuries to the plaintiff's land, where it appeared that A. was the general agent of the corporation, and that the acts complained of were done by his subordinates, and inured to the benefit of the corporation and not of himself, it was held that the bill should be dismissed as against A., but without costs.<sup>2</sup>

**§ 6290. Rule where the Common-law System of Pleading Prevails.** — Where the common-law system of pleading prevails, the doctrine of this and the preceding section is further complicated by the question of making the principal and agent jointly liable in such a case as that of the assault upon a passenger by a railway conductor, — the conductor

<sup>1</sup> Woodward v. Webb, 65 Pa. St. 254.

<sup>2</sup> Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 80.

being liable for a *direct* injury and the action against him being *trespass*, while the corporation is liable *indirectly*, and in consequence of the violation by its agent of the duty which it has assumed of carrying the passenger safely, so that the action against it will be *case*. This principle may prevent the joining of the corporation and its servant in a common-law action, where the manner of committing the tortious act has been *direct* on the part of the servant and *indirect* on the part of the corporation;<sup>1</sup> but the question does not seem to be clear on authority, even at common law. In an old case<sup>2</sup> a master sent his servant out to train two ungovernable horses, and, the servant being unable to govern them, they ran down and injured the plaintiff; and an action on the *case* was sustained against both the master and the servant, the wrong imputed to the master being the sending of such horses to be trained in such a place. In another case, on the contrary, a joint action on the *case* was brought against a father and his son, for the *willful* act of the son in driving the father's wagon over a boy and injuring him; and the court presented no reason why the action would not lie against both jointly, though it was held that the father was not liable because the act of the son was willful.<sup>3</sup> Another court has held that a master and servant are not jointly liable, in an action on the *case*, for an injury occasioned by the negligence of the servant, while driving the horse and carriage of the master in his absence.<sup>4</sup>

**§ 6291. Action for Non-performance of Public Duties on Sunday.**—It may be stated in general terms that, if the

<sup>1</sup> See, for illustration of the principle, *Parsons v. Winchell*, 5 Cush. (Mass.) 592. Another reason for this conclusion is, that in these cases, where the wrong proceeds directly from the servant, and not directly from the master, the latter, being compelled to pay damages, should have an action over against the former; but he would not, at common-

law, be entitled to such an action, where the judgment went against both as *joint tort-feasors*. *Ibid*.

<sup>2</sup> *Michael v. Alestree*, 2 Lev. 173; *s. c. sub. nom. Mitchil v. Alestree*, 1 Vent. 295; *Mitchell v. Alestry*, 3 Keb. 650.

<sup>3</sup> *Wright v. Wilcox*, 19 Wend. (N. Y.) 343; *s. c.* 32 Am. Dec. 507.

<sup>4</sup> *Parsons v. Winchell*, 5 Cush. (Mass.) 592; *s. c.* 52 Am. Dec. 745.

statute law prohibits the doing of work and labor on Sunday, an action cannot be maintained against a corporation such as a railroad company or a telegraph company, for the failure to perform its ordinary public duties on that day. Thus, an action cannot be maintained against a common carrier for a breach of its *public duty* in failing to carry passengers on Sunday.<sup>1</sup> So, in a State where contracts made on Sunday are void by force of statute, an action cannot be maintained against a *telegraph* company to recover a statutory penalty for failure to transmit or deliver a message which is placed in the hands of the company on Sunday, a contract for the transmission of which is made on that day,—the dispatch not relating to a *work of necessity*.<sup>2</sup> So, in Missouri the penalties given by a statute against a telegraph company, for failing to inform one who sends a dispatch for transmission, when required by him, that the line is not in working order, or that dispatches already on hand for transmission will occupy the time, or for intentionally giving false information to him in relation to the time within which the dispatch may be sent,<sup>3</sup>—are not recoverable, where the company has neglected or refused to transmit an ordinary business dispatch on Sunday,—there being a general statute of the State<sup>4</sup> prohibiting work and labor on Sunday, except works of necessity and charity.<sup>5</sup> To this rule of non-liability an *exception* exists in respect of telegraph companies where the message relates to a “*work of necessity*”; and as these companies usually keep their offices open on Sunday, the least that can be assumed in their favor is that they do it in order to hold themselves ready to discharge the public duty of forwarding messages which relate to works of *necessity*, or, in some States, to works of *necessity* or *charity*. If the telegraph company keeps its office open on Sunday, and refuses a message relating to such a work, and its agent receiving the message is clearly apprised of its char-

<sup>1</sup> Walsh v. Chicago &c. R. Co., 42 Wis. 23; s. c. 24 Am. Rep. 376.

<sup>2</sup> Rogers v. Western Union Tel. Co., 78 Ind. 169; s. c. 41 Am. Rep. 558.

<sup>3</sup> Rev. Stat. Mo. 1872, § 885.

<sup>4</sup> *Ibid.*, § 1578.

<sup>5</sup> Thompson v. Western Union Tel. Co., 32 Mo. App. 191.

acter, either by the terms of the message or by extrinsic information, it will be liable for not sending it.<sup>1</sup> Whether a *contract* is within the statutory exception, that is, whether it relates to a work of necessity or charity, must, it seems, be determined as a question of fact, upon the circumstances of each particular case.<sup>2</sup> A message which, on its face, relates to mere secular business, such as one which reads,—"Bring forty if you want record,"—does not, without a showing of extrinsic facts tending to vary its apparent import, show that it relates to a work of necessity.<sup>3</sup> So, under a statute giving a penalty for failing to transmit and deliver messages, it has been held that the penalty cannot be recovered for the failure of the company to transmit and deliver a message notifying the person addressed to pay a visit to the sender, in the following language: "Come up in the morning—bring all,"—such a visit not being a work of necessity, within the meaning of the statute.<sup>4</sup> In another case it was held that "*ordinary business*" is not a work of *necessity*.<sup>5</sup> But it seems clear that this may or may not be so, according to circumstances. Where the statute relating to work on Sunday creates an exception in favor of works of *charity*, it has been held that a telegraphic dispatch sent by a husband to his wife, intended to allay her anxiety as to his protracted absence, was a work of charity, and that the company would be liable for not sending it.<sup>6</sup> In this case the court reasoned that there may be a *social*, as well as a *material* or *physical*, *necessity*, which will justify the sending of such a message on Sunday, and make the telegraph company, which receives it and agrees

<sup>1</sup> *Rogers v. Western Union Tel. Co.*, 78 Ind. 169; *s. c.* 41 Am. Rep. 558.

<sup>2</sup> *Ibid.*, opinion of Elliott, C. J.

<sup>3</sup> *Western Union Tel. Co. v. Yopst*, 118 Ind. 248; *s. c.* 20 N. E. Rep. 222; 21 Am. & Eng. Corp. Cas. 88; 25 Am. & Eng. Corp. Cas. 514; 3 L. R. A. 224. In this case it is held, under a particular state of facts, that the procuring of the *stenographer's transcript* for a bill of *exceptions* was not a work of necessity.

<sup>4</sup> *Rogers v. Western Union Tel. Co.*, 78 Ind. 169; *s. c.* 41 Am. Rep. 558.

<sup>5</sup> *Thompson v. Western Union Tel. Co.*, 32 Mo. App. 191.

<sup>6</sup> *Burnett v. Western Union Tel. Co.*, 39 Mo. App. 599, 614. Compare *Brashears v. Western Union Tel. Co.*, 45 Mo. App. 433, where the purport of the message was to inform a non-resident of the *death of a son* of the sender of the message.

to send it, liable for failure in the performance of this duty; and on this principle a recovery was had against the company, where a young gentleman had started on Sunday to make a visit to a young lady in a distant city, and, on his way, had gone into a restaurant to get some refreshments, and in consequence of this got left by the train, and thereupon delivered to the agent of the telegraph company at the station a message to the young lady, intended to apprise her of the reason why he would not arrive as expected by her.<sup>1</sup> The fact that the corporation keeps, on Monday and the following days, the money which it received on Sunday for sending the dispatch, has been held not a *ratification* of its illegal undertaking, so as to entitle the plaintiff to enforce his right to the statutory penalty.<sup>2</sup>

§ 6292. **Liability as between Trustees in Possession and Purchasers under a Mortgage.** — It has been held that where the management of a railroad company, at the time of an accident, is jointly in the hands of trustees under a mortgage of the railroad property, and a corporation purchasing the property from them, under a contract by which the trustees retain possession as security for the purchase-money, but which contract provides that the trustees shall be indemnified for losses by negligence pending the transfer of the property under the contract, — *both* are liable to pay damages for the accident, if it is a negligent one, and that the plaintiff may recover judgment against either, the verdict and judgment

<sup>1</sup> *Bassett v. Western Union Tel. Co.*, 48 Mo. App. 566. Where the circumstances are such that the sending of a message is a work of *charity*, it is none the less so, because the necessity of sending it grew out of the *negligence* of the sender, in not sending the information on the previous Saturday. *Burnett v. Western Union Tel. Co.*, 39 Mo. App. 599, 614; reaffirmed in

*Bassett v. Western Union Tel. Co.*, 45 Mo. App. 566.

<sup>2</sup> *Rogers v. Western Union Tel. Co.*, 78 Ind. 169; s. c. 41 Am. Rep. 558. The courts cite *Perkins v. Jones*, 26 Ind. 499, as settling the law that the retention of what has been received, under a contract entered into on Sunday, will not of itself be a *ratification*.

being moulded, under the operation of a statute of the State,<sup>1</sup> to suit the circumstances.<sup>2</sup>

§ 6293. **Liability of a Lessor Railroad Company for Torts of its Lessee.**—It may be stated generally that a railroad company cannot free itself from its civil liability for negligence in the performance of its public duties, by leasing its properties to another individual or corporation; although it does not follow from this that the lessee will not be held liable also. The leading proposition, supported by many decisions, is that a railroad company which has leased its properties will be liable in damages to a person injured by the negligence or other tortious conduct of the servants or agents of its lessee, in the management and operation of the properties; and that it is immaterial that the lessee has covenanted with the lessor to assume all burdens and liabilities imposed upon the lessor by its charter or governing statute.<sup>3</sup> Under the operation of this rule, where a railroad company permits

<sup>1</sup> *Mill. & V. Tenn. Code*, § 3687, 3688; as construed in *Knott v. Cunningham*, 2 Sneed (Tenn.), 204, and *Parris v. Brown*, 5 Yerg. (Tenn.) 267.

<sup>2</sup> *Lockhart v. Little Rock &c. R. Co.*, 40 Fed. Rep. 631. Hammond, J., dwelt on the difficulty of an injured person determining the nice question of liability as between the trustees and purchasers under such a contract, but entered a judgment against both, to be satisfied by either, —leaving them to adjust their difficulties between themselves.

<sup>3</sup> *Wabash &c. R. Co. v. Peyton*, 106 Ill. 534; *s. c.* 46 Am. Rep. 705; *Thompson v. New Orleans &c. R. Co.*, 10 La. An. 403; *Ricketts v. Chesapeake &c. R. Co.*, 33 W. Va. 433; *s. c.* 25 Am. St. Rep. 901; 10 S. E. Rep. 801; 7 L. R. A. 354; 41 Am. & Eng. Rail. Cas. 42; *Railroad Co. v. Barron*, 5 Wall. (U. S.) 90, 104; *Ohio &c. R. Co. v. Dunbar*, 20 Ill. 623; *s. c.*

71 Am. Dec. 291; *Chicago &c. R. Co. v. Whipple*, 22 Ill. 105; *Nelson v. Vermont &c. R. Co.*, 26 Vt. 717; *s. c.* 62 Am. Dec. 614; *McElroy v. Nashua &c. R. Co.*, 4 Cush. (Mass.) 400; *s. c.* 50 Am. Dec. 794; *Aycock v. Raleigh &c. R. Co.*, 89 N. C. 321; *New York &c. R. Co. v. Winans*, 17 How. (U. S.) 30, 39; *Macon &c. R. Co. v. Mayes*, 49 Ga. 355; *s. c.* 15 Am. Rep. 678; *Abbott v. Johnstown &c. R. Co.*, 80 N. Y. 27; *s. c.* 36 Am. Rep. 572; *Singleton v. Southwestern R. Co.*, 70 Ga. 464; *s. c.* 48 Am. Rep. 574; *Railroad Co. v. Brown*, 17 Wall. (U. S.) 445, 450; *Rome &c. R. Co. v. Chasteen*, 88 Ala. 591; *s. c.* 7 South. Rep. 94; 40 Am. & Eng. Rail. Cas. 559; *Briscoe v. Southern Kan. R. Co.*, 40 Fed. Rep. 273; *s. c.* 7 Rail. & Corp. L. J. 736; 40 Am. & Eng. Rail. Cas. 599; *Brown v. Hannibal &c. R. Co.*, 27 Mo. App. 394; *McCoy v. Kansas &c. R. Co.*, 36 Mo. App. 445. See also *ante*, §§ 5356, 5357, 5886, 5998.

another corporation or person to run cars upon its track, it is liable for damages caused by *their* negligence in so running them.<sup>1</sup> But these decisions are, in strictness, applicable only to cases where the railroad company has presumed to attempt to cast off its public duties, by leasing its railroad properties to another corporation, without direct authority of the law. They have no just application to cases where the leasing is authorized by an act of the legislature, in which case the lessor will not, in principle at least, be liable for the torts of the lessee in managing and operating the property, any more than the lessor of a farm will be liable for the torts of its lessee in the managing of it.<sup>2</sup> But it has been held that such a lease, in order to be effectual to relieve the lessor company from liability for the torts of the lessee company, must be *recorded* as required by the governing statute.<sup>3</sup> Again, the lessor and lessee company may, in the case of an act in the nature of a *nuisance*, both be liable on the principle which sometimes charges with liability both the *author* and the *continuer* of a nuisance. Thus, where one railroad company has *raised the grade* of the street and laid an additional track, and another has taken possession under a lease and continued the permanent use of the same, they are jointly liable for permanent injury to the property of an adjoining land-owner, and also for temporary injuries occurring after the lease for causes created without right by the lessor and continued by the lessee.<sup>4</sup>

<sup>1</sup> Macon &c. R. Co. v. Mayes, 49 Ga. 355; s. c. 15 Am. Rep. 678; Aycock v. Raleigh &c. R. Co., 89 N. C. 321; McCoy v. Kansas &c. R. Co., 36 Mo. App. 445.

<sup>2</sup> Virginia &c. R. Co. v. Washington, 86 Va. 629; s. c. 7 L. R. A. 344; 43 Am. & Eng. Rail. Cas. 688; 7 Rail. & Corp. L. J. 353; 10 S. E. Rep. 927.

<sup>3</sup> Oregon &c. Nav. Co. v. Dacres, 1 Wash. 195; s. c. 23 Pac. Rep. 415.

<sup>4</sup> Railroad Co. v. Hambleton, 40 Ohio St. 496. In a case of Massachusetts one street railway corporation

leased their railway to another, who covenanted to assume all the liabilities and burdens imposed on the lessors by their charter. On the refusal of the lessees to comply with an order of a town to alter the track, the town revoked part of the location, and threatened to revoke the rest. It was held that the lessors could not maintain a bill in equity against the lessees to compel them to alter the track; the lessors might alter it themselves, and sue at law. Medford &c. R. Co. v. Middlesex R. Co., 111 Mass. 232, 236.

## CHAPTER CXXXVIII.

### LIABILITY FOR TRESPASSES AND MALICIOUS INJURIES.

#### SECTION

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#### SECTION

- 6307. Illustration in the case of assaults upon passengers by the servants of incorporated carriers.
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- 6312. Liable for malicious prosecution.
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- 6314. Liable for malicious prosecution of civil actions.
- 6315. Liable for damages caused by a conspiracy.
- 6316. Liable for vexatiously and maliciously interfering with the business of another.

§ 6298. **Liable for Malicious Torts of Agents and Servants.** — By the old law a master was not liable for a *willful* or *malicious* act committed by his servant. It is said in *Brooke's Abridgment*,<sup>1</sup> "If my servant, contrary to my will, chase my beasts into the soil of another, I shall not be punished." And in *Rolle's Abridgment*,<sup>2</sup> "If my servant, without my notice, put my beasts into another's land, my servant is the trespasser, and not I; because, by the voluntary putting of the beasts there without my assent, he gains a special property for the time, and so to this purpose they are his beasts." And in *Noy's Maxims*, chapter 44, "If I command my servant to distress, and he ride on the distress, he shall be punished, not

<sup>1</sup> Tit. Trespass, pl. 435.

<sup>2</sup> 2 Roll. Abr. 553.



I." And it is laid down by Holt, C. J., in *Middleton v. Fowler*,<sup>1</sup> as a general proposition, that "no master is chargeable with the acts of his servant but when he acts in execution of the authority given by his master." Quoting these authorities, Lord Kenyon held, in 1800, in the case of *M'Manus v. Crickett*,<sup>2</sup> which has been ever since the leading case on the subject, that, when a servant does a *willful act*, not in the presence of his master, and without his direction or assent, such as driving his master's carriage against the chaise of another person, the servant, and not the master, is liable for the trespass. Following this case, many cases are found which hold that the master will not be responsible, unless it be shown that he authorized the particular act, or ratified it after it was committed;<sup>3</sup> or, as these cases more generally formulate the rule, the master will not be liable for the *willful* or *criminal* acts of his servant, although done at a time when he is pursuing his master's business, and although done with the means which the master has placed in his hands for the discharge of such business.<sup>4</sup> The courts which have so ruled have proceeded on the theory that authority from the master to the servant to commit a willful wrong, or a crime, will not be implied,

<sup>1</sup> 1 Salk. 282.

<sup>2</sup> 1 East, 106; s. c. 2 Thomp. Neg. (1st ed.), 865.

<sup>3</sup> *Brown v. Purviance*, 2 Har. & G. (Md.) 316; *Moore v. Sanborne*, 2 Mich. 519; s. c. 59 Am. Dec. 209; *Lindsay v. Griffin*, 22 Ala. 629; *Philadelphia &c. R. Co. v. Wilt*, 4 Whart. (Pa.) 143; *Snodgrass v. Bradley*, 2 Grant Cas. (Pa.) 43; *Illinois &c. R. Co. v. Downey*, 18 Ill. 259. *Contra*, *St. Louis &c. R. Co. v. Dalby*, 19 Ill. 353; *Illinois Central R. Co. v. Read*, 37 Ill. 484; s. c. 87 Am. Dec. 260.

<sup>4</sup> *Jones v. Hart*, 2 Salk. 441; *Vanderbilt v. Richmond Turnp. Co.*, 2 N. Y. 479; s. c. 51 Am. Dec. 315; *Philadelphia &c. R. Co. v. Wilt*, 4 Whart. (Pa.) 143; *Wright v. Wilcox*, 19 Wend. (N. Y.) 343; s. c. 32 Am. Dec. 507;

*De Camp v. Mississippi &c. R. Co.*, 12 Iowa, 348; *Cooke v. Illinois &c. R. Co.*, 30 Iowa, 202; *Fraser v. Freeman*, 43 N. Y. 566; s. c. 3 Am. Rep. 740; *Garvey v. Dung*, 30 How. Pr. (N. Y.) 315; *Steele v. Smith*, 3 E. D. Smith (N. Y.), 321; *Ryan v. Hudson River R. Co.*, 1 Jones & Sp. (N. Y.) 139; *McCoy v. McKowen*, 26 Miss. 487; s. c. 59 Am. Dec. 264; *New Orleans &c. R. Co. v. Harrison*, 48 Miss. 112; s. c. 12 Am. Rep. 356; *Oxford v. Peter*, 28 Ill. 434; *Johnson v. Barber*, 10 Ill. 425; s. c. 50 Am. Dec. 416; *Tuller v. Voght*, 13 Ill. 277; *Pritchard v. Keefer*, 53 Ill. 117; *Haltz v. Markel*, 44 Ill. 225; s. c. 92 Am. Dec. 182; *Wesson v. Seaboard &c. R. Co.*, 4 Jones L. (N. C.) 379; *Puryear v. Thompson*, 5 Humph. (Tenn.) 397.

and that the servant, when so acting, will therein be deemed to act, not for his master, but for himself. If he makes use of his master's property in committing this wrong, he will be deemed, according to the fantastic reasoning of Lord Kenyon, borrowed from *Rolle's Abridgment*, to have acquired, for the time being, a special property therein.<sup>1</sup> The fallacy of this reasoning was, that it made a certain mental condition of the servant the test by which to determine whether he was acting about his master's business or not.<sup>2</sup> Moreover, with respect of all intentional acts done by a servant in the supposed furtherance of his master's business, it clothed the master with immunity if the act was right, because it was right; and if it was wrong, it clothed him with a like immunity because it was wrong. He thus got the benefit of all his servant's acts done for him, whether right or wrong, and escaped the burden of all intentional acts done for him which were wrong. Under the operation of such a rule, it would always be more safe and profitable for a man to conduct his business vicariously than in his own person. He would escape liability for the consequences of many acts connected with his business, springing from the imperfection of human nature, because done by another, for which he would be responsible if done by himself. Meanwhile the public, obliged to deal or come in contact with his agents, for intentional injuries done by them, might be left wholly without redress. He might delegate to persons pecuniarily irresponsible the care of large factories, of extensive mines, of ships at sea, or of railway trains on land, and these persons, by the use of the extensive power thus committed to them, might inflict wanton and malicious injuries on third persons, without other restraint than that which springs from the imperfect execution of the criminal laws. A doctrine so fruitful of mischief could not long stand unshaken in an enlightened system of jurisprudence. We shall not, therefore, be surprised to find it repudiated by

<sup>1</sup> *M'Manus v. Crickett*, 1 East, 106; *Delaware &c. R. Co.*, 3 Hun (N. Y.), s. c. 2 Thomp. on Neg. (1st ed.), 865. 336.

<sup>2</sup> *Countryman, J.*, in *Rounds v.*

eminent writers,<sup>1</sup> and by the great weight of modern authority.<sup>2</sup>

§ 6299. **The True Test Suggested.**—Such a rule, fairly applied, would lead to the result embodied in the charge of a

<sup>1</sup> Reeve's Dom. Rel. 640; Cooley on Torts, 535.

<sup>2</sup> *Shea v. Sixth Ave. R. Co.*, 62 N. Y. 180; s. c. 20 Am. Rep. 480; *Mott v. Consumers' Ice Co.* (same court, 1878), 18 Alb. L. J. 90; *Croft v. Alison*, 4 Barn. & Ald. 590; *Howe v. Newmarch*, 12 Allen (Mass.), 49; *Wolfe v. Mersereau*, 4 Duer (N. Y.), 473; *McCormick v. Pennsylvania R. Co.*, 49 N. Y. 303; *Pittsburg &c. R. Co. v. Donahue*, 70 Pa. St. 119; *Jeffersonville &c. R. Co. v. Rogers*, 38 Ind. 116; s. c. 10 Am. Rep. 103; *Toledo &c. R. Co. v. Harmon*, 47 Ill. 298; s. c. 95 Am. Dec. 489; *Philadelphia &c. R. Co. v. Derby*, 14 How. (U. S.) 568; *Hawes v. Knowles*, 114 Mass. 518; s. c. 19 Am. Rep. 383; *Sherley v. Billings*, 8 Bush (Ky.), 147; s. c. 8 Am. Rep. 451; *Hawkins v. Riley*, 17 B. Mon. (Ky.) 101; *Duggins v. Watson*, 15 Ark. 118; s. c. 60 Am. Dec. 560; *Eckert v. St. Louis Transfer Co.*, 2 Mo. App. 36; *Malecek v. Tower Grove &c. R. Co.*, 57 Mo. 17; *Buckley v. Knapp*, 48 Mo. 152; *Ramsden v. Boston &c. R. Co.*, 104 Mass. 117; s. c. 6 Am. Rep. 200; *Metcalf v. Baker*, 2 Jones & S. (N. Y.) 10; *Rounds v. Delaware &c. R. Co.*, 3 Hun (N. Y.), 329; s. c. affirmed, 64 N. Y. 129; 21 Am. Rep. 597; *Pittsburgh &c. R. Co. v. Theobald*, 51 Ind. 246; *Pendleton v. Kinsley*, 3 Cliff. (U. S.) 416; *Goddard v. Grand Trunk R. Co.*, 57 Me. 202; s. c. 2 Am. Rep. 39; *Craker v. Chicago &c. R. Co.*, 36 Wis. 657; s. c. 17 Am. Rep. 504; *Keene v. Lizardi*, 5 La. 431; s. c. 6 La. 315; *Bryant v. Rich*, 106 Mass. 180; *Maynard v. Fireman's Fund Ins.*

*Co.*, 34 Cal. 48; s. c. 91 Am. Dec. 672; *Northwestern R. Co. v. Hack*, 66 Ill. 238; *Chicago &c. R. Co. v. Sykes*, 96 Ill. 162 (with which compare *Chicago &c. R. Co. v. Casey*, 9 Ill. App. 632; *Arasmith v. Temple*, 11 Ill. App. 39; and *Illinois Cent. R. Co. v. Downey*, 18 Ill. 259); *Morton v. Metropolitan Life Ins. Co.*, 34 Hun (N. Y.), 366; s. c. affirmed, 103 N. Y. 645; *Reed v. Home Sav. Bank*, 130 Mass. 443; s. c. 39 Am. Rep. 468; *Krulevitz v. Eastern R. Co.*, 140 Mass. 573; *Western News Co. v. Wilmanth*, 33 Kan. 510; *New York &c. R. Co. v. Schuyler*, 34 N. Y. 30; *Chicago &c. R. Co. v. Dickson*, 63 Ill. 151; s. c. 14 Am. Rep. 114; *Quigley v. Central Pac. R. Co.*, 11 Nev. 350; s. c. 21 Am. Rep. 757, *per Hawley, C. J.*; *Brokaw v. New Jersey R. Co.*, 32 N. J. L. 328; s. c. 90 Am. Dec. 659; *Vance v. Erie R. Co.*, 32 N. J. L. 334; s. c. 90 Am. Dec. 665; *Green v. London &c. Omnibus Co.*, 7 C. B. (N. S.) 290; *Perkins v. Missouri &c. R. Co.*, 55 Mo. 201; *Gillett v. Missouri Valley R. Co.*, 55 Mo. 315; s. c. 17 Am. Rep. 653. In *Edwards v. Midland R. Co.*, 43 L. T. (N. S.) 494, the question reserved for decision was whether a corporation could be liable for an act which required *malice* in order to be actionable. Mr. Justice Fry delivered an opinion, holding that a company could be so liable, reviewing the following authorities: *Stevens v. Midland R. Co.*, 10 Ex. 352; *Whitfield v. Southeastern R. Co.*, 1 El. Bl. & El. 115, 122; 31 L. T. (O. S.) 113; *Yarborough v. Bank of England*, 16 East, 6; 27 L. J. (Q. B.) 229; *Green v. London &c. Omnibus*

judge at *nisi prius*, in a leading case in Illinois:<sup>1</sup> If the conductor of a railway train, authorized to remove therefrom persons who refuse to pay their fare, uses merely as much force as is necessary to effect this result, the company will not be liable, for the act is proper; and if he uses more force than is necessary, the company will not be liable, for, in so far as he uses excessive force, the act is his own act, and not the company's. There is no sense in this, and it is not the law. The modern rule is, that if a servant, authorized to use force about his master's business, uses *excessive force*, his master must answer in damages to the person thereby injured, wholly without reference to the state of mind under which the servant acted.<sup>2</sup> If he is required to use force, and is left to his discretion as to how much he shall use, the master will, upon either view of the subject, be answerable if he uses too much force through *negligence*.<sup>3</sup> The distinction was thus stated in an English *per curiam* opinion, much quoted: "If a servant, driving a carriage, *in order to effect some purpose of his own*, wantonly strike the horses of another person, and produce the accident, the master will not be liable. But if, *in order to perform his master's orders*, he strikes, but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in pursuance of the servant's employment."<sup>4</sup> In all these cases it would seem,

Co., 1 L. T. (N. S.) 95; s. c. 7 C. B. (N. S.) 290; Goff v. Great Northern R. Co., 3 L. T. (N. S.) 850; s. c. 30 L. J. (Q. B.) 148.

<sup>1</sup> Charge of the judge at *nisi prius*, in St. Louis &c. R. Co. v. Dalby, 19 Ill. 353.

<sup>2</sup> Hewett v. Swift, 3 Allen (Mass.), 420; Moore v. Fitchburg R. Co., 4 Gray (Mass.), 465; s. c. 64 Am. Dec. 83; Seymour v. Greenwood, 6 Hurlst. & N. 359; s. c. 4 L. T. (N. S.) 835; 30 L. J. (Ex.) 327; Chicago &c. R. Co. v. Parks, 18 Ill. 460; s. c. 68 Am. Dec. 562; Cohen v. Dry Dock &c. R. Co., 69

N. Y. 170; Echols v. Dodd, 20 Tex. 190; Rounds v. Delaware &c. R. Co., 64 N. Y. 129; s. c. 21 Am. Rep. 597; affirming s. c. 3 Hun (N. Y.), 329; 5 Thomp. & C. (N. Y.) 475; St. Louis &c. R. Co. v. Dalby, 19 Ill. 353. *Contra*, Cantrell v. Colwell, 3 Head (Tenn.), 471.

<sup>3</sup> Puryear v. Thompson, 5 Humph. (Tenn.) 397; Seymour v. Greenwood, 6 Hurlst. & N. 359; Croft v. Alison, 4 Barn. & Ald. 590.

<sup>4</sup> Croft v. Alison, 4 Barn. & Ald. 590, 592.

upon principle, that the state of mind of the immediate actor is only material as an evidential fact tending to show whether, at the time, he was acting about his master's business or his own. In this view, even under the modern doctrine, the acts and declarations of the servant or agent, tending to show his state of mind at the time of the act complained of, would be admissible in evidence as part of the *res gestæ*.

§ 6300. **Difficulties in Applying This Test.**—While this seems simple enough as a theoretical rule, it must be admitted that the difficulty of applying it to actual cases is very great. It is believed that in every case the real question comes back to this: What will be evidence, under all the circumstances of the case, that the agent or servant of the corporation was acting within the scope of his authority when he did the wrong complained of? It must now be conceded, as the modern rule, that the mere fact that the wrong complained of was willful or malicious, or that in doing it the *state of mind of the actor* was really that which is characterized by the use of the words "*malice*," "*hatred*," or "*ill will*,"—does not exonerate the corporation from liability. But, on the other hand, this very state of mind of the actor may be *relevant evidence*, and in some cases of the most cogent nature, to show that, when he did the act, he was not acting for the corporation. Let us suppose, for illustration, a case familiar to anyone who has traveled on a steamboat on the Mississippi River. It is the duty of the *mate* of the boat to superintend the deckhands called "*roustabouts*," in taking on fuel and in loading and unloading the boat. This work must be done promptly, and even quickly. The mate has authority, and it is his duty to his principal, to urge the hands in the performance of this work, by language, by gestures, and by any reasonable action short of assault or battery or other known violation of law. But suppose that, in the performance of this duty, he strikes a lagging or obstinate deckhand with a stick? Taking a step further in this course of reasoning, suppose that he strikes him and wounds him severely? Suppose further that he strikes him so severely that the blow results

in his death? In either of these three successive cases, will the owner of the boat be liable, or will he not? Assuming, in such cases, that there is authority to use force in case of resistance or non-compliance with orders, may not the force used be so extreme—may not the weapon employed be so unusual—as entirely to defeat this presumption of authority?<sup>1</sup> From this statement, it plainly appears that, in many cases, the real difficulty will be to determine on which side of the line the particular case lies. The actor may be the agent, and even a principal officer of the corporation, and he may, even at the time of doing the wrongful act, be intending to serve the corporation, and yet the act may be of a character so extraordinary as to defeat any presumption that it could possibly be authorized by the corporation; and, as in every such case, the operation of a judgment against a corporation for damages must be to mulct the stockholders who may be really innocent, there will be no just grounds for holding the corporation liable. Thus, it has been reasoned that there is no presumption that a railroad corporation has authorized its local agent to *hinder access*, by the counsel of an adverse suitor, to a *witness* in the employment of the company; and that, unless the delegation of such authority appears in evidence, the corporation will not be affected by such conduct on the part of its agent.<sup>2</sup> In a case in Mississippi, where the servant of a railway company, in charge of its train, ordered a boy fifteen years of age to uncouple the train, enforcing the order with a threat, couched in profane language, that, in case of refusal, he would hit him with a billet of wood, and where the boy in obeying the order was hurt,—it was held that the railroad company was not liable; but the true reason was, not that the act was willful or malicious, but that it was plainly outside of the line of duty of the servant of the com-

<sup>1</sup> See the case of *Jones v. St. Louis &c. Packet Co.*, 43 Mo. App. 399, where, on a state of facts such as above submitted, the question troubled the judges greatly, and they resolved it in favor of the proprietor of

the steamboat, which was a corporation, but not to the satisfaction of a considerable portion of the profession.

<sup>2</sup> *Marsh v. South Carolina R. Co.*, 56 Ga. 274.

pany.<sup>1</sup> If the boy had been in the employ of the company, and the master of the train had given him an erroneous order, enforcing it with a profane threat, and he had been hurt, the company would have been plainly liable. The inherent difficulty of the question has resulted in what would otherwise be regarded as inexcusable judicial refinements. Thus, in a case in Pennsylvania, a boy, riding on a railway car, was willfully and wantonly struck by the driver and thrown off the car, and afterwards a wheel of one of the cars passed over him. In an action against the company, it was held that they were not liable for the act of the driver in striking the boy, but were liable for his act in negligently driving over him.<sup>2</sup> In this case the company should have been held liable on both grounds. The boy was stealing a ride on a street car, and the driver thrust him off with an iron switch-turner, using a brutal instrument and unnecessary force. It should have been held that the driver had implied authority to use the necessary force in expelling trespassers from the car. It was, therefore, a case where, acting within the line of his duty, he *used excessive force*; and the company should have been held liable upon a ground hereafter considered,<sup>3</sup> upon which railway companies are held liable where their conductors, expelling from their trains persons who have no right to be there, use unnecessary violence.

§ 6301. **Untenable Decisions on This Question.**—It would not be profitable to enter into an extended analysis of many of the judicial decisions upon this question. Many of them, and especially the early ones, are plainly untenable, and some have been expressly overruled.<sup>4</sup> Such was the case where the plaintiff, a passenger in a

<sup>1</sup> New Orleans &c. R. Co. v. Harrison, 48 Miss. 112; s. c. 12 Am. Rep. 356.

<sup>2</sup> Pittsburg &c. R. Co. v. Donahue, 70 Pa. St. 119.

<sup>3</sup> *Post*, § 6307.

<sup>4</sup> Such, for instance, was *Childs v. Bank of Missouri*, 17 Mo. 213, repudiated by all subsequent decisions in that State. Such also was *Illinois*

*Cent. R. Co. v. Downey*, 18 Ill. 259, where it was held that a common-law action on the case cannot be maintained against a corporation for injuries willfully and intentionally committed by its servants,—the case being the ordinary case of a traveler at a railway crossing being run over by a train.

street car, wishing to alight, passed out upon the platform and asked the conductor to stop the car, telling him that she would not get out until the car had come to a full stop. He thereupon, and while the car was in motion, threw her from it with great violence, breaking her leg. It was held that this was a wanton and willful trespass, for which the company was not liable.<sup>1</sup> It was reasoned that, in such a case, the company might be liable, but the court added the silly qualification, if the jury should find that the act was without malice or ill-feeling toward the plaintiff.<sup>2</sup>

**§ 6302. Ancient Doctrine that a Corporation could not Commit a Trespass except by Deed.**—By the English common law, trespass did not lie against a corporation; though in *Viner's Abridgment* it was admitted that a corporation *could commit a trespass by a writing under its seal*.<sup>3</sup>

<sup>1</sup> *Isaacs v. Third Ave. R. Co.*, 47 N. Y. 122; *s. c.* 7 Am. Rep. 418. This regrettable decision was rendered as late as the year 1871, and the opinion was pronounced by a judge whose opinions were greatly affected in favor of corporations. Compare *Fraser v. Freeman*, 43 N. Y. 566; *s. c.* 3 Am. Rep. 740, an opinion written by the same judge.

<sup>2</sup> *Jackson v. Second Ave. R. Co.*, 47 N. Y. 274; *s. c.* 7 Am. Rep. 448. See also *Higgins v. Watervliet & C. R. Co.*, 46 N. Y. 23; *s. c.* 7 Am. Rep. 293.

<sup>3</sup> *Vin. Abr., Corp. K.*, 22. "In trespass by taking a ship, the defendant justified as servant to the common company, to which the plaintiff demurred specially: 1. Because no deed is set forth, which in such particular case they must do"; in support of which a good deal of ancient law was cited, thus: "The Commonwealth of Mercers could not make a bailiff to appear": 12 Hen. 7, 27. "License to take trades must be by deed": 9 Edw. IV, 39. "Delivery of a deed must be by deed": *Br. Corp.* 24, 34, 43, 59. "They cannot be trespassers or dis-

seisors but by deed": *Dumper & Syms*, 1 Roll. 515. "Entry for condition must be by deed": *Dr. Bonham's Case*, 8 Coke, 106 *a*. After all this display of learning, the precise question was not decided. *Horn v. Ivy*, 2 Keb. 567. Some dying embers of the old light will be found in the early American reports. One of the best cases in which the old rule is reiterated is *Orr v. Bank of United States*, 1 Ohio, 36; *s. c.* 13 Am. Dec. 588. Here it was held that an action for an *assault and battery* and *false imprisonment* did not lie against a corporation. *Burnett, J.*, in giving the opinion of the court, thus presented the old law upon the subject, as it is found in the old reports and digests, strung together point by point without logic or sense. "In 8 East, 230, *Lawrence, J.*, says trespass does not lie against a corporation. *Thorpe, J.*, says trespass does not lie against a corporation aggregate by its corporate name, for a *capias* and *exigent* do not lie against it. 22 Ass. 67. A corporation cannot beat nor be beaten, nor commit treason, nor felony, nor be



§ 6303. Modern Law that a Corporation can Commit a Trespass like a Natural Person. — But this is no longer the rule with regard to private corporations,<sup>1</sup> but it is now firmly settled that a corporation aggregate may commit a trespass, and may be held answerable in damages for a trespass, in like manner as a natural person.<sup>2</sup> Such an artificial body, from

outlawed, etc.: 21 Edw. IV., 7, 12, 27, 67. They cannot be assigned: 1 Bac. Abr. 507. Nor outlawed: 10 Coke, 32. Nor attached: Ray, 152. No replevin lies against them by the name of their corporations: Brownl. 175. They cannot be declared against in custody: 6 Mod. 183. They are not indictable, though the particular members are: 12 Mod. 559. They cannot sue as a common informer: 2 Stra. 1241. For torts they must be sued individually: Salk. 192. Trespass does not lie against its members: 4 Com. Dig. Franchise, F. 19. A corporation cannot commit a trespass, but by their writing under their seal: Vin. Abr., Corp. K., 22. Trespass does not lie against commonalty, but shall be against the persons by their proper names, for *capias* and *exigent* lie not against commonalty: *Ibid.*, pl. 2. Trespass does not lie against a corporation, viz., by the name of corporation, but against the persons who did it, by their proper names, for *capias* and *exigent* do not lie: *Ibid.*, pl. 2, 15. As outlawry does not lie against an aggregate corporation, therefore trespass does not lie against them, for a *capias* and *exigent* do not go: 2 Sel. 149; 2 Imp. 675; Bro. Corp. 43. A corporation can neither maintain nor be made defendant to an action of battery, or such like personal injuries; for a corporation can neither beat nor be beaten in its body politic: 1 Bla. Com. 503. It appears also that the *civil law* ordains, in conformity with this rule, that for the misbe-

havior of a body corporate the directors only shall be answerable in their personal capacities. Woodesson, in his lectures on corporations, 1 vol. 494, is very clear and explicit on the subject. He says: 'It is incident to all bodies politic to sue and be sued by their name of incorporation, but it is manifest that this must be restricted to particular actions. Thus, corporations can neither be plaintiffs nor defendants in actions of assault and battery.'"

<sup>1</sup> *Sabin v. Vermont Cent. R. Co.*, 25 Vt. 363; *Eastern Counties R. Co. v. Broom*, 6 Ex. 314; *s. c.* 15 Jur. 297; 20 L. J. Ex. 196; *Rehoboth v. Catholic Cong. Church*, 23 Pick. (Mass.) 139.

<sup>2</sup> *Illinois &c. R. Co. v. Read*, 37 Ill. 484, 508; *s. c.* 87 Am. Dec. 260, *per Bresse, J.*; *Maund v. Monmouthshire Canal Co.*, 4 Man. & G. 452; *s. c.* 5 Scott N. R. 457; *Hay v. Cohoes Co.*, 3 Barb. (N. Y.) 42; *s. c.* affirmed, 2 N. Y. 159; 51 Am. Dec. 279; *Moore v. Fitchburg R. Co.*, 4 Gray (Mass.), 465; *s. c.* 64 Am. Dec. 83; *Edwards v. Union Bank*, 1 Fla. 136; *Whiteman v. Wilmington &c. R. Co.*, 2 Harr. (Del.) 514; *s. c.* 33 Am. Dec. 411; *Smith v. Birmingham Gas Co.*, 1 Ad. & El. 526. See *Yarborough v. Bank of England*, 16 East, 6; *Giles v. Taff Vale R. Co.*, 2 El. & Bl. 822; *Bath v. Caton*, 37 Mich. 199; *Hewett v. Swift*, 3 Allen (Mass.), 420; *Leshner v. Wabash Nav. Co.*, 14 Ill. 85; *s. c.* 56 Am. Dec. 494; *Hinde v. Wabash Nav. Co.*, 15 Ill. 72; *Chicago &c. R.*

its very nature, can act only through its agents and servants; and for this reason, the law, in regard to the torts of corporations, has been assimilated to that which governs the liability of a natural person for the trespass of his agent or servant. There is no doubt that a *master* is liable for the trespasses of his *servant* upon the property of others, negligently committed,<sup>1</sup>—as, where a master sends his servant to cut timber in his wood, without taking care to advise him as to its boundaries, and he thereby accidentally fells a tree on the land of another;<sup>2</sup> or where the master directs his servant to pile rubbish in a certain place, and it accidentally slides down against his neighbor's wall;<sup>3</sup> or where a servant, in order to move his master's barge to a dock, removes the plaintiff's therefrom, and so injures it.<sup>4</sup> So, if a *railroad company*, in order to facilitate its business, allows a *telegraph company* the use of its right of way for a telegraph line, such company may *cut down timber* on the right of way in order to prevent interference with its poles and wires, without incurring liability to an action by the land-owner for damages. The railway company would have this right,<sup>5</sup> and the telegraph company might acquire it from the railroad company, where the telegraph line was intended to promote the business of the railway company.<sup>6</sup> If, however, the trees are not on the right of way, the telegraph company will be liable for damages, without reference to the question whether its line has been built by itself alone, or jointly with the railroad company.<sup>7</sup>

§ 6304. Rule Extends to Trespasses upon the Person.—The rule equally extends to *trespasses upon the person*, although

Co. v. McCarthy, 20 Ill. 385; s. c. 71 Am. Dec. 285; Limpus v. North Gen. Omnibus Co., 30 L. J. (Q. B.) 148; Goff v. Great Northern R. Co., 30 L. J. (Q. B.) 148.

<sup>1</sup> Luttrell v. Hazen, 3 Sneed (Tenn.), 20; Bath v. Caton, 37 Mich. 199; s. c. 6 Reporter, 335; Gregory v. Piper, 9 Barn. & C. 591; s. c. 4 Man. & R. 500; Mackay v. Commercial Bank of Brunswick, L. R. 5 P. C. 394.

Contra, Bolingbroke v. Swindon Local Board, L. R. 9 C. P. 575.

<sup>2</sup> Bath v. Caton, 37 Mich. 199.

<sup>3</sup> Gregory v. Piper, 9 Barn. & C. 591.

<sup>4</sup> Page v. Defries, 7 Best & S. 137.

<sup>5</sup> St. Joseph & c. R. Co. v. Dryden, 11 Kan. 186.

<sup>6</sup> Western Union Tel. Co. v. Rich, 19 Kan. 517; s. c. 27 Am. Rep. 159.

<sup>7</sup> Ibid.

accompanied with *malice* on the part of the servant. A familiar illustration of this is found in actions for the forcible and violent *expulsion of passengers* from railway trains by the conductors of such trains.<sup>1</sup> Here, although the company is under an obligation, assumed by *contract*, to carry the passenger safely, yet an action *ex delicto* equally lies against it.<sup>2</sup> A most apt illustration of the principle is found in the case where a railroad company, which will be called A., was in the actual and peaceable possession of a railroad property, and another railroad company, which will be called B., entered upon the property with an armed force, under the command of its chief officers, and drove from their posts the agents and servants of A. company, and took forcible possession of the road; but while in the act of driving off the servants of A. company, one of them was fired upon and seriously wounded. The B. company having thus wrested the railroad from the possession of A. company by force of arms, continued to operate it as its own. It was held that B. company was liable to the servant of A. company in damages, for the tortious acts of its agents and servants, whereby the wound was inflicted upon him.<sup>3</sup>

<sup>1</sup> *Post*, § 6307.

<sup>2</sup> *Perkins v. Missouri &c. R. Co.*, 55 Mo. 201; *Quigley v. Central Pac. R. Co.*, 11 Nev. 350; *s. c.* 21 Am. Rep. 757.

<sup>3</sup> *Denver &c. R. Co. v. Harris*, 122 U. S. 597. There is, in the opinion in this case, written by Mr. Justice Harlan, a valuable exposition of the liability of corporations for the torts of their servants. Contrast this decision with *Vanderbilt v. Richmond Turnp. Co.*, 2 N. Y. 479; *s. c.* 51 Am. Dec. 315, — where it was held, in deference to the ancient and exploded law, that a corporation is not liable for the willful trespass of a person employed by it, although the act is authorized and sanctioned by its president and general agent. The utter untenability

of this last decision will be seen in a single quotation from the opinion of the court written by Cady, J.: "A general agent, when he commits, or orders a willful trespass to be committed, acts without the scope of his authority, as much as a special agent would in committing or ordering the same trespass to be committed." *Ibid.* 482. The trespass consisted in running a steamboat, belonging to the defendant corporation, into one belonging to the plaintiff corporation, which was a business rival of the defendant. Another decision, which must be put in the same wretched category, is to the effect that an action of trespass does not lie against a railroad company for injury to animals run over by its cars or engines, unless

§ 6305. Corporations Liable in Common-law Actions of Trespass, Trover, etc.—It results from the foregoing that, wherever the rules of common-law pleading prevail, corporations may be held liable, in appropriate states of fact, in the common-law actions of *trespass*, *trover*, *trespass on the case ex delicto*, etc., for torts commanded or authorized by them.<sup>1</sup> For instance, it is now settled that an action of *trespass vi et armis*, at common law, may be maintained against a corporation aggregate.<sup>2</sup> Contrary to an early misconception in

the act was done by the company's direction or assent; and that for the purpose of giving such assent, the conductor, engineer, or other subordinate agent who has charge of the train at the time, is not the representative of the corporation. *Selma &c. R. Co. v. Webb*, 49 Ala. 240. Another decision which proceeds on a semblance of justice, but which is nevertheless out of line with the modern authority, is to the effect that if the servants of a corporation, while acting for the corporation in violation of their orders, commit trespasses upon private property, the corporation will not be liable,—as where laborers in the employ of a telephone company, in erecting its line, cut trees not on its right of way. *Fairchild v. New Orleans &c. R. Co.*, 60 Miss. 931; s. c. 45 Am. Rep. 427. This decision is untenable, by reason of the fact that it proceeds on the ancient distinction between willfulness and negligence, which is repudiated by the modern courts. If the servant of the telephone company had stepped out of the line of his master's employment in order to effect some purpose of his own, as to cut firewood for his private use, or to commit a malicious trespass upon someone with whom he was at enmity, then the decision could be vindicated. Under this rule, if a corporation desires to commit a

trespass for its own advantage upon the property of an individual, it is only necessary to arm and send forward a gang of irresponsible persons and order them, with a wink, not to commit the trespass.

<sup>1</sup> *Hawkins v. Dutchess &c. Steamboat Co.*, 2 Wend. (N. Y.) 452; *McCready v. Guardians of the Poor*, 9 Serg. & R. (Pa.) 94; s. c. 11 Am. Dec. 667; *Lyman v. White River Bridge Co.*, 2 Aik. (Vt.) 255; s. c. 16 Am. Dec. 705; *Goodloe v. Cincinnati*, 4 Ohio, 500; s. c. 22 Am. Dec. 764; *Hamilton County v. Cincinnati &c. Turnp.*, *Wright (Ohio)*, 603; *Chestnut Hill Turnp. v. Rutter*, 4 Serg. & R. (Pa.) 6, 16; s. c. 8 Am. Dec. 675; *Riddle v. Proprietors &c.*, 7 Mass. 169, 187; s. c. 5 Am. Dec. 35; *Beach v. Fulton Bank*, 7 Cow. (N. Y.) 485; *Barnard v. Stevens*, 2 Aik. (Vt.) 429; s. c. 16 Am. Dec. 733; *Underwood v. Newport Lyceum*, 5 B. Mon. (Ky.) 129, 130; s. c. 41 Am. Dec. 260; *Crawfordsville &c. R. Co. v. Wright*, 5 Ind. 252; *Hazen v. Boston &c. R.*, 2 Gray (Mass.), 574; *Chicago &c. R. Co. v. Fell*, 22 Ill. 333; *Chicago &c. R. Co. v. Whipple*, 22 Ill. 105; *Crocker v. New London &c. R. Co.*, 24 Conn. 249.

<sup>2</sup> *Whiteman v. Wilmington &c. R. Co.*, 2 Harr. (Del.) 514; s. c. 33 Am. Dec. 411; *Underwood v. Newport Lyceum*, 5 B. Mon. (Ky.) 129; s. c. 41 Am. Dec. 260. In *Orr v. Bank of*

Ohio,<sup>1</sup> it is now settled that a common-law action of *trespass quare clausum fregit* may be maintained against a corporation under a state of facts which would warrant a like action against an individual,<sup>2</sup>—as against a *bridge company*, for breaking and entering the plaintiff's close and erecting thereon a bridge, etc.<sup>3</sup> For stronger reasons, an action of *trespass on the case* will lie against a corporation aggregate, upon any state of facts which would make the action an appropriate one against a natural person.<sup>4</sup> Thus, an action on the case, for a *vexatious suit*, may be sustained against a corporation aggregate.<sup>5</sup> It results from what is stated in the preceding section, that, where the common-law rules of pleading prevail, an action of *trespass will lie against a municipal corporation*.<sup>6</sup> Accordingly, an action of trespass against such a body for entering the plaintiff's close, cutting his timber, etc., in an attempt to lay out a road through it, has been sustained.<sup>7</sup> In like manner, a town in Illinois has been held liable, in trespass *de bonis asportatis*, for the act of its constable in wrongfully levying an execution on the plaintiff's goods.<sup>8</sup>

### § 6306. Liable for Damages for Assault and Battery.—

A common illustration of the principle of the preceding section is found in those modern cases which hold that a cor-

United States, 1 Ohio, 36; s. c. 13 Am. Dec. 588,—it was held that an action of trespass for an *assault and battery* will not lie against a corporation aggregate, and that such a corporation cannot be joined as defendant with natural persons in such an action. The principle on which this case proceeded was reaffirmed in *Foote v. Cincinnati*, 9 Ohio, 31; s. c. 34 Am. Dec. 420. The former of these cases does not seem to have been distinctly overruled in Ohio, though it has been entirely discredited by later decisions in that State,—such as *Atlantic & C. R. Co. v. Dunn*, 19 Ohio St. 162; s. c. 2 Am. Rep. 382; and *Passenger R. Co.*

*v. Young*, 21 Ohio St. 518; s. c. 8 Am. Rep. 78.

<sup>1</sup> *Foote v. Cincinnati*, 9 Ohio, 31; s. c. 34 Am. Dec. 420.

<sup>2</sup> *Lyman v. White River Bridge Co.*, 2 Aik. (Vt.) 255; s. c. 16 Am. Dec. 705.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Riddle v. Proprietors &c.*, 7 Mass. 169; s. c. 5 Am. Dec. 35; *Ochestnut Hill Turnp. Co. v. Rutter*, 4 Serg. & R. (Pa.) 6; s. c. 8 Am. Dec. 675.

<sup>5</sup> *Goodspeed v. East Haddam Bank*, 22 Conn. 530; s. c. 58 Am. Dec. 439; *post*, §§ 6312, 6313, 6314.

<sup>6</sup> *Allen v. Decatur*, 23 Ill. 332; s. c. 76 Am. Dec. 692.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Wolf v. Boettcher*, 64 Ill. 316.

poration may be answerable *civiliter* in damages for assault and battery committed by its agents and servants in the course of their agency or employment.<sup>1</sup>

§ 6307. **Illustration in the Case of Assaults upon Passengers by the Servants of Incorporated Carriers.**—A common illustration of this principle is found in the case where the servants of an *incorporated carrier of passengers*,—generally a *railway company*,—possessing either an express or implied authority to *expel trespassers* from the vehicles of the corporation and to use a reasonable amount of force to that end, expel a passenger who has a right to ride, or, in expelling one who has no right to ride, use *excessive or unreasonable violence*,—in either of which cases the corporation is answerable in damages. Indeed, the cases where incorporated carriers are held liable for assaults upon passengers and trespassers by their servants form a large portion of the category of judicial decisions illustrating the principle that a corporation aggregate may be answerable in damages for an assault and battery.<sup>2</sup> Nor is there much room in such cases for refinements upon the question whether the assault was done by the servant while acting within the general scope of his employment, or whether, in doing it, he had stepped out of the scope of his employment to accomplish some purpose of his own; since, it being the duty of the corporation to carry the passenger safely, and the particular servant having been appointed by

<sup>1</sup> St. Louis &c. R. Co. v. Dalby, 19 Ill. 353; Brokaw v. New Jersey R. Co., 32 N. J. L. 328; s. c. 90 Am. Dec. 659; Coleman v. New York &c. R. Co., 106 Mass. 160; Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48; s. c. 91 Am. Dec. 672; Eastern Counties R. Co. v. Broom, 6 Ex. 314; Moore v. Fitchburg Railroad, 4 Gray (Mass.), 465; s. c. 64 Am. Dec. 83; Hanson v. European &c. R. Co., 62 Me. 84; s. c. 16 Am. Rep. 404; McKinley v. Chicago &c. R. Co., 44 Iowa, 314; s. c. 24 Am. Rep. 748; Passenger R. Co. v.

Young, 21 Ohio St. 518; s. c. 8 Am. Rep. 78; Monument Nat. Bank v. Globe Works, 101 Mass. 57, 59; s. c. 3 Am. Rep. 322.

<sup>2</sup> Higgins v. Watervliet &c. Co., 46 N. Y. 23; s. c. 7 Am. Rep. 293; Perkins v. Missouri &c. R. Co., 55 Mo. 201; Malecek v. Tower Grove R. Co., 57 Mo. 17; Ramsden v. Boston &c. R. Co., 104 Mass. 117; s. c. 6 Am. Rep. 200; Pendleton v. Kinsley, 3 Cliff. (U. S.) 416; Springer Trans. Co. v. Smith, 16 Lea (Tenn.), 489; s. c. 1 S. W. Rep. 280.

it to discharge this duty, if the servant, from whatever motive or for whatever purpose, commits an assault upon the passenger, he, and the corporation through him, necessarily violates this duty.<sup>1</sup> When, therefore, the *conductor* of a railway passenger train *kissed a female passenger*, the company was mulcted in damages in the sum of \$1,000 for the indecent assault.<sup>2</sup> Again, where the conductor of a railway train wrongfully ejects a passenger, although from a *malicious motive*, the railway company must pay damages; since the act is in the scope of the employment of the conductor, and the motive or intention of the servant is of no consequence. The court justly say: "If the nature of the injurious act is such as to make the master liable for its consequences, in the absence of the particular intention, it is not perceived how the presence of such intention can be held to excuse the master."<sup>3</sup> It is scarcely necessary to add that the courts have no difficulty whatever in holding the railway companies liable in damages where their servants, in consequence of a *mistake of facts*, wrongfully eject a passenger from their coaches, — as where the conductor of a horse-car ejects a passenger under the mistaken idea that he is intoxicated;<sup>4</sup> or where the porter of a steam-railway coach ejects a passenger under the erroneous impression that he is in the wrong carriage.<sup>5</sup> On like grounds, where the plaintiff was a passenger on a steamboat, and the steward and some of the table waiters wrongfully assaulted and injured him, it was held that the proprietors of the boat were liable for the damages.<sup>6</sup> The theory of all these cases is that expressed by Mr. Justice Clifford in a case at circuit, where he said: "Passengers do not contract merely for ship-room and transportation from one place to another; but they also contract for good treatment

<sup>1</sup> *Sherley v. Billings*, 8 Bush (Ky.), 147; s. c. 8 Am. Rep. 451.

<sup>2</sup> *Craker v. Chicago &c. R. Co.*, 36 Wis. 657; s. c. 17 Am. Rep. 504.

<sup>3</sup> *Passenger R. Co. v. Young*, 21 Ohio St. 518; s. c. 8 Am. Rep. 78.

<sup>4</sup> *Higgins v. Watervliet &c. R. Co.*, 46 N. Y. 23; s. c. 7 Am. Rep. 293.

<sup>5</sup> *Bailey v. Manchester &c. R. Co.*, L. R. 7 C. P. 415; s. c. 3 Moake, 308.

See also *The Thetis*, L. R. 2 Adm. & Ec. 365.

<sup>6</sup> *Bryant v. Rich*, 106 Mass. 180; s. c. 8 Am. Rep. 311.

and against personal rudeness and every wanton interference with their persons, either by the carrier or his agents employed in the management of the ship or other conveyance.”<sup>1</sup>

§ 6308. **Further of This Subject.**—Most of the decisions under this head, where the right to recover damages has been sustained, proceed upon the principle that the incorporated carrier invests the particular servant with authority of determining who may be admitted and who excluded from its vehicles, and is consequently liable for the *wrongful exercise of this authority*.<sup>2</sup> Under many circumstances, it is not only the right but the duty of the conductor, or other servant of the carrier, in charge of his vehicle, to expel improper, drunken, or disorderly persons therefrom.<sup>3</sup> He may be obliged to do this in order to discharge the duty of his principal to the other passengers; and in the discharge of this duty he may lawfully use such force as is rendered necessary by the resistance of the person whom he attempts to expel; and such resistance may be sufficient to justify the giving of a *blow*.<sup>4</sup> He is not bound to wait until some overt act of violence, profanity, or other misconduct has been committed, but may exercise his authority to exclude or expel the offender, when his conduct or condition is such as to render it reasonably certain that he will occasion discomfort or annoyance to other passengers.<sup>5</sup> But although he may be justified in ejecting a passenger, yet if he does so with *unnecessary force or violence*, the company will be liable for the resulting damages.<sup>6</sup> Moreover,

<sup>1</sup> Pendleton v. Kinsley, 3 Cliff. (U. S.) 416.

<sup>2</sup> Passenger R. Co. v. Young, 21 Ohio St. 518; s. c. 8 Am. Rep. 78; Hamilton v. Third Ave. R. Co., 13 Abb. Pr. (N. Y.) 318; s. c. 44 How. Pr. (N. Y.) 294; Terre Haute & C. R. Co. v. Fitzgerald, 47 Ind. 79.

<sup>3</sup> West Chester & C. R. Co. v. Miles, 55 Pa. St. 209; s. c. 93 Am. Dec. 744.

<sup>4</sup> Pittsburg & C. R. Co. v. Donahue, 70 Pa. St. 119.

<sup>5</sup> Vinton v. Middlesex R. Co., 11

Allen (Mass.), 304; s. c. 87 Am. Dec. 714.

<sup>6</sup> Higgins v. Watervliet & C. R. Co., 46 N. Y. 23; s. c. 7 Am. Rep. 293; Seymour v. Greenwood, 7 Hurlst. & N. 355; McKinley v. Chicago & C. R. Co., 44 Iowa, 314; s. c. 24 Am. Rep. 748. Compare Isaacs v. Third Ave. R. Co., 47 N. Y. 122; s. c. 7 Am. Rep. 418; Jackson v. Second Ave. R. Co., 47 N. Y. 274; s. c. 7 Am. Rep. 448. *Untenable decisions* to the effect that the company is not liable for an ex-



the *manner* in which a conductor expels a passenger from the train, although the expulsion itself is lawful, may be such as to furnish a ground for damages,—as where the conductor compels a passenger to *jump* from the train while in motion.<sup>1</sup> So, it has been held that a railway company is liable for a *malicious and criminal assault* by its servant upon a passenger, committed in carrying out what the servant *supposed to be an order* from the company, although such order did not contemplate its enforcement by such means.<sup>2</sup> Again, where the conductor of a railway passenger train attempted to *seize articles of property* in the hands of a passenger for the purpose of enforcing payment of fare, the corporation was held liable in an action for an *assault and battery*.<sup>3</sup>

§ 6309. *Instances under This Head.*—It is not intended greatly to multiply instances under this head, because the subject relates rather to the law of carriers of passengers than to the law of corporations,—that is to say, there is nothing about it which distinctively applies to corporations, when once the liability of a corporation to respond in damages in such cases for the acts of its agents or servants, the same as an individual proprietor, is conceded. Indeed, there is no substantial difference, except that growing out of peculiar circumstances, between the liability of an incorporated railway or navigation company, for assaults upon passengers committed by its agents and servants, and the liability of an unincorporated proprietor of a line of stages for similar assaults. We shall therefore dismiss the subject with a few fur-

cess of violence or force, but for the use of only enough force to carry out its orders, are *Sanford v. Eighth Ave. R. Co.*, 7 Bosw. (N. Y.) 122; *St. Louis &c. R. Co. v. Dalby*, 19 Ill. 353.

<sup>1</sup> *Holmes v. Wakefield*, 12 Allen (Mass.), 580; *s. c.* 90 Am. Dec. 171; *Sanford v. Eighth Ave. R. Co.*, 23 N. Y. 343; *s. c.* 80 Am. Dec. 286. Whether it is *due care* to attempt to remove a *drunken passenger* while the car is in motion, is a question of fact for the jury: *Murphy v. Union R. Co.*, 118 Mass. 228.

<sup>2</sup> *McKinley v. Chicago &c. R. Co.*, 44 Iowa, 314; *s. c.* 24 Am. Rep. 748. But in *Poulton v. London &c. R. Co.*, L. R. 2 Q. B. 534, the plaintiff was *arrested* by the station-agent for non-payment of freight charges on a horse which he was bringing home from a fair, the company having agreed to return the horse free. It was held that the company was not liable, the *agent not being authorized so to do*.

<sup>3</sup> *Ramsden v. Boston &c. R. Co.*, 104 Mass. 117; *s. c.* 6 Am. Rep. 200.

ther illustrations, and then add a considerable citation of cases to which the reader can refer who desires to pursue the subject specially. In one case, the plaintiff, a boy about fifteen years of age, while a deck passenger on a steamboat, was assaulted and knocked down by an officer of the boat, and one of his eyes was totally destroyed. For this the proprietors of the steamboat were adjudged to pay the sum of \$4,400.<sup>1</sup> If the same person is employed by a street railroad company to drive the car and to collect fares, and is authorized by the company to eject passengers who will not pay fare, the company may be liable to a person put off, for injuries which he sustains, either through the use of *excessive violence* by the company's agent in putting him off, or through the *negligence* of the agent in discharging his duties as driver, — as if he does not stop the car at the time. His negligence as driver may warrant a recovery, irrespective of whether he was authorized to demand fare.<sup>2</sup> In a suit for damages against a railroad company, caused by the action of its conductor in ejecting the plaintiff from its cars, he need not *allege* nor *prove* that *specific authority* was conferred on the conductor by the company, to perform such acts, where it appeared that to him was intrusted all the authority which concerned the reception or rejection of passengers, and that he was acting within the scope — even though in abuse — of the general authority devolved on him by his position. And the *courts* will, without testimony, *take cognizance* of the duties of conductors, as pointed out by the statute.<sup>3</sup> A woman was sitting in the ladies' parlor of the defendant company's station, when an employé of the company, who acted as *janitor* of the company, approached her and *told her that she was a negro*, and that he was instructed by the company to keep negroes out of that parlor. She refused to leave the parlor, whereupon he seized her and dragged her out, throwing her with violence to the floor upon her face (she being then pregnant), thereby injuring her. It was held that the company was liable to her in damages.<sup>4</sup>

<sup>1</sup> *Sherley v. Billings*, 8 Bush (Ky.), 147; *s. c.* 8 Am. Rep. 451.

<sup>2</sup> *Healy v. City Passenger R. Co.*, 28 Ohio St. 23.

<sup>3</sup> *Travers v. Kansas Pac. Railway*, 63 Mo. 421.

<sup>4</sup> *Redding v. South Carolina R. Co.*, 3 S. C. 1; *s. c.* 16 Am. Rep. 681. It is worthy of note that the judge of the

Supreme Court of South Carolina who wrote the opinion in this case — a very creditable one — was himself a negro. Duty of passenger who buys a ticket to the wrong station: *Chicago &c. R. Co. v. Griffin*, 68 Ill. 499. Duty of conductor in such a case: *Ibid.* Refusing to pay fare where all the seats are occupied: *Pittsburgh*

§ 6310. **Liable for a Malicious Libel.**—A corporation aggregate may be liable in a civil action for damages for publishing a *malicious libel*, though necessarily the act of publishing is done by its agents or servants.<sup>1</sup> This must be obvious in the case of a corporation organized for the very purpose of printing and publishing newspapers or books.<sup>2</sup> But the rule is by no means confined to such cases. Even a *railroad company* may be liable in damages for a malicious libel published by its agents, acting in its behalf in the course of its business and of their employment.<sup>3</sup> And it has been held that a railway company operating a line of *telegraph*, may be liable in a civil action for a libel in transmitting over its line to different stations libelous matter concerning a person.<sup>4</sup> In like manner, a railroad company has been held liable in a civil action

&c. R. Co. v. Van Houten, 48 Ind. 90. Liability for expelling the passenger where the agent promised him "a stop-over" privilege which the conductor refuses to recognize: Burnham v. Grand Trunk R. Co., 63 Me. 298; s. c. 18 Am. Rep. 220. Expelling a passenger who has got aboard without a ticket after making an ineffectual attempt to get one: Perkins v. Missouri &c. R. Co., 55 Mo. 201. Retention of conductor by company *evidence of ratification* of his malicious expulsion of a passenger: Perkins v. Missouri &c. R. Co., 55 Mo. 201. When brakeman expelling passenger deemed to act within the scope of his employment: Peck v. New York &c. R. Co., 9 Hun (N. Y.), 236; s. c. 6 Thomp. & C. (N. Y.) 436. Assaulting a foot passenger who endeavors to pass over the platform of a street car when the street is obstructed—company liable: Shea v. Sixth Ave. R. Co., 62 N. Y. 180; s. c. 20 Am. Rep. 480; 5 Daly (N. Y.), 221. Refusing to carry a *colored woman* because of her color—nominal damages only: Pleasants v. North Beach &c. R. Co., 34 Cal. 586.

<sup>1</sup> Philadelphia &c. R. Co. v. Quigley, 21 How. (U. S.) 202; Howe Machine Co. v. Souder, 58 Ga. 64; Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48; s. c. 91 Am. Dec. 672; s. c. on rehearing, 47 Cal. 207; Johnson v. St. Louis Dispatch Co., 2 Mo. App. 565; s. c. affirmed, 65 Mo. 539; s. c. 27 Am. Rep. 293; Vinas v. Merchants' &c. Ins. Co., 27 La. An. 367; Whitfield v. Southeastern R. Co., El., Bl. & El. 115; s. c. 27 L. J. (Q. B.) 229; 4 Jur. (N. S.) 688; Lawless v. Anglo-Egyptian Co., L. R. 4 Q. B. 462.

<sup>2</sup> Johnson v. St. Louis Dispatch Co., 2 Mo. App. 565; s. c. affirmed, 65 Mo. 539, 542; s. c. 27 Am. Rep. 293; overruling Childs v. Bank of Missouri, 17 Mo. 213; Evening Journal Asso. v. McDermott, 44 N. J. L. 430; s. c. 43 Am. Rep. 392; McDermott v. Evening Journal Asso., 43 N. J. L. 488; s. c. 39 Am. Rep. 606.

<sup>3</sup> Philadelphia &c. R. Co. v. Quigley, 21 How. (U. S.) 202.

<sup>4</sup> Whitfield v. Southeastern R. Co., El., Bl. & Ell. 115; s. c. 96 Eng. Com. L. 113.

for the act of its *directors* in publishing, in the course of its business, a libel injuriously reflecting on a stranger to the company.<sup>1</sup> On the other hand, it seems that a *libel* may be committed against a corporation,—as where a corporation is engaged in a business which depends upon credit, and a defamatory publication is made which injures its credit.<sup>2</sup>

§ 6311. Not so Liable where Agent not Acting in Course of Duty.—It may be difficult, in many cases, to draw the line between the case where the agent of the corporation, who publishes the libel, is acting out of his own malice, and the case where he is acting in order to further his duty toward the corporation. Where he is acting in the latter character, the corporation will be liable; and where he is acting in the former, it will not. Taking this distinction, it was held that where the son of the agent of an express company, who was acting in the performance of the duties which the company intrusted to the father, wrote to the consignor of goods a letter referring to the consignee, who had made a complaint to the express company that the goods were damaged, and signing himself as “acting agent,” in which letter he referred to the consignee as a “fellow”; said that when the latter wrote his letter of complaint he had no idea that “it would be referred here for explanation,” or he would have been far from doing so; “that he is engaged in a small business here, in principle is a small man, will do anything dirty, and is endeavoring to beat you out of tea. . . . His idea was to beat you out of another can, or simply to get something for nothing. As I said before, he is a dirty, low-lived whelp, and seeks to put me on an equality with him, as, if he had a chance, he would do anything that was dirty. I send you a three-cent stamp,

<sup>1</sup> Philadelphia &c. R. Co. v. Quigley, 21 How. (U. S.) 202.

<sup>2</sup> Knickerbocker Life Ins. Co. v. Ecclesine, 6 Abb. Pr. (N. s.) (N. Y.) 9; s. c. 34 N. Y. Super. 76. That a corporation may have an order for the arrest of the defendant, on the ground that the wrong is an injury to “character,”

under the New York Code of Civil Procedure: *Ibid.* That a corporation may maintain an action for *slander*, see Temperance Mut. Ben. Asso. v. Schweinhart, 3 Pa. County Ct. 353. For a discussion of the liability of corporations for libel, see 29 Cent. L. J. 72.

and want you to send this letter to him and advise me on card." The consignor sent the letter to the consignee, and the latter sued the express company for libel, and had a verdict and judgment. It was held, reversing this judgment, that, assuming that the writer of the letter was the agent of the defendant when it was written, no facts were shown from which the jury could infer express or implied authority on his part to act for the company in the business, or to write any communications for the company, and therefore that the company was not liable.<sup>1</sup>

§ 6312. **Liable for Malicious Prosecution.**—It is now settled that a corporation may be liable for the *malicious prosecution of a criminal action*, instituted by its agents in the carrying out of its policy, or in the furtherance of its business.<sup>2</sup> It is seen, by the comparison of cases made in the

<sup>1</sup> Southern Express Co. v. Fitzner, 59 Miss. 581; s. c. 42 Am. Rep. 379.

<sup>2</sup> Hussey v. Norfolk &c. R. Co., 98 N. C. 34; s. c. 2 Am. St. Rep. 312; 3 S. E. Rep. 923; 3 Rail. & Corp. L. J. 3; Williams v. Planters' Ins. Co., 57 Miss. 759; s. c. 34 Am. Rep. 494; Wheless v. Second Nat. Bank, 1 Baxt. (Tenn.) 469; s. c. 25 Am. Rep. 783; Vance v. Erie R. Co., 32 N. J. L. 334; s. c. 90 Am. Dec. 665; Fenton v. Wilson Sewing Machine Co., 9 Phila. (Pa.) 189; Copley v. Grover & Baker Sewing Machine Co., 2 Woods (U. S.), 494; Woodward v. St. Louis &c. R. Co., 85 Mo. 142; Boogher v. Life Asso., 75 Mo. 319; s. c. 42 Am. Rep. 413; overruling Gillett v. Missouri Valley R. Co., 55 Mo. 315; Jordan v. Alabama &c. R. Co., 74 Ala. 85; s. c. 49 Am. Rep. 800; overruling Owsley v. Montgomery &c. R. Co., 37 Ala. 560; Carter v. Howe Machine Co., 51 Md. 290; s. c. 34 Am. Rep. 311; Iron Mountain Bank v. Mercantile Bank, 4 Mo. App. 505; American Express Co. v. Patterson, 73 Ind. 430; Pennsylvania Co. v. Weddle, 100 Ind. 18;

Morton v. Metropolitan Life Ins. Co., 34 Hun (N. Y.), 366; Ricord v. Central Pac. R. Co., 15 Nev. 167; Wheeler &c. Co. v. Boyce, 36 Kan. 350; s. c. 59 Am. Rep. 571; Goodspeed v. East Haddam Bank, 22 Conn. 530; s. c. 58 Am. Dec. 439; Reed v. Home Sav. Bank, 130 Mass. 443; s. c. 39 Am. Dec. 468; Walker v. South-eastern R. Co., L. R. 5 C. P. 640; Edwards v. Midland R. Co., 6 Q. B. Div. 287; s. c. 43 L. T. (N. S.) 494. The Supreme Court of Alabama denied the doctrine of the text in Owsley v. Montgomery &c. R. Co., 37 Ala. 560; but this decision is founded upon the overruled case of Childs v. Bank, 17 Mo. 213, the discredited case of Stevens v. Midland County R. Co., 10 Ex. 352, and the case of McLellan v. Cumberland Bank, 24 Me. 566. The case of Gillett v. Missouri Valley R. Co., 55 Mo. 315; s. c. 17 Am. Rep. 653,—limited Childs v. Bank of Missouri, 17 Mo. 213, which had denied the liability of a corporation for an assault and battery, malicious prosecution, or slander, and conceded

preceding note, that there has been, even within a recent period, some diversity of opinion, as to whether a corporation will be liable for a malicious prosecution set on foot by its officers.' The question, however, is not at all difficult of solution. It rests upon precisely the same principles which govern the liability of corporations for torts in other cases. The liability of the corporation does not depend wholly upon the state of mind of the officer or agent who did the act. The act may be malicious in a legal sense and in fact, and yet the corporation may be liable.<sup>1</sup> The test is whether the agent acted within the general scope of his powers, about the corporate business, or in furtherance of its real or supposed interests. Thus, it is clear that a corporation, owning property, has the same power to sue for injuries thereto which a natural person has; and where a *felonious act* is committed against its rights of property, it may be assumed that its civil remedy will not be available to it until it has prosecuted the

its liability in such cases where the act comes within the purview of its charter powers, and is within the scope of the agent's authority, or is ratified. But the alleged malicious prosecution in that case being a criminal prosecution for embezzlement, it was held that it was not within the scope of the corporation's general or special powers, and therefore that the action would not lie. This last case, in so far as it imposes such limitations on the right of action, is now expressly overruled and exploded in Missouri. *Boogher v. Life Asso.*, 75 Mo. 319; *s. c.* 42 Am. Rep. 413; reversing *s. c.* 7 Mo. App. 591; *Woodward v. St. Louis &c. R. Co.*, 85 Mo. 142. The case of *Carter v. Howe Machine Co.*, 51 Md. 290, resembled in its circumstances the Missouri case of *Gillett v. Missouri Valley R. Co.*, *supra*, and it was held that, although a corporation is liable to an action for malicious prosecution, yet in such a case the agent must be shown to have

express authority for his act, or it must have been ratified,—a limitation not upheld by the current of authority. A manufacturing corporation was held *not liable*, in an action for damages for *false imprisonment*, brought by one who had been arrested in proceedings conducted by a *detective* at the instance of a *superintendent* of the mills of the corporation, no special authority having been given by the corporation to the superintendent. *Pinkerton v. Gilbert*, 22 Ill. App. 568. Such a corporation was held not liable for damages for a *criminal prosecution for forgery*, where it appeared that the prosecution was instituted by the agent of his own motion, and under circumstances likely to cause him to profit by it. *Springfield Engine & Threshing Co. v. Green*, 25 Ill. App. 106. There is a note on this subject in 11 Va. L. J. 5, reprinted from the *Law Times* (London).

<sup>1</sup> *Ante*, § 6295.

felon criminally. And even where such an act reaches only the grade of a misdemeanor, it may be assumed that it is under the same duty of prosecuting an offender, which rests upon natural persons against whose rights of property the like misdemeanors are committed. But, as the corporation can act only through agents, if it institutes and prosecutes a criminal action in such a case, this can only be done by some agent acting for it. Therefore, agents of a corporation, who are intrusted with the general management of its business, clearly have an implied power to institute and prosecute, not only civil suits for the redress of injuries to its property, but also the appropriate criminal actions in cases where such injuries are of a criminal nature. Now, of course, the corporation cannot assume the attitude of a plaintiff in a civil action, nor, through its managing officers, of the prosecutor in a criminal action, in either case employing its funds to further the prosecution, without becoming subject to the liabilities which attach to a natural person when assuming the same attitude; and hence, if its agents, in exercising this power, abuse it, or pervert it to malicious purposes, the corporation is clearly answerable for the resulting damages.<sup>1</sup> Upon the foregoing grounds, liability to pay damages for the malicious prosecution of civil or criminal actions has been ascribed to corporations aggregate, without regard to the object which such corporations were organized to promote, — such, for instance, as a *banking company*,<sup>2</sup> a *sewing-machine company*,<sup>3</sup> an *express company*,<sup>4</sup> and a *railroad company*.<sup>5</sup>

§ 6313. **Liable for False Imprisonment.** — On like grounds, a corporation may be liable in damages for that species of

<sup>1</sup> See the reasoning of Vories, J., in *Gillett v. Missouri Valley R. Co.*, 55 Mo. 315, 316; s. c. 17 Am. Rep. 653; *Goodspeed v. East Haddam Bank*, 22 Conn. 330.

<sup>2</sup> *Goodspeed v. East Haddam Bank*, 22 Conn. 530; s. c. 58 Am. Dec. 439; *Reed v. Home Sav. Bank*, 130 Mass. 443; s. c. 39 Am. Rep. 468.

<sup>3</sup> *Copley v. Grover & c. Sewing Machine Co.*, 2 Woods (U. S.), 494.

<sup>4</sup> *American Express Co. v. Patterson*, 73 Ind. 430.

<sup>5</sup> *Ricord v. Central Pac. R. Co.*, 15 Nev. 167; *Krulevitz v. Eastern R. Co.*, 140 Mass. 573.

wrong which is commonly called *false imprisonment*,<sup>1</sup> and which is generally but another name for the imprisonment which results from the malicious prosecution of a criminal action. It is not necessary, however, that a false imprisonment should be involved in a criminal prosecution; for a person may be arrested and imprisoned upon a pretended charge, or without any charge, as in a case of *kidnapping*, where no criminal prosecution is commenced, threatened, or intended. Where a railroad company had a regulation that passengers, on leaving its trains, must exhibit their tickets to the gateman at the company's station, and a passenger tried to pass out without exhibiting his ticket, alleging that he had lost it, and the gateman thereupon detained him, and caused him to be arrested and confined in the police station over night on the charge of disorderly conduct, and he was discharged by the police justice the next morning,—it was held that he could maintain an action against the company for false imprisonment. The power which the company sought to exercise was not like the power to expel a passenger from its cars for non-payment of fare; but it was the power to imprison for debt.<sup>2</sup>

#### § 6314. Liable for Malicious Prosecution of Civil Actions.

As every corporation has the capacity for maintaining civil actions to redress injuries to its rights of property, if such an action is commenced and unsuccessfully prosecuted by a corporation, under circumstances where the law allows an action for damages for the *malicious and vexatious prosecution of a civil action*,—and those circumstances are limited,—such an action may be maintained against the corporation. Therefore, where the plaintiff brought such an action against an incorporated bank, alleging that the defendants, without

<sup>1</sup> *Lynch v. Metropolitan &c. R. Co.*, 24 Hun (N. Y.), 506; *Moore v. Metropolitan R. Co.*, L. R. 8 Q. B. 36; *Bayley v. Manchester &c. R. Co.*, L. R. 8 C. P. 148; *Moore v. Fitchburg R. Co.*, 4 Gray (Mass.), 465; *s. c.* 64 Am. Dec. 83; *Chilton v. London &c. R. Co.*, 16 Mees. & W. 212; *s. c.* 11 Jur. 149; 16

L. J. Ex. 89; *Goff v. Great Northern R. Co.*, 3 El. & El. 672; *s. c.* 30 L. J. Q. B. 148; 7 Jur. (N. s.) 286; 3 L. T. (N. s.) 850; *Eastern Counties R. Co. v. Broom*, 6 Welsb., H. & G. 314; *s. c.* 20 L. J. Ex. 196; 15 Jur. 297.

<sup>2</sup> *Lynch v. Metropolitan &c. R. Co.*, 24 Hun (N. Y.), 506.



probable cause, and with a malicious intent, unjustly to vex, harass, embarrass, and trouble the plaintiff, commenced by writ of *attachment*, and prosecuted against him a certain vexatious suit, and gave evidence tending to sustain his allegations,—it was held that he had a right to go to the jury.<sup>1</sup> Upon the same principle, a corporation may be liable to a separate action for damages, not brought upon the injunction bond, for wrongfully suing out an *injunction*. “The common-law action for damages arising from the injunction is essentially an action for malicious prosecution. The failure in the suit determines the wrongfulness of the claim, but it does not therefore give a common-law action for damages to defendant. The wrong was not the falsehood or injustice of the claim, but that it was without probable cause. It is, therefore, not enough to allege that the action was wrongfully brought.”<sup>2</sup>

§ 6315. **Liable for Damages Caused by a Conspiracy.**— Upon like grounds, an action may be maintained against a corporation to recover damages caused by a *conspiracy* to which the corporation was a party.<sup>3</sup>

§ 6316. **Liable for Vexatiously and Maliciously Interfering with the Business of Another.**— On like grounds, it has been held that one corporation may be civilly liable in damages for *vexatiously and maliciously interfering with the business of another*,— as where a company established for conveying passengers by an omnibus in the streets of London, by its servant, wrongfully, vexatiously, and maliciously did certain acts with the view to obstruct and annoy the plaintiff in the conduct of a similar trade, and which acts had the effect intended.<sup>4</sup>

<sup>1</sup> *Goodspeed v. East Haddam Bank*, 22 Conn. 530; s. c. 58 Am. Dec. 439. To the same effect is *Western News Co. v. Wilmarth*, 33 Kan. 510.

<sup>2</sup> *Iron Mountain Co. v. Mercantile Co.*, 4 Mo. App. 505. As to the grounds of such an action, see, further,

*Keber v. Mercantile Co.*, 4 Mo. App. 195.

<sup>3</sup> *Buffalo Lubricating Oil Co. v. Standard Oil Co.*, 106 N. Y. 669, *mem.*; s. c. 12 N. E. Rep. 825; affirming s. c. 38 Hun (N. Y.), 634.

<sup>4</sup> *Green v. London Omnibus Co.*, 7 C. B. (N. S.) 290.

## CHAPTER CXXXIX.

### LIABILITY FOR FRAUDS.

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- cers or agents when acting *ultra vires*.
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#### § 6321. Corporations Liable for the Frauds of their Agents.

It was formerly supposed by some judges that corporations were not bound by the *fraud* of their agents. This supposition rested upon the notion that the agent of a corporation could not be deemed its agent for the purpose of committing a fraud, since no such power had been delegated to him. If, therefore, he committed a fraud, it was deemed his own fraud, and not the fraud of his principal.<sup>1</sup> As corporations can only

<sup>1</sup> Ex parte Sheffield, 1 John. (Eng. Ch.) 451; s. c. 28 L. J. (Ch.) 325; Duranty's Case, 26 Beav. 268, 274; Lord Chelmsford, L. C., in Gibson's Case, 2 De Gex. & J. 275, 283. On this ground *shareholders were held to their contracts* in Holt's Case, 22

Beav. 48. In Felgate's Case, 2 De Gex, J. & S. 456, it was ruled that if a person has been *deceived into taking shares* in a company, he has no remedy against the company on that ground; his remedy is against the person who deceived him. Compare

act through the agency of individuals, this doctrine was equivalent to a declaration that while a corporation may be clothed with power to conduct every species of business,—banking, trading, mining, and manufacturing,—it cannot commit fraud or be made liable for fraud. Such a conclusion never had any foundation in juridical sense, and is now thoroughly exploded. Although there remain some doubts as to the rule which obtains in the English courts of chancery,<sup>1</sup> yet it is the settled rule in England in cases at law,<sup>2</sup> and in America, both at law and in equity, that a corporation is responsible for the frauds of its agent when acting within the powers of the corporation, and within the scope of his agency, precisely as a natural person is.<sup>3</sup>

Barry v. Croskey, 2 Johns. & Hem. 1. In *Dodgson's Case*, 3 De Gex & Sm. 85, Vice-Chancellor Knight Bruce held that "directors cannot be the agents of the body of the shareholders to commit a fraud, and that the directors were only liable for their conduct." This opinion was adopted by Vice-Chancellor Parker, in *Bernard's Case*, 5 De Gex & Sm. 289, where he said: "*Dodgson's Case* shows that the directors cannot be the agents of the company to commit a fraud; and therefore, if Mr. Bernard had been induced to take shares by misrepresentations of the directors, there was no reason why he would not be a contributory." But in *Brockwell's Case*, 4 Drew. 205, where the directors of the Royal British Bank, in their published reports, misrepresented the state of the company, and Brockwell, relying upon the truth of these reports, purchased some new shares, which were issued by the company, upon which it was sought to make him a contributory, Vice-Chancellor Kindersley held, principally upon the authority of the *National Exch. Co. v. Drew*, decided in the House of Lords, 2 Macq. 103, that reports made by directors of the company, if they get into circulation,

must be considered as reports of the company; and Brockwell was removed from the list of contributories. *Brockwell's Case* was overruled by Lord Chancellor Campbell and the Lords Justices, in *Mixer's Case*, 4 De Gex & J. 575, which was also a case connected with the Royal British Bank. Lord Campbell, in his judgment, said: "Clearly there was a fraud, a gross fraud, on the part of the directors, and I have no doubt that Mixer was induced by fraud to take his shares. I think, however, that it was a fraud on the part of the directors, which cannot be attributed to the company"; and Mixer was continued on the list of contributories. But this case was in its turn overruled by the House of Lords. Compare *ante*, § 1361, *et seq.*

<sup>1</sup> See the cases cited in the preceding note; also *Green's Brice's Ultra Vires* (2d ed), p. 335, *et seq.*

<sup>2</sup> *Barwick v. English Joint-stock Bank*, L. R. 2 Ex. 259; *Kennedy v. Panama Co.*, L. R. 2 Q. B. 580, 589; *Swift v. Winterbottom*, L. R. 8 Q. B. 244.

<sup>3</sup> *Western Bank of Scotland v. Addie*, L. R. 1 H. L. (Sc.) 145; Lord

**§ 6322. Provided the Agents Acted within the General Scope of their Authority.**—The distinction under this head is, whether the fraud was committed while the agent was acting within the scope of his agency, or whether he stepped aside from his agency and *committed the fraud to accomplish some purpose of his own*; though if he acted within the scope of his agency, and professed to act for his principal, and the defrauded person supposed that he was so acting, his principal will, according to the best opinion, be answerable, although the agent intended merely to accomplish some purpose of his own.<sup>1</sup> A *special authority* to commit the fraudulent act is not necessary to make the corporation answerable for it. It is enough that the agent had authority to transact the business for the corporation, in the course of which he committed the fraud. The decisions establish that a corporation is liable for the consequences of the wrongful acts and omissions of its agent while engaged in the business of his agency, to the same extent and under the same circumstances as natural persons. They equally illustrate the familiar principle that, though a principal is not liable *criminaliter* for the conduct of his agent, yet he is responsible *civiliter* for all acts done by the latter in the course of his employment, and bound by his frauds when so committed, whether the principal concur in them or not. For acts *wholly foreign to the business* in which the agent is engaged, the principal is not

Chelmsford in *Oakes v. Turquand*, L. R. 2 H. L. 325, 344; *National Exch. Co. v. Drew*, 2 Macq. 103; s. c. 1 Pat. (Sc.) App. 482; *Mackay v. Commercial Bank*, L. R. 5 P. C. 394; *Ranger v. Great Western R. Co.*, 5 H. L. Cas. 72; *New Brunswick Co. v. Conybeare*, 9 H. L. Cas. 711; *Brockwell's Case*, 4 Drew. 205; *Ayre's Case*, 25 Beav. 513; *Blake's Case*, 34 Beav. 639; *Ex parte Ginger*, 5 Ir. Ch. (n. s.) 174; *Kennedy v. Panama &c. Co.*, L. R. 2 Q. B. 580, 589; *Barwick v. English Joint-stock Bank*, L. R. 2 Ex. 259; *Swift v. Winterbottom*, L.

R. 8 Q. B. 244; *Griswold v. Haven*, 25 N. Y. 595; s. c. 82 Am. Dec. 380; *Hunter v. Hudson Riv. Iron Co.*, 20 Barb. (N. Y.) 493, 507; *Peebles v. Patapsco Guano Co.*, 77 N. C. 233; s. c. 24 Am. Rep. 447; *McClellan v. Scott*, 24 Wis. 81; *Derrick v. Lamar Ins. Co.*, 74 Ill. 404; *Henderson v. Railroad Co.*, 17 Tex. 560; s. c. 67 Am. Dec. 675; *Butler v. Watkins*, 13 Wall. (U. S.) 456; *Scofield &c. Co. v. State*, 54 Ga. 635.

<sup>1</sup> *Ante*, §§ 4816, 4819, 4824, 4826, 4827, 4841. Compare *post*, § 6331, *et seq.*

bound. But it has been well said that an act cannot be extrinsic to his employment, which is adopted as the means of accomplishing the object of his agency.<sup>1</sup>

§ 6323. **Liable for the Fraud where It Adopts the Contract.**—This rule rests upon another, which at once stands forth as an obvious rule of right, and at the same time indicates the limit of the liability of a corporation for fraud: A corporation cannot, any more than a natural person can, *retain an advantage* which has come to it through fraud, without thereby making itself answerable for the fraud.<sup>2</sup> This being so, it is no answer to an application to be relieved from such a contract for the corporation to say: "It is true you were entrapped into the contract by fraud; fraudulent misrepresentations and concealments were the proximate causes which induced the agreement on your part. But, as this fraud was committed by one not our agent, we claim the advantages accruing from it." This upon its face is absurd. By adopting the contract, the corporation adopts the means by which it was procured. The person who procured it becomes their agent, and the acts by which he procured it become their acts by ratification. "Contracts made for the benefit of another, but without his privity or direction, may be rejected or affirmed at his election. But, by making the election to affirm it, he adopts the agency altogether, as well that which is detrimental as that which is for his benefit. And in seeking to enforce contracts entered into by agents, the principal is subject to have them impeached by any conduct of his

<sup>1</sup> Fishkill Sav. Inst. v. National Bank of Fishkill, 80 N. Y. 162; s. c. 36 Am. Rep. 595, reasoning of Danforth, J. See also New York & C. R. Co. v. Schuyler, 34 N. Y. 30; Holden v. New York & C. Bank, 72 N. Y. 286.

<sup>2</sup> Western Bank of Scotland v. Addie, L. R. 1 H. L. (Sc.) 145, 158. Lord Chelmsford, in Oakes v. Turquand, L. R. 2 H. L. 325, 344; Rives v. Montgomery Plank Road Co., 30

Ala. 92; Henderson v. Railroad Co., 17 Tex. 560; s. c. 67 Am. Dec. 675. See, on the general principle, Atwood v. Wright, 29 Ala. 346; Bowers v. Johnson, 10 Smedes & M. (Miss.) 169; Meadows v. Smith, 7 Ired. Eq. (N. C.) 7; Harris v. Delamar, 3 Ired. Eq. (N. C.) 219; Bridgman v. Green, 2 Ves. Sr. 627; Huguenin v. Baseley, 14 Ves. 273; s. c. 2 White & Tudor Lead. Cas. Eq. 556.

agent which would have had that effect if proceeding from himself. Every species of fraud, misrepresentation, or concealment, therefore, in the agent, affects the principal's right to recover."<sup>1</sup>

§ 6324. **Limitation of This Principle.**—It is submitted, however, that this principle, properly understood, is not that a person or corporation cannot retain an advantage secured by the fraud of *another*; but that a person or corporation cannot retain an advantage secured by the fraud of *its agent*, that is, by the fraud of one who has acted for it, with whom it is in privity, or whose unauthorized acts, done for its benefit, it has adopted. There must be a relation of agency, arising either out of antecedent authorization or subsequent adoption, or at least a privity, between the wrong-doer and the person or corporation receiving the benefit. Such a privity may arise by relation, by an adoption by the corporation of the act of the person who has thus acted for it, provided the corporation have knowledge of the means by which he secured the contract, where the person so acting for it was, when he so acted, a stranger to it. But if the person so acting was, when he so acted, the agent of the corporation, the corporation, by accepting the benefit of his act, adopts also the means by which he procured it, although it may have had no knowledge as to what those means were. To make this plain, let us suppose two cases. The board of directors of a corporation send out an agent to solicit subscriptions to its capital stock. This agent makes false representations, on the faith of which he induces a person to subscribe. The subscriber is entitled to a rescission, although neither the directors nor the body of shareholders either authorized or even knew of the making of the false representations. On the other hand, a mining company is organized and purchases a claim of unknown value. A, who is an entire stranger to the company, believing that its claim is of no value and that its stock is worthless, but desiring to deceive and injure B., makes false representations

<sup>1</sup> 1 Paley on Agency, 324, 325; Min. Co., 7 Gratt. (Va.) 352, 368; quoted in Crump v. United States s. c. 56 Am. Dec. 116.

to B. about the value of the company's claim, on the faith of which B. applies to the secretary of the company for shares and receives an allotment of them. No officer or member of the company knows anything about the fraud which induced B. to make this purchase. Obviously, by taking the purchase-money paid by B. for the shares, they do not adopt the fraud by which he was led into the contract, and, if the shares turn out to be worthless, he cannot have a rescission. He was led into it by a fraud, but it was a fraud of a third person, wholly collateral to the contract, and one which can in no way affect their right to hold him to his bargain. His remedy is an action of deceit against A.

§ 6325. **Negligent Ignorance of Directors does not Relieve Corporation.** — It is a general principle in the law of negligence that where there is a duty of knowing, *i. e.*, a duty of inspection or inquiry, — *negligent ignorance*, in the intendment of law, *is the equivalent of actual knowledge*.<sup>1</sup> This principle has often been applied in the case where it is sought to charge a corporation with responsibility for the frauds of its ministerial officers or agents, committed without the knowledge of its board of directors or trustees. Where the directors are thus negligently ignorant, the reasons which impute liability to the corporation are, in the opinion of some courts, as strong as where they are willfully ignorant. The rule here, as in many other cases, is that where facts and circumstances exist which would put a reasonably prudent man upon inquiry, which inquiry would result in his acquiring knowledge of the transaction, his ignorance will be no defense, but constructive knowledge will be imputed to him: he will be treated as if he had made the inquiry and ascertained the fact.<sup>2</sup>

§ 6326. **View that a Corporation is not Liable for Damages for Deceit.** — The old rule of *M'Manus v. Crickett*,<sup>3</sup> which

<sup>1</sup> *Ante*, § 4108.

<sup>2</sup> *Fishkill Sav. Bank v. National Bank of Fishkill*, 80 N. Y. 162; *s. c.* 36 Am. Rep. 595; *New Hope &c.*

*Bridge Co. v. Phenix Bank*, 3 N. Y. 156. See also *Kennedy v. Green*, 3 Mylne & K. 699.

<sup>3</sup> See *ante*, § 6298.

ascribes the malicious conduct of the agent to the agent himself, and not to his principal, so far lingers in our jurisprudence, that holdings are still met with to the effect that an action at law for damages for a deceit will not lie against a corporation; and that it can only be maintained against the persons who have been guilty of the deceit.<sup>1</sup> The reason ascribed for this conclusion is that the very gist of an action for deceit is evil motive—a guilty *scienter*. This must be positively alleged and proved,<sup>2</sup> and the law will not impute it to a corporation; though, as we have seen,<sup>3</sup> the rule does not apply in other cases of fraud. “The principle,” said Lord Cranworth, “cannot be carried to the wild length that I have heard suggested, namely, that you can bring an action against the company upon the ground of deceit, because the directors have done an act which might render them liable to such an action. That I take not to be the law of the land, nor do I believe that it would be the law of the land if the directors were the agents of some person not a company. The fraud must be a fraud that is either personal on the part of the individual making it, or some fraud which another person has impliedly authorized him to be guilty of.”<sup>4</sup> In a later case Lord Chancellor Chelmsford, after examining the authorities, said: “The distinction to be drawn from the authorities, and which is sanctioned by sound principle, appears to be this: Where a person has been drawn into a contract to purchase shares belonging to a company by fraudulent misrepresentations of the directors, and the directors, in the name of the company, seek to enforce that contract, or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract, because a company cannot retain any benefit which they have obtained through the fraud of their

<sup>1</sup> New Brunswick &c. R. Co. v. s. c. 10 Am. Rep. 551; Nelson v. Luling, 9 H. L. Cas. 711, 740; Conybeare, 4 Jones & S. (N. Y.) 544.  
 Western Bank of Scotland v. Addie, L. R. 1 H. L. (Sc.) 145, 157.

<sup>3</sup> Ante, § 6321.

<sup>4</sup> New Brunswick &c. R. Co. v. Conybeare, 9 H. L. Cas. 711, 740.

<sup>2</sup> Wakeman v. Dalley, 51 N. Y. 27;



agents. But if the person who has been induced to purchase shares by the fraud of the directors, instead of seeking to set aside the contract, prefers to bring an action for damages for the deceit, such an action cannot be maintained against the company, but only against the directors personally.”<sup>1</sup>

§ 6327. **Unsoundness of This Conclusion.**—The slightest reflection will show that a principle of jurisprudence which exempts a corporation from liability for damages for *deceit* committed by its agent, when making or taking contracts in its behalf, and which makes it liable for other malicious torts committed by them when acting in its behalf, is essentially self-contradictory. In fact, the grounds for holding the corporation liable in damages for a deceit practiced by its agents, when negotiating a contract in its behalf, are stronger and clearer than those which hold it liable for *torts simpliciter* maliciously committed by its agents; for in the former case the question can seldom arise whether the agent was in reality acting for his principal. Consider the question for a moment. A man who negotiates with a corporation for a contract must always negotiate with some one or more of its agents, for it can only act through agents. In conducting the negotiation, he knows and feels that he is negotiating *with the corporation*, and not with the agent personally. He therefore accepts the statements made by the agent, as statements made to him by the corporation, and supported by its reputation and pecuniary responsibility; and he does not usually, in accepting such statements, take into consideration the character for truthfulness of the particular agent making them. Moreover, the rule which makes an individual answerable in damages for deceits committed by himself personally, and which exempts a corporation, which can never act personally, but must always act through others, from liability for damages, is fundamentally unjust, because it creates an exemption in favor of aggregate money and power, which a single individual does not enjoy. It is, therefore, contrary to the general doctrines expounded

<sup>1</sup> *Western Bank of Scotland v. Addie*, L. R. 1 H. L. (Sc) 145, 157.

by the cases cited in this title, and also fundamentally unsound and unjust, to hold, as modern courts even have held, that an incorporated company cannot be called upon to answer, in an action of deceit, for false representations made by its employés, unless it has *authorized* the false representations.<sup>1</sup> But if, as was probably the case in the decision last cited, the representation made by the agent lies not only outside of his express authority, but also outside of his implied and ostensible authority,—then the corporation will not be liable to make it good by way of damages.<sup>2</sup> In a case where this question

<sup>1</sup> *Houston &c. R. Co. v. McKinney*, 55 Tex. 176.

<sup>2</sup> The case was that the agent of a railway company, acting under a general power to procure a right of way for the railroad, promised to locate a depot at a particular place, in consideration of which the plaintiff gave to the company a deed of a right of way over his land. In an action for damages for the fraudulent representation, the petition did not aver that the agent had authority to locate depots; and the court held that the authority to procure a right of way did not, as a matter of law, imply an authority to locate depots, or to make promises as to where such depots should be located. They therefore held that the petition did not state a cause of action for damages. *Houston &c. R. Co. v. McKinney*, 55 Tex. 176. The decision seems to be unsound in overlooking the fact, elsewhere considered (*ante*, § 5303), that the company *accepted the benefit* of the fraud of its agent, by occupying the right of way with its railroad track. In *East Line &c. R. Co. v. Garrett*, 52 Tex. 133, the plaintiff brought a similar action for damages against a railroad company, caused by the false and fraudulent representations of its agents, to the effect that they would locate a depot on the plaintiff's land,

whereby the plaintiff was induced to convey to the railroad company a right of way over his land. He was permitted to testify that *four members of the board of directors* of the company had told him, before he made the conveyance to the company, that he should have a depot on his land, and that one of them stated, before the execution of the deed, that the company had agreed to give him a depot. This was held error, for the following reasons, given in the opinion of the court by Bonner, J.: "The testimony does not disclose the number or the powers of the directors, or that they had authority to bind the company by any such declarations as those imputed to them; neither is it shown that these declarations were made when they were in the performance of any act authorized by the company, so as to make them a part of the *res gestæ*." This language does not disclose the true reason supporting the conclusion of the court, which was that the testimony did not show that the directors, in making the representation, were *acting together as a board*,—the rule being, as already seen (*ante*, § 3906), that the acts and declarations of individual directors are not in general binding on the corporation. What the court means by the use of the expression "in the per-

was well reasoned, it was said: "If a corporation be incapable of committing deceit, the safety of third persons with whom it deals by agent requires that it be held liable in the proper action for the deceit of its agent perpetrated in such dealing."<sup>1</sup>

§ 6328. **Liable for Fraud and Deceit of its Agent in Selling its Goods or Lands.**—The conclusion of the preceding section will be the more obvious, if we take the case where a manufacturing or mercantile corporation sells its *goods* through an agent, as it must, and the agent, for the purpose of effecting the sale, makes deceitful representations to the vendee. Here, upon principles of the most obvious justice, the corporation is answerable for the fraud or deceit resorted to by its agent in order to effect the sale, exactly as a natural person would be answerable.<sup>2</sup> So, it has been held in a case where the defendant was a corporation, that an action for *deceit* will lie for the breach of an *express* contract of *warranty*, but not for the breach of an implied contract of *warranty*,<sup>3</sup>—the action proceeding *ex delicto*, founded on the *false representation*

formance of any act authorized by the company," cannot be divined; since, in regard to such matters, the directors are the company, and matters of that kind are seldom, if ever, expressly authorized by the stockholders in general meeting.

<sup>1</sup> Erie City Iron Works v. Barber, 106 Pa. St. 125; s. c. 51 Am. Rep. 508.

<sup>2</sup> Peebles v. Patapsco Guano Co., 77 N. C. 233; s. c. 24 Am. Rep. 447; Erie City Iron Works v. Barber, 106 Pa. St. 125; s. c. 51 Am. Rep. 508. On the other hand, false representations made by the seller of an article to the promoters of a corporation organized to sell it, are, in effect, made to the corporation, and afford a foundation for an action on the case by the corporation. Iowa Economic Heater Co. v. American Economic Heater Co., 32 Fed. Rep. 735.

<sup>3</sup> Erie City Iron Works v. Barber,

102 Pa. St. 156. Compare, as to the remedy at common law for a breach of an express contract of warranty, Vanleer v. Earle, 26 Pa. St. 277. Reviewing the question in relation to the general law of warranty and without special reference to corporations, it has been held that, in an action against a corporation for deceit grounded on alleged false representations made by its agent in the sale of goods of its manufacture for a particular purpose, there can be no recovery without proof of bad faith, or of the absence of reasonable ground of belief in the representations made. In other words, the court take the well-known distinction between *deceit* and *warranty*, express or implied, and between *deceit* on the one hand and *mistake* on the other, which is often a ground for equitable relief. Erie City Water Works v. Barber, *supra*.

embodied in the contract of warranty. So, it has been held that an action for damages will lie against a corporation, grounded on fraudulent representations made by its agent, whereby the plaintiff was induced to become the purchaser of certain *land* from the corporation.<sup>1</sup>

§ 6329. **Whether Liable for Deceit of Officers or Agents when Acting Ultra Vires.**—There is a view that a corporation is not answerable for the *deceit* of its officers committed when attempting to make a contract in its behalf which is beyond the scope of its corporate powers. Thus, the selling of railroad bonds upon commission is not within the scope of the corporate powers of a *national bank*. Therefore, according to this view, no action lies against such a corporation for false representations made by its teller to induce the plaintiff to buy such bonds of the corporation.<sup>2</sup> But we have already had occasion to consider the general principle that it is no defense, by a corporation, to an action for damages for a tort, that the transaction or matter out of which the tort arose was something in which the corporation had no power to engage; and that the contrary doctrine would exempt corporations from liability for torts entirely, since all torts are necessarily *ultra vires*.<sup>3</sup> The above decision seems, therefore, to be out of line with the modern authority, and to involve a conclusion which is doubtful, to say the least.

§ 6330. **One Person, Officer in Two Corporations, Committing Fraud in One for Benefit of the Other.**—Where a *cashier of a national bank*, who was at the same time *treasurer of a savings bank*, took bonds belonging to the savings bank, and, as cashier and manager of the national bank, pledged them as security for an advance to the national bank, and they were afterwards sold by the pledgees and the pro-

<sup>1</sup> *Lynch v. Mercantile Trust Co.*, 18 Fed. Rep. 486. The question of any exemption from liability, growing out of the fact of the defendant being a corporation, does not appear to have been considered.

<sup>2</sup> *Weckler v. First Nat. Bank*, 42 Md. 581; s. c. 20 Am. Rep. 95.

<sup>3</sup> *Ante*, § 6279, *et seq.*

ceeds credited to the national bank,—it was held that the national bank was liable to the savings bank for the bonds, although the directors of the national bank were ignorant of the transaction, it appearing that, by the slightest inquiry, they might have become aware of it.<sup>1</sup>

§ 6331. **Liability of an Incorporated Carrier for Fraudulent Bills of Lading.**—On a question which, considered in the light of the foregoing principles, ought to be absolutely plain and free from all doubt, especially in the interests of commerce, to say nothing of the common notions of justice,—there is an unfortunate difference of opinion among the American courts. This difference of opinion relates to the question whether, in case the agent of an incorporated carrier issues a *fraudulent bill of lading*, representing that the carrier has received for shipment goods which he has not received, and the shipper of the goods, by means of the well-known negotiable qualities of a bill of lading,<sup>2</sup> procures from an innocent banker an advance of money upon his draft with the bill of lading deposited as collateral security,—the carrier will be answerable to the banker for what he has lost in consequence of the fraud of the carrier's agent concurring with the fraud of the shipper. Before proceeding to notice this difference of opinion, it may be observed that, *as between the original parties* to a transaction,—the shipper on the one hand and the owner of the vessel, or the railway company, on the other hand,—there will be *no estoppel* against the latter, from explaining the real character of the transaction. In such a case, it has been held that the carrier is only liable for so much of the goods as he *actually receives*, or for so much as has been actually delivered to someone authorized to receive

<sup>1</sup> Fishkill Sav. Inst. v. National Bank of Fishkill, 80 N. Y. 162; s. c. 36 Am. Rep. 595.

<sup>2</sup> By statute in England, and in many of the American States, *bills of lading are negotiable*. In the absence

of statute, the courts constantly take judicial notice as to the manner in which they are employed as instruments of commerce, and ascribe to them either a negotiable or *quasi-negotiable* quality.

goods on his account.<sup>1</sup> But where the question arises as between the carrier and an innocent third person,—generally a banker,—who has advanced money on the faith of the representation made by the carrier through his agent in the bill of lading, and on the faith of the negotiable or *quasi-negotiable* qualities of such an instrument, the better view, supported by considerable authority, is that the carrier is liable to make good to the innocent assignee of the bill of lading the representations made therein, and that the bill is conclusive against the carrier in respect of the quantity of goods.<sup>2</sup> Proceeding upon these views, the Supreme Court of Kansas have held that where the agent of a railway company, authorized to receive grain for shipment over its road, and to issue, in the name of the corporation, a bill of lading for each consignment received, *issues two original bills* of lading for a single consignment, and the two bills are assigned to a bank which advances money thereon in good faith, and the shipper is insolvent and has absconded,—the railway company will be *estopped*, by its statement and promise in each bill of lading, to deny that it has received the grain mentioned therein.<sup>3</sup>

**§ 6332. Contrary View that the Carrier is not Liable where the Goods are not Received.**—A contrary view has obtained to a considerable extent, that the carrier is not liable for the fraud of his agent, if in point of fact the goods have never been received for transportation. The courts which take this view proceed upon the theory that, as the corporation empow-

<sup>1</sup> *Dean v. King*, 22 Ohio St. 118. As between the parties to a bill of lading, *parol evidence* may be given to contradict or explain it, just as in the case of a receipt for the payment of money. *Portland Bank v. Stubbs*, 6 Mass. 422; *s. c.* 4 Am. Dec. 151; *Sears v. Wingate*, 3 Allen (Mass.), 103.

<sup>2</sup> *Sioux City & c. R. Co. v. First Nat. Bank*, 10 Neb. 556; *s. c.* 35 Am. Rep. 488; *Dickerson v. Seelye*, 12 Barb. (N. Y.) 99; *Wichita Sav. Bank v. Atchison & c. R. Co.*, 20 Kan. 519;

*Armour v. Michigan Cent. R. Co.*, 65 N. Y. 111; *s. c.* 22 Am. Rep. 603. The opinion in this case is an elaborate and learned one by Mr. Commissioner Dwight, for many years dean of the law school of Columbia College. Mr. Commissioner Earl dissented. The court denied the authority of the leading English case on this question, *Grant v. Norway*, 10 C. B. 665.

<sup>3</sup> *Wichita Sav. Bank v. Atchison & c. R. Co.*, 20 Kan. 519.

ered the agent only to sign bills of lading *where the goods were received*, when the agent signed bills of lading without the goods being received, he did it for himself and his confederate in the fraud, and not for the corporation.<sup>1</sup> The doctrine seems to take root in a case in the English Court of Common Pleas, where it was held that the master of a ship, signing a bill of lading for goods which have never been put on board, is not to be considered the agent of the owner of the ship in that behalf, so as to make the latter responsible to an indorsee of the bill for value.<sup>2</sup> This decision has been followed in England in other cases, which hold that a bill of lading, so signed, is not conclusive against the owner as to the *quantity* of goods or cargo shipped.<sup>3</sup> The Parliament of England partially reversed this iniquitous rule, by a statute<sup>4</sup> declaring that "every bill of lading, in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment *against the master or other person signing the same*, notwithstanding that such goods or some part thereof may not have been so shipped."<sup>5</sup> This statute appears to leave untouched the rule, so far as the owner of the vessel is concerned, where he himself does not sign the bill of lading. The Supreme Court of the United States fell in with the English rule, and, notwithstanding its gross and bald injustice, have persistently reaffirmed it to the present time.<sup>6</sup> Other American courts have fallen into the same doctrine.<sup>7</sup>

**§ 6333. The Injustice and Bad Policy of These Decisions.**  
 Since the decision in the great case of *Lickbarrow v. Mason*,<sup>8</sup>

<sup>1</sup> Among these cases is that of *Baltimore &c. R. Co. v. Wilkens*, 44 Md. 11; s. c. 22 Am. Rep. 26.

<sup>2</sup> *Grant v. Norway*, 10 C. B. 665.

<sup>3</sup> *Jessell v. Bath*, L. R. 2 Ex. 267; *Brown v. Powell &c. Co.*, L. R. 10 C. P. 562.

<sup>4</sup> 18 & 19 Vict., ch. 111.

<sup>5</sup> So stated in *Jessel v. Bath*, L. R. 2 Ex. 267.

<sup>6</sup> *Hickox v. Buckingham*, 18 How. (U. S.) 182; *Friedlander v. Texas &c. R. Co.*, 130 U. S. 416.

<sup>7</sup> *Sears v. Wingate*, 3 Allen (Mass.), 103; *The Loon*, 7 Blatchf. (U. S.) 244; *Fellows v. Steamer Powell*, 16 La. An. 316; s. c. 79 Am. Dec. 581; *Dean v. King*, 22 Ohio St. 118; *Louisiana Nat. Bank v. Laveille*, 52 Mo. 380.

<sup>8</sup> 2 T. R. 63, 75.

it has not been doubted that *bills of lading are symbols of the property* which they represent, and that, while not being strictly negotiable, they possess many of the qualities of negotiable instruments. They are used in moving articles of commerce, by drawing drafts against the consignment and annexing the bills of lading as collateral security to the drafts, and procuring bankers to discount the drafts, on the faith that the bill of lading so drawn carries with it a transfer of the title to the property mentioned therein. Vast sums of money are every day advanced upon bills of lading by bankers in England and America. If the principle of the foregoing decisions is sound, these bankers have, in many cases, little better security than the honesty of the thousand agents of railway companies and other carriers who are empowered by their principals to sign bills of lading. The bankers cannot watch these agents, and cannot ordinarily know whether the property which the bill of lading represents the carrier as having received, has actually been received by him or it. The known and universal custom of commerce being for bankers and consignees to advance money upon the faith of bills of lading, and under the rule of law that a bill of lading is the symbol of the property which has been shipped, and that a transfer of it transfers title to the property,—the bill of lading becomes itself a representation, put forth to the world by the carrier, through his agent appointed to draw and sign bills of lading, that the property therein described has been received by the carrier for shipment as therein described. If the bill of lading is false by reason of the dishonesty of the carrier's agent, shall the loss fall upon the carrier, or upon the innocent consignee or banker who has thereby been defrauded? Shall not a principle, frequently resorted to for the sake of justice, be called into play, that where one of two innocent parties must suffer through the fraud of a third, the loss shall fall rather on the party who empowered the third person to commit the fraud. The innocent consignee or banker did not appoint the carrier's agent, cannot watch him, or control him; and on what principle ought he to be held as guarantor for



his honesty? Some one must stand as guarantor for his honesty and good faith in the transaction of his business; and shall that person be the public, or his principal who has appointed him, and who has it in his power to exact from him security for the faithful performance of those duties? These questions answer themselves. The rule of law which we are considering, denied, we are glad to say, by several enlightened American courts, is so iniquitous that it rests on the verge of wickedness.

§ 6334. Cases to Which this Principle does Not Extend.—

But where the wrong complained of consists in a fraudulent or negligent misrepresentation, if the subject-matter of the inquiry, or if the statement itself is such that there is *no presumption* based upon the course of business, or upon the powers usually exercised by such agents, *of an authority* on the part of the agent to bind his principal with reference to the particular statement, then the corporation will not be bound. Thus, there is no presumption that the *cashier* of a bank has authority to bind the bank by statements made as to the solvency of its customers; and if such an agent makes a negligently untrue or willfully false statement of this kind, to a person applying to him for information, whereby such person sustains damage,—the latter cannot maintain an action against the bank therefor.<sup>1</sup> So, if the agent of a corporation, who has been sent out to procure subscriptions to its capital stock, makes representations contrary to the interest and duty of the corporation, no presumption exists that he had authority to make them, and the fact that a person subscribed for shares on the faith of them will not relieve him from his contract of subscription.<sup>2</sup> So if a draft is deposited with a bank for collection, and the bank, without special authority from the holder of the draft, employs an

<sup>1</sup> *Ante*, § 4782; *Horrigan v. National Bank*, 5 Rep. 188.

<sup>2</sup> *Custar v. Titusville &c. Co.*, 63 Pa. St. 381. See also *Litchfield Bank v. Peck*, 29 Conn. 384; *Litchfield*

*Bank v. Church*, 29 Conn. 137, 150; *Center Turnp. Co. v. McConaby*, 16 Serg. & R. (Pa.) 140; *Graff v. Pittsburgh &c. R. Co.*, 31 Pa. St. 489. Compare *ante*, § 1360, *et seq.*

attorney to bring suit thereon, or to compromise with the party liable thereon, the bank will not be liable, in the absence of a special authorization, for *the president's representations* in the matter, unless it takes a benefit therefrom, — the reason being that the bank has no power to employ the attorney to bring suit or to compromise the claim.<sup>1</sup>

**§ 6335. Remedies against Corporations Committing Frauds.**

Under any theory, the liability of a corporation for fraud extends to an obligation to *return what it has acquired* through the fraud of its agent, with interest. This may be compelled by an action of *assumpsit* at common law, or by an action of that nature under the modern codes of procedure, for *money had and received*;<sup>2</sup> in the view of some courts, though not of others,<sup>3</sup> by a common-law action for *damages* for the fraudulent representations or *deceit* of the agent of the corporation acting in its behalf, whereby the plaintiff was entrapped into the contract or course of action complained of;<sup>4</sup> by a *bill in equity* for the *rescission* of the contract, for a restitution of the money which the corporation has acquired by the fraud,<sup>5</sup> and for an *injunction* against the bringing of suits on such contract.<sup>6</sup> On the other hand, where the fraud had been prac-

<sup>1</sup> Ryan *v.* Manufacturers' &c. Bank, 9 Daly (N. Y.), 308.

<sup>2</sup> *Ante*, § 6004.

<sup>3</sup> *Ante*, § 6326.

<sup>4</sup> Reasoning in Scofield &c. Co. *v.* State, 54 Ga. 635; and in New York &c. R. Co. *v.* Schuyler, 38 Barb. (N. Y.) 534.

<sup>5</sup> Bwlch-y-Plwm Lead Mining Co. *v.* Baynes, L. R. 2 Ex. 324; Glamorganshire Iron &c. Co. *v.* Irvine, 4 Fost. & Fin. 947; Davis *v.* Dumont, 37 Iowa, 47; Water Valley Man. Co. *v.* Seaman, 53 Miss. 655; Occidental Ins. Co. *v.* Ganzhorn, 2 Mo. App. 205; Crump *v.* United States Min. Co., 7 Gratt. (Va.) 352; *s. c.* 56 Am. Dec. 116; Rives *v.* Montgomery &c. R. Co., 30 Ala. 92; New Brunswick &c. R. Co. *v.* Muggeridge, 1 Drew. & Sm. 363.

<sup>6</sup> Smith *v.* Reese River Co., L. R. 2 Eq. 263; *s. c.* L. R. 4 H. L. 64; Henderson *v.* Lacon, L. R. 5 Eq. 249; Directors *v.* Kisch, L. R. 2 H. L. 99. Practice in such cases, Thorpe *v.* Hughes, 3 Mylne & C. 742, where an injunction was denied; Askew's Case, L. R. 9 Ch. 664, where the shares the purchase of which, it was alleged, was brought about by the fraud of the company's agent, having been fully paid up, it was ruled that the merits ought to be tried at law, in an action to recover back the purchase-money, and not by a motion in chancery, under section 35 of the Companies Act, 1862, to have the plaintiff's name excluded from the list of shareholders.

ticed by an agent of the corporation to the prejudice of the corporation and of its stockholders, the corporation, suing for itself and as the representative of its stockholders, may have an appropriate relief in equity, — as, for instance, in the case of an issue of *spurious stock*, by having the stock *canceled* as a *cloud upon title*,<sup>1</sup> — leaving the defrauded taker of the spurious shares to his action for damages.<sup>2</sup>

<sup>1</sup> New York &c. R. Co. v. Schuyler, 34 N. Y. 30. Compare *ante*, 17 N. Y. 592; s. c. on a subsequent appeal, § 1496.

<sup>2</sup> *Ante*, § 1493.

## CHAPTER CXL.

### LIABILITY FOR NEGLIGENCE.

ART. I. IN THE PERFORMANCE OF DUTIES IMPOSED BY LAW.  
§§ 6339-6353.

II. IN THE PERFORMANCE OF DUTIES VOLUNTARILY  
ASSUMED. §§ 6357-6366.

#### ARTICLE I. IN THE PERFORMANCE OF DUTIES IMPOSED BY LAW.

SECTION	SECTION
6339. Corporations liable for negligence.	6346. Other illustrations—damages denied.
6340. General theory of civil liability for negligence.	6347. Application of the doctrine of <i>respondeat superior</i> .
6341. Cases not resting in contract—grounds of liability in.	6348. Not liable for negligence of independent contractors.
6342. Legislative authorization no excuse for negligent injuries.	6349. Cannot escape liability for negligent performance of public duties on this ground.
6343. Damages awarded upon the taking of private property for public use do not satisfy subsequent negligent injuries.	6350. Liable to servants for negligence of vice-principal.
6344. Nor does the purchase-money where the land is voluntarily conveyed.	6351. Contracts with employes releasing damages.
6345. Illustrations of the foregoing doctrines.	6352. Liability for negligence under statutes.
	6353. Negligence in the performance of <i>ultra vires</i> acts.

§ 6339. **Corporations Liable for Negligence.**—A corporation aggregate, having, or supposed to have, a corporate fund, is liable, in an action at common law, for *negligence* in the performance of its duties, in the conduct of its business, or in the care of its property, just as an individual is.<sup>1</sup>

<sup>1</sup> Fowle v. Alexandria, 3 Cranch (U. S.), 70, and other cases cited in this chapter.

## § 6340. General Theory of Civil Liability for Negligence.—

The term "*negligence*," in its juridical sense, indicates something more than a want of care; it is employed to designate a *failure of duty*, which generally, though not always, happens through carelessness or inadvertence. It means a failure or violation of some duty imposed by law under given conditions. Duties of this nature are of two classes,—those springing out of *social relations*, and those springing out of relations which the parties have voluntarily assumed by *contract*. The term is not used to designate those failures of duty which consist of direct breaches of contract. For such injuries redress is sought in an action founded on the contract; but for what are termed negligent injuries, the action is *ex delicto*. This can be quickly illustrated by a few instances. I am an adjoining occupier of B. I owe B. the duty of not suffering the sewage from my premises to escape into his well.<sup>1</sup> I am a traveler approaching a railway crossing. The company owes me the duty of making some signal to warn me of the approach of its trains, so that I shall not get run over if I attempt to cross.<sup>2</sup> My cattle have escaped upon a railroad track. The company owes me the duty of not running over them if it can be avoided by the exercise of ordinary care.<sup>3</sup> Two travelers approach each other on the highway. Each owes to the other the duty of using ordinary care and skill so to direct his vehicle as not to produce a collision.<sup>4</sup> In each of these cases, the parties, pursuing the ordinary affairs of life, have found themselves placed in certain relations to each other, in which the law, as well as considerations of social duty, imposes upon them certain obligations, for the violation of which an action *ex delicto* may be maintained; and the violation of duty is called *negligence*. In the second class of cases, persons assume towards each other certain relations by contract; and when the relation is once assumed, the law

<sup>1</sup> *Humphries v. Cousins*, 2 C. P. Co., 3 Ohio St. 172; s. c. 62 Am. Dec. Div. 239. 246; 1 Thomp. Neg. (1st ed.), 472.

<sup>2</sup> *Bilbee v. London & C. R. Co.*, 18 C. B. (N. S.) 584, 592.

<sup>4</sup> See, generally, 1 Thomp. Neg. (1st ed.), p. 380, *et seq.*

<sup>3</sup> *Kerwhacker v. Cleveland & C. R.*

steps in and declares certain duties which the contracting parties owe to each other by reason of the relation. Thus, a carrier agrees to transport my goods to New York. The law declares that he is liable as an insurer for their safe delivery, saving losses which are ascribed to the act of God and the public enemy.<sup>1</sup> A railway company sells me a ticket to Chicago. The law imposes upon the company the duty of exercising the utmost care and foresight to transport me safely.<sup>2</sup> I assume the office of a bank director without compensation. The law steps in and declares me liable to the bank and to the stockholders only for gross negligence, non-attendance, and want of attention to the affairs of the bank.<sup>3</sup> Thus, it is seen that whether the relation is an accidental one, or whether it has been voluntarily assumed by contract for a consideration, the law imposes certain duties, the failure to perform which is called in law *negligence*.

**§ 6341. Cases not Resting in Contract — Grounds of Liability in.** — As to the first class of duties, there is a fundamental maxim, *Sic utere tuo ut alienum non lædas*, which may be translated, So use your own property as not to injure the property of your neighbor. But the principle which lies at the foundation of the maxim is broader than the maxim itself. Every man must so use his own property, conduct his own business, govern his own person and those under his control, as not to injure the persons, the property, or the reputation of others. Considered in the light of a mere civil obligation, that is, without reference to the criminal law, this obligation is of precisely the same force in the case of a private corporation as in the case of a natural person.<sup>4</sup> Thus, although the legislature has authorized a corporation to construct a certain

<sup>1</sup> *Forward v. Pittard*, 1 T. R. 27; *Read v. Spaulding*, 30 N. Y. 630; *s. c.* 86 Am. Dec. 426; *Nugent v. Smith*, 1 C. P. Div. 423.

<sup>2</sup> 2 Kent's Com. 602; *Gardner, J.*, in *Hegeman v. Western R. Corp.*, 13 N. Y. 9, 24; *s. c.* 64 Am. Dec. 517; *Thomp. Carr. Pass.* 169.

<sup>3</sup> *Ante*, § 4100, *et seq.*

<sup>4</sup> *Hooker v. New Haven &c. Co.*, 15 Conn. 312, 323; *Lyman v. White River Bridge Co.*, 2 Aik. (Vt.) 255; *s. c.* 16 Am. Dec. 705; *State v. Vermont Cent. R. Co.*, 27 Vt. 103, 107.

railway, yet if, in blasting rocks in the grading of its roadbed, it casts stones upon the land of an adjacent proprietor, it must pay him damages therefor.<sup>1</sup> So, where a railway company has been clothed by the legislature with power to take materials along the line of its railway for the construction of its road, this is held to be a power in derogation of the rights of land-owners, which the legislature can only confer in virtue of the right of eminent domain, and because it is necessary to the reasonable exercise of sovereignty. In the exercise of this right the contractor building the road for the company is the agent of the company, and if he exercises it unreasonably, the company must pay damages to the injured land-owner.<sup>2</sup>

§ 6342. **Legislative Authorization No Excuse for Negligent Injuries.** — Although damages cannot, as a general rule, be recovered for injuries sustained by a person in consequence of the due and proper exercise by a corporation of the franchises granted it by the legislature, upon the obvious principle that an action will not lie for the doing of an act authorized by law,<sup>3</sup> yet this rule is so far limited that some

<sup>1</sup> *Sabin v. Vermont Cent. R. Co.*, 25 Vt. 363.

<sup>2</sup> *Vermont Cent. R. Co. v. Baxter*, 22 Vt. 365.

<sup>3</sup> *British Cast-Plate Manufacturers v. Meredith*, 4 T. R. 794; *Schuylkill Nav. Co. v. McDonough*, 33 Pa. St. 73; *Bordentown &c. Turnp. Co. v. Camden &c. R. Co.*, 17 N. J. L. 314; *Hatch v. Vermont &c. R. Co.*, 25 Vt. 49; *Sutton v. Clarke*, 6 Taunt. 29; *Boulton v. Crowther*, 2 Barn. & C. 703; *Pollock, C. B.*, in *Whitehouse v. Birmingham Canal Co.*, 25 L. J. (Ex.) 27; *Henry v. Pittsburgh &c. Bridge Co.*, 8 Watts & S. (Pa.) 85; *Shrunk v. Schuylkill Nav. Co.*, 14 Serg. & R. (Pa.) 71; *Com. v. Fisher*, 1 Penr. & W. (Pa.) 462, 467; *Monongahela Nav. Co. v. Coons*, 6 Watts & S. (Pa.) 101; *Susquehanna Canal Co. v. Wright*, 9 Watts & S. (Pa.) 9; s. c.

42 Am. Dec. 312; *Lansing v. Smith*, 8 Cow. (N. Y.) 146; *Cleveland &c. R. Co. v. Speer*, 56 Pa. St. 325, 334; s. c. 94 Am. Dec. 84; *Stowell v. Flagg*, 11 Mass. 364; *Stevens v. Middlesex Canal*, 12 Mass. 466; *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35; *Hollister v. Union Co.*, 9 Conn. 436; s. c. 25 Am. Dec. 36; *Burroughs v. Housatonic R. Co.*, 15 Conn. 124; s. c. 38 Am. Dec. 64. In the leading case of *Mersey Docks Trustees v. Gibbs*, in the House of Lords, L. R. 1 H. L. 93, 112, Mr. Justice Blackburn, in giving the opinion of the judges, said: "If the legislature directs or authorizes the doing of a particular thing, the doing of it cannot be wrongful; if damage results from the doing of that thing, it is just and proper that compensation should be made for it, and that is

courts understand it to mean no more than was held in *Rex v. Pease*,<sup>1</sup> that a corporation may *justify*, in a *criminal prosecution* under authority of a statute, the doing of an act which otherwise would amount to a *public nuisance*. "It is by no means true," said Green, C. J., "that an act constituting a nuisance must necessarily be in itself unlawful. On the contrary, acts which in themselves are perfectly lawful may, and frequently do, in their consequences, work actionable injuries to others. To construct a mill-dam upon one's own property is a perfectly lawful act; but if, by means of such dam, the natural current of the water is obstructed and thrown back upon the land of another, it becomes actionable as a nuisance. . . . It is well settled that an injury to private property resulting from an act authorized by law, and done in pursuance of the statute, cannot be justified unless the act were done by one acting as an agent, or in behalf of government, or to affect a public interest; and the statute is no bar to an action for damages resulting from such act, unless it provide a different mode of compensation."<sup>2</sup> It is further limited so far that, in many cases where the legislature authorizes the doing of an act by an individual or a corporation, for his or

generally provided for in the statutes authorizing the doing of such things. But no action lies for what is *damnum sine injuria*; the remedy is to apply for compensation under the provision of the statutes legalizing what would otherwise be a wrong. This, however, is the case, whether the thing is authorized for a public purpose or a private profit. No action will lie against a railway company for erecting a line of railway authorized by its acts, so long as the directors pursue the authority given them, any more than it would lie against the trustees of a turnpike road for making their road under their acts; though the one road is made for the profit of the shareholders in the company, and the other is not. The principle is,

that the act is not wrongful, not because it is for a public purpose, but because it is authorized by the legislature."

<sup>1</sup> 4 Barn. & Adol. 30.

<sup>2</sup> *Delaware &c. Canal Co. v. Lee*, 22 N. J. L. 243, 247 (qualifying the language of Nevius, J., in *Van Schoick v. Delaware &c. Canal Co.*, 20 N. J. L. 249). This view of the law is supported by *Sinnickson v. Johnson*, 17 N. J. L. 129; *s. c.* 34 Am. Dec. 184, *Dayton and Nevius, J.J.*, giving forcible opinions. Compare *Rogers v. Bradshaw*, 20 Johns. (N. Y.) 735; *Stevens v. Middlesex Canal*, 12 Mass. 466; *Shrunk v. Schuylkill Nav. Co.*, 14 Serg. & R. (Pa.) 71; *Com. v. Fisher*, 1 Penr. & W. (Pa.) 462.



its private gain or benefit, without providing for the assessment or payment of possible damages which may thereby result to individuals, the courts will not infer that the legislature intended that the citizen should be damnified, even for the public benefit, without redress, but will imply an obligation on the part of the person or corporation for whose benefit the injury has been done, to pay such damages. The grantee is deemed to accept such a grant subject to the maxim, *Sic utere tuo ut alienum non lædas*.<sup>1</sup> One court has gone further, and has declared,—the constitution of the State being silent upon the question, and the court understanding the fifth amendment to the Federal constitution to be restrictive upon the States merely,—that the government cannot damnify private persons, even for the public benefit, without making compensation.<sup>2</sup> So, where a canal company's act, after providing for the purchase by the company of subjacent mines, on notice by the owner of an intention to work them,

<sup>1</sup> *Crittenden v. Wilson*, 5 Cow. (N. Y.) 165; s. c. 15 Am. Dec. 462, *per* Sutherland, J.; *Hooker v. New Haven & Co.*, 14 Conn. 146; s. c. 36 Am. Dec. 477; *Baltimore & C. R. Co. v. Reaney*, 42 Md. 117; *Delaware & Canal Co. v. Lee*, 22 N. J. L. 243; *Gardner v. Newburgh*, 2 Johns. Ch. (N. Y.) 162; s. c. 7 Am. Dec. 526; *Sinnickson v. Johnson*, 17 N. J. L. 129. *Contra*, *Dodd v. Williams*, 3 Mo. App. 278. Thus, a statute authorized John Denn to build a dam across a navigable creek, for his own private advantage. This protected him against an indictment for obstructing the navigation, but not against an action for damages for flowing the lands of an adjacent owner. He proceeded to execute the power conferred upon him by the statute, at the peril of paying the damages he might thereby cause to others. *Sinnickson v. Johnson*, *supra*.

<sup>2</sup> *Ten Eyck v. Delaware & Canal* 4972

*Co.*, 18 N. J. L. 200; s. c. 37 Am. Dec. 233. In *Sinnickson v. Johnson*, 17 N. J. L. 129, 146; s. c. 34 Am. Dec. 184, Dayton, J., declared the fifth amendment to the Federal constitution, though not binding on the States (*Barron v. Baltimore*, 7 Pet. (U. S.) 243; *Livingston v. Moore*, 7 Pet. (U. S.) 469, 551), "operative as a principle of universal law." The same view of the subject was taken by the Supreme Court of North Carolina, in the absence of a similar constitutional provision. *Raleigh & C. R. Co. v. Davis*, 2 Dev. & B. (N. C.) 451. Under like circumstances, the Supreme Court of South Carolina, by a divided court, ruled that compensation was not indispensable. *State v. Dawson*, 3 Hill (S. C.), 100. In a leading case in Vermont, *Hatch v. Vermont & C. R. Co.*, 25 Vt. 49, Redfield, J., expressed the view that the decision of the minority of the South Carolina court, as expressed by Richardson, J., is the better view.

contained a clause reserving to the owner the right to work the mines, "provided that in working such mines no injury be done to the said navigation," this was held to mean no unnecessary injury,—that is, no injury except such as might arise from a failure to work the mines in the usual and customary manner.<sup>1</sup>

**§ 6343. Damages Awarded upon the Taking of Private Property for Public Use do not Satisfy Subsequent Negligent Injuries.**—But where the statutes authorizing the taking of private property by corporations, for the construction of works of public utility, provide a specific procedure for the assessment and payment of the damages thereby inflicted upon land-owners, if the land-owners bring subsequent actions for damages, the courts are, for the most part, careful to distinguish between damages which were necessarily attendant upon the construction of the work, and which are hence justly presumed to have been taken into consideration by the commissioners or jury in assessing the plaintiff's prospective damages before the work was commenced, and subsequent damages arising from negligence, or other wrong in the manner of conducting or maintaining the work, and which the commissioners or jury, in making the original assessment of damages, could not have anticipated or fairly estimated.<sup>2</sup> The rule generally agreed upon is, that no common-law action can be maintained for any injury resulting from the due, proper, and careful prosecution of the work authorized by the company's charter; the remedy must be sought in the mode pointed out in the charter itself; but that an action at common law will lie for injuries which are the result of an abuse of the company's powers, or of a negligent execution of them.<sup>3</sup>

<sup>1</sup> *Dudley Canal Nav. Co. v. Grazebrook*, 1 Barn. & Adol. 59. An elaborate exposition of a similar statute will be found in *Dunn v. Birmingham Canal Co.*, L. R. 8 Q. B. 42; *s. c.* 21 Week. Rep. 266; 27 L. T. (N. S.) 683; 42 L. J. (Q. B.) 34.

<sup>2</sup> *Steele v. Western &c. Lock Nav.*, 2 Johns. (N. Y.) 283; *Delaware &c. Canal Co. v. Lee*, 22 N. J. L. 243; *Schuylkill Nav. Co. v. McDonough*, 33 Pa. St. 73.

<sup>3</sup> *Schuylkill Nav. Co. v. McDonough*, *supra*; *Fehr v. Schuylkill Nav.*

The converse rule necessarily obtains, that in assessing land damages under a statute authorizing the taking of private property by a corporation for the construction of a work of public utility, the jury will take into consideration only such damages as are the direct or natural result of the work which the corporation is authorized to do. Injuries arising from negligence, want of skill, improper construction of the work, or other wrong done by the corporation in or about the execution or maintaining of it, are not to be anticipated by the jury, but may be redressed, if they should happen, by an action at common law.<sup>1</sup> For like reasons, in a proceeding to assess the damages caused by the taking of land for a railway already built, evidence of injuries to the land, growing out of the negligent manner in which the road has been constructed, —as, for instance, evidence tending to show that the company by failing to erect cattle-guards, had for a time thrown the

Co., 69 Pa. St. 161; *Van Schoick v. Delaware Canal Co.*, 20 N. J. L. 249; *Delaware &c. Canal Co. v. Lee*, 22 N. J. L. 243; *Hentz v. Long Island R. Co.*, 13 Barb. (N. Y.) 646; *Spencer v. Hartford &c. R. Co.*, 10 R. I. 14; *Waterman v. Connecticut &c. R. Co.*, 30 Vt. 610; *s. c.* 73 Am. Dec. 326; *Fowle v. New Haven &c. Co.*, 107 Mass. 352; *s. c.* 112 Mass. 334; 17 Am. Rep. 106; *Terre Haute &c. R. Co. v. McKinley*, 33 Ind. 274; *Oregon &c. R. Co. v. Barlow*, 3 Or. 311; *Jones v. Festiniog R. Co.*, L. R. 3 Q. B. 733; *Regina v. Bristol &c. R. Co.*, 2 Eng. Rail. Cas. 99; *Brine v. Great Western R. Co.*, 31 L. J. (Q. B.) 101. See *Manser v. Northern &c. R. Co.*, 2 Eng. Rail. Cas. 380; *McCormick v. Kansas &c. R. Co.*, 57 Mo. 433; *Stevens v. Middlesex Canal*, 12 Mass. 466; *Stowell v. Flagg*, 11 Mass. 364; *Lebanon v. Olcott*, 1 N. H. 339; *Calking v. Baldwin*, 4 Wend. (N. Y.) 667; *s. c.* 21 Am. Dec. 168; *Dodge v. County Comm'rs*, 3 Met. (Mass.) 380; *Mason v. Kenne-*

*bec &c. R. Co.*, 31 Me. 215; *Hatch v. Vermont &c. R. Co.*, 25 Vt. 49, 69; *Railroad Co. v. Yeiser*, 8 Pa. St. 366; *Huyett v. Philadelphia &c. R. Co.*, 23 Pa. St. 373; *Aldrich v. Cheshire R. Co.*, 21 N. H. 359; *s. c.* 53 Am. Dec. 212; *Southside R. Co. v. Daniel*, 20 Gratt. (Va.) 344; *Lawrence v. Great Northern R. Co.*, 16 Ad. & El. (N. S.) 643; *s. c.* 6 Eng. Rail. Cas. 656; *Pittsburgh &c. R. Co. v. Gilleland*, 56 Pa. St. 445; *s. c.* 94 Am. Dec. 97; *Cockburn v. Erewash Canal Co.*, 11 Week. Rep. 34.

<sup>1</sup> *Jackson v. Portland*, 63 Me. 55; *Dearborn v. Boston &c. Railroad*, 24 N. H. 179; *Fleming v. Chicago &c. R. Co.*, 34 Iowa, 353; *King v. Iowa &c. R. Co.*, 34 Iowa, 458; *Sater v. Burlington &c. Plank Road Co.*, 1 Iowa, 386; *Selma &c. R. Co. v. Keith*, 53 Ga. 178; *Gear v. C. C. & D. R. Co.*, 43 Iowa, 83; *Whitehouse v. Androscoggin R. Co.*, 52 Me. 208; *Sabin v. Vermont &c. R. Co.*, 25 Vt. 363.

plaintiff's land open as a common;<sup>1</sup> or that the railroad company, by erecting a dam, backed water upon the plaintiff's land;<sup>2</sup> or that it neglected to remove stones thrown upon the plaintiff's land by blasting,<sup>3</sup> — is not admissible. Neither can the prospective obstruction of a *public highway* be considered in estimating such damages; for if a railway company lays its track upon a public highway, it is bound to put it in as good condition as it was in before; and failing to do this, it may be indicted.<sup>4</sup> But if the railroad is located near a farmer's barn, the jury, in assessing his damages, may take into consideration the liability to loss by fire from passing locomotives, and the cost of removing the barn.<sup>5</sup> It will be presumed, in support of a verdict, that damages given by the jury were for injuries by negligence or other wrong.<sup>6</sup>

§ 6344. **Nor does the Purchase-money where the Land is Voluntarily Conveyed.** — The same effect is given to a *deed*, made to the company by a land-owner, of so much land as the company would otherwise be entitled to condemn for the erection of its works. The consideration of the deed is deemed to stand in the place of the damages which would have been assessed by commissioners acting under the statute, and is understood to embrace compensation for all damages reasonably to be expected to flow from the construction and maintenance of the work, if done in a proper manner, and without negligence,<sup>7</sup> but not for damages which might have been prevented by the exercise of reasonable care and skill, — such as damages arising from flowing one's land, in consequence of a railway company failing to build a suitable culvert or sluice,<sup>8</sup>

<sup>1</sup> *King v. Iowa & C. R. Co.*, 34 Iowa, 458.

<sup>2</sup> *Selma & C. R. Co. v. Keith*, 53 Ga. 178.

<sup>3</sup> *Whitehouse v. Androscoggin R. Co.*, 52 Me. 208; *Sabin v. Vermont & C. R. Co.*, 25 Vt. 363.

<sup>4</sup> *Gear v. C. C. & D. R. Co.*, 43 Iowa, 83.

<sup>5</sup> *Oregon & C. R. Co. v. Barlow*, 3 Or. 311.

<sup>6</sup> *Steele v. Western & C. Lock Nav., 2 Johns. (N. Y.)* 283.

<sup>7</sup> *Delaware & C. Canal Co. v. Lee*, 22 N. J. L. 243; *Brearley v. Delaware & C. Canal Co.*, 20 N. J. L. 236.

<sup>8</sup> *Hatch v. Vermont & C. R. Co.*, 25 Vt. 49, 70.

or to erect a bridge in a proper manner,<sup>1</sup> or for the reason that the dam or embankment erected by the defendant, a canal company, at the time the conveyance of the land was made to them, was improperly constructed, or that it was subsequently suffered to get out of repair, whereby water got on the plaintiff's land.<sup>2</sup> Accordingly, a provision of the charter of a canal company that it should be the duty of the company, where its canal intersected the farm-lands of any individual, "to provide and keep in repair a suitable bridge or bridges, so that the owner or owners and others may pass the same," was held to have been waived by a deed granting lands to the company without stipulating for the erection of such a bridge,—the court saying: "The presumption is, that as the plaintiff sold the land for the purpose mentioned, he took into consideration all the inconveniences which might result from the construction of the canal through his farm, and asked and received a price, which, in his estimation, would cover all the damages that he might sustain in consequence of it. Had it been the intention of the parties, at the time of the conveyance, that the defendants should make and maintain a bridge for the plaintiff's convenience, the presumption is, there would have been a condition or covenant to that effect in the deed. The defendants having used the land for the single and only purpose for which it appears by the deed it was purchased, they are in no worse condition, nor are they to have more burdens imposed upon them, than if an individual had purchased it for the same purpose, or for making any other improvement thereon which would equally prevent the plaintiff from passing over all parts of his farm. So long as the express intention of the parties is carried out, and the land is applied to the uses for which it was purchased, the grantee, in the absence of any covenant or agreement on his part, is not liable in damages for any inconveniences the grantor may sustain, necessarily resulting from doing the act contemplated by the parties. The liability of the defendants, in this respect,

<sup>1</sup> *Spencer v. Hartford &c. R. Co.*,  
10 R. I. 14.

<sup>2</sup> *Morris Canal Co. v. Ryerson*, 27  
N. J. L. 457, 476.

depends, not upon the provisions of their act of incorporation, but upon the contract between the parties, and for the reason that their right to enter upon the land and dig their canal is founded upon contract, and not upon the statute.”<sup>1</sup>

§ 6345. **Illustrations of the Foregoing Doctrines — Damages Awarded.** — Many illustrations might be given of the foregoing doctrines. A railway company cannot defend an action for damages for injuries flowing from an act done in excess of its powers, although without negligence. If a railway company, without authority from the legislature, uses steam-engines to draw its trains, and sparks from such engines set fire to property along its line, it must pay damages without proof of negligence.<sup>2</sup> A slack-water navigation company suffered one of its dams to become filled up with dirt and *débris*, so that, in order to preserve the navigation, it was necessary either to clear it out or to raise the dam to a greater height, which their charter, taken literally, empowered them to do. They chose the latter course, and in so doing flowed the land of an adjacent proprietor. It was held that an action at common law would lie for the damages thereby inflicted. Lowrie, J., in giving the judgment of the court, said: “All the principles that are necessary for the ruling of this case may be stated in a few plain propositions: 1. The remedies against the company, provided by the act of incorporation, are for the injuries arising from the construction of the dam as a part of the navigable highway, and they do not exclude the common-law remedies for injuries arising from an abuse of the privileges granted to the company, or for the neglect of its duties. 2. The dams and locks of the company were constructed as part of the navigable highway, and the dam and lock No. 1 could not have been lawfully constructed for any other purpose where they are; and the company had no right to convert them into a mere receptacle of the dirt washed down from the country above, to the injury of the riparian inhabitants. 3. The company, as custodians of a navigable highway, stand in two distinct relations to the public, — one to navigators, and the other to the riparian inhabitants; and out of these relations arise distinct classes of duties and laws. To navigators they owe the right of a sufficient highway, and to the riparian inhabitants the right to have the natural flow of the river

<sup>1</sup> Brearley v. Delaware &c. Canal Co., 20 N. J. L. 236, 238.

<sup>2</sup> Jones v. Festiniog R. Co., L. R. 3 Q. B. 733.

preserved, except so far as, by their charter, they may change it for the purpose of improving its navigability; and the injuries and remedies correspond to those relations. 4. The company cannot excuse themselves for suffering the dam to be and remain filled up, to the injury of the riparian inhabitants, by showing that it would not have happened except because of the deposits of dirt improperly made by others in and near the upper part of the stream; because the company have the care and control of the dam, and it occasioned the deposit there, and they have a full remedy against all who wrongfully contributed to filling it up.”<sup>1</sup> A railroad company, in constructing its road, makes an insufficient culvert over a stream of water, and so floods the lands of a proprietor, through which the road passes. He is entitled to recover damages in an action at common law, notwithstanding a previous assessment of land damages by a jury under the statute under which the road was built;<sup>2</sup> and so is any other person similarly injured.<sup>3</sup> Nor, in the opinion of the Supreme Court of Vermont, is this right confined to damages arising from obstructing or diverting natural streams; but if the drains on the side of a railway track are negligently suffered to get filled up, so that an adjacent proprietor suffers damage from a diversion of *surface-water* upon his land, he may recover damages, notwithstanding a previous assessment, under a statute, of damages for the taking of the land necessary for the company’s roadbed.<sup>4</sup> In repairing their roads, turnpike companies must take care not to injure the owners of adjoining lands. They have no right to turn water which washes their roads onto the lands of private persons; if they do, such persons may have an action against them for the damages.<sup>5</sup> The proprietors of an irrigating ditch, during an extraordinary flood, in order to preserve the ditch, cut one of its embankments and turned its waters upon adjacent cultivated lands, where there was no natural watercourse to carry them away. They sought to justify

<sup>1</sup> Schuylkill Nav. Co. v. McDonough, 33 Pa. St. 73, 79.

<sup>2</sup> Southside R. Co. v. Daniel, 20 Gratt. (Va.) 344; Pittsburg &c. R. Co. v. Gilleland, 56 Pa. St. 445; s. c. 94 Am. Dec. 97; Terre Haute &c. Co. v. McKinley, 33 Ind. 274.

<sup>3</sup> Hentz v. Long Island R. Co., 13 Barb. (N. Y.) 646.

<sup>4</sup> Waterman v. Connecticut R. Co., 30 Vt. 610; s. c. 73 Am. Dec. 326.

<sup>5</sup> Boughton v. Carter, 18 Johns. (N. Y.) 405; Allen v. Hayward, 7 Ad. & El. (N. S.) 960; s. c. 4 Eng. Rail. Cas. 104. As to damages in excavating for a railroad, and erecting a bridge to pass a highway over it, see Parker v. Boston &c. Railroad, 3 Cush. (Mass.) 107; s. c. 50 Am. Dec. 709.

this trespass on the ground that it was the act of God. It was held that, although the storm was the act of God, yet the act of the irrigating company, in cutting away their embankment, was not; that one man may not thus destroy another's property in order to preserve his own; and that whether this act was one of negligence was properly left to the jury.<sup>1</sup>

§ 6346. **Other Illustrations—Damages Denied.**—On the other hand, where a navigation company, without being guilty of negligence in suffering mud to accumulate in its dam, or otherwise, raised the height of it for the necessary preservation of the navigation, as its charter empowered it to do, which act resulted in the flowing of the land of an adjacent owner, the owner could not maintain an action at common law for the consequent damage.<sup>2</sup> The waters of a canal, by percolating through the soil, and otherwise, injured the land of an adjacent proprietor. He brought an action at common law for the damages, without showing negligence, and failed, on the ground that these damages might have been assessed by the jury which made his assessment of damages under the statute.<sup>3</sup> This rule has protected railroad companies from actions at common law

<sup>1</sup> *Turner v. Tuolumne Water Co.*, 25 Cal. 397.

<sup>2</sup> *Fehr v. Schuylkill Nav. Co.*, 69 Pa. St. 161. Williams, J., thought that the company could not raise the dam from mere motives of economy, unless the expenses of clearing it were excessive and unreasonable, in which case they might raise it, paying damages, under the statute, for the injury.

<sup>3</sup> *Van Schoick v. Delaware &c. Canal Co.*, 20 N. J. L. 249. A corporation was created by the Legislature of Connecticut for the purpose of constructing and maintaining a canal within certain limits, with all necessary waste-weirs, etc., and providing for the appointment of a board of commissioners, with power to designate the route of the canal, with all the works connected therewith, and to appraise the damages, giving notice to the parties interested. The canal

and waste-weirs were constructed under the direction of such commissioners. The water of the canal, discharged from one of the waste-weirs, after running through the lands of other persons, flowed upon the land of the plaintiff, and thereby greatly injured it; but it was found that the corporation, in thus discharging the water, acted with proper prudence and care. This injury to the plaintiff's land resulted, not from any *vis major*, but from using the waste-weir for the necessary protection of the canal. In an action on the case against the corporation for this injury, it was held: 1. That although it is an incident of the sovereignty of every government to take private property for public use, of the necessity or expediency of which the government must judge, the obligation to make compensation is commensurate with the right. 2. That no intent of the



for damages caused by blasting rocks in the necessary prosecution of their work;<sup>1</sup> by cutting off one portion of the plaintiff's land from the rest by the necessary construction of their road;<sup>2</sup> by setting fire to adjacent property by sparks emitted from their engines, due care being used to avoid such consequences,<sup>3</sup> but not where the fire is the result of negligence.<sup>4</sup>

**§ 6347. Application of the Doctrine of *Respondet Superior*.**—We have already considered the question of the application of the rule of *respondet superior* to the liability of corporations for the torts of their servants, without special reference to the question whether the tort was negligent or malicious,<sup>5</sup> with the conclusion that, if the agent or servant was acting within the general scope of his authority when he did the wrong, the corporation will be liable to respond in damages, although the agent or servant may, in the particular instance, have acted without orders, or even against orders.<sup>6</sup> In all these cases, the governing inquiry is, What was the scope of the agency or employment of the actor at the time of committing the act? Thus, the negligence of the *conductor* of a railway train, in putting or assisting passengers on or off the cars, is the negligence of the corporation owning or operating the road, because the performance of such duties is within the general scope of his employment.<sup>7</sup> So, a corporation,

legislature to authorize the injury in question was apparent from the charter of incorporation, either by express provision or fair construction. 3. That the approval by the commissioners of this waste-weir, with the other works connected with the canal, did not authorize the defendants to use it, though with prudence and care, to the injury of the plaintiff. 4. That an injury to land, which deprives the owner of the ordinary use of it, is equivalent to a *taking* of that land. 5. That, no compensation having been provided for or made to the plaintiff for the injury sustained, he was entitled, in this action, to re-

cover damages for such injury. *Hooker v. New Haven &c. Canal Co.*, 14 Conn. 146; s. c. 36 Am. Dec. 477.

<sup>1</sup> *Dodge v. County Comm'rs*, 3 Met. (Mass.) 380.

<sup>2</sup> *Mason v. Kennebec &c. R. Co.*, 31 Me. 215.

<sup>3</sup> *Railroad Co. v. Yeiser*, 8 Pa. St. 366. That this is the prevailing law, see 1 Thomp. Neg. (1st ed.), p. 159.

<sup>4</sup> *Ibid.*; *Huyett v. Philadelphia &c. R. Co.*, 23 Pa. St. 373.

<sup>5</sup> *Ante*, § 6276, *et seq.*

<sup>6</sup> *Ante*, § 6283.

<sup>7</sup> *Columbus &c. R. Co. v. Powell*, 40 Ind. 37. From this the conclusion has been reached that an *allegation* of

operating a *street railway*, was held liable for injuries sustained by a lad who got upon the platform of one of its cars, at the request of the driver of the car, to bring him a drink of water, and who was injured in getting off in consequence of the refusal of the driver to slacken speed for him, the court proceeding upon the ground, more or less doubtful, that the conduct of the driver was within the scope of his employment.<sup>1</sup> So, where the plaintiff was injured in consequence of being thrown from a wagon by a collision with a car *owned* by railroad A., but *drawn* by horses owned by railroad B., and driven by a man employed by railroad B., — it was held that the company operating railroad B. was liable in damages.<sup>2</sup> On the other hand, a corporation organized to *establish* and conduct an *agricultural fair* has been held not liable for the negligence of a *hackman* employed by its officers to convey persons to and from the fair grounds, — the court proceeding upon the doubtful ground that there was nothing in the articles of incorporation requiring this service.<sup>3</sup> This decision, given merely to illustrate the manner in which the courts are divided on the question under consideration, seems to violate the principle, elsewhere considered,<sup>4</sup> that it is immaterial in determining the liability of a corporation for a tort that the tort was what may be called an *ultra vires* tort, that is to say, committed by its officers or agents in doing some act which it had no power to do. On a similar theory, it has been held that a railroad company is not liable for injuries received by a child while attempting to get upon one of its cars, in consequence of an invitation from one of its servants in charge of the car, where the evidence shows no authority on the part of the servant to permit persons to ride on the car, and it does not appear that the invitation or permission was in furtherance of the interests of the road, or connected in any manner

such negligence of a conductor is a sufficient charge of negligence against the corporation. *Ibid.*

<sup>1</sup> *Day v. Brooklyn &c. R. Co.*, 12 Hun (N. Y.), 435; *s. c.* affirmed, 76 N. Y. 593.

<sup>2</sup> *Weyant v. New York &c. R. Co.*, 3 Duer (N. Y.), 360.

<sup>3</sup> *Bathe v. Decatur County Agric. Soc.*, 73 Iowa, 11; *s. c.* 5 Am. St. Rep. 651.

<sup>4</sup> *Ante*, § 6282.

with the service which the servant was employed to render.<sup>1</sup> These cases will serve to illustrate a principle, the extended discussion of which would take us beyond the plan and limits of the present work.

§ 6348. **Not Liable for Negligence of Independent Contractors.** — On a principle already considered,<sup>2</sup> where a contractor takes entire control of the work, the employer having no right of supervision or interference, the employer, if he is not negligent in his selection of the contractor, is not liable to third parties for the contractor's lack of care in the performance of what he has undertaken. This rule is not only applicable to individuals,<sup>3</sup> but to *private* corporations,<sup>4</sup> and also to *municipal* corporations;<sup>5</sup> but this is because they are municipal and public corporations,<sup>6</sup> and not because the work has been done by an independent contractor.<sup>7</sup>

<sup>1</sup> Snyder v. Hannibal & C. R. Co., 60 Mo. 413.

<sup>2</sup> *Ante*, § 6278.

<sup>3</sup> Allen v. Willard, 57 Pa. St. 374.

<sup>4</sup> Ardesco Oil Co. v. Gilson, 63 Pa. St. 146; Edmundson v. Pittsburgh & C. R. Co., 111 Pa. St. 316.

<sup>5</sup> Painter v. Pittsburgh, 46 Pa. St. 213, 216; Borough Susquehanna Depot v. Simmons, 112 Pa. St. 384; s. c. 56 Am. Rep. 317; Reed v. Allegheny City, 79 Pa. St. 300; Erie v. Caulkins, 85 Pa. St. 247; s. c. 27 Am. Rep. 642.

<sup>6</sup> Lancaster Avenue Imp. Co. v. Rhoads, 116 Pa. St. 377; s. c. 2 Am. St. Rep. 608.

<sup>7</sup> There is authority to the effect that *public corporations*, which merely assume duties on behalf of the public which the law casts upon them and for which their members receive no pecuniary benefit, are not liable for the negligence of the contractors whom they employ to discharge those duties, even where such negligence relates to the result of the work which the contractor turns over to the cor-

poration. Thus, if repairs are done upon a *schoolhouse* by an independent contractor so negligently that one of the pupils is injured in the execution of it, the school board will not be liable in damages to the pupil. School District v. Fuess, 98 Pa. St. 600; s. c. 42 Am. Rep. 627; Wood v. Independent School District, 44 Iowa, 27; s. c. 31 Am. Rep. 206, note. The only plausible theory on which this conclusion can be made to rest is, that the municipal corporation owes no duty to the public to see to the good *results* of the contractor's work, for the non-performance of which duty it is answerable in damages, distributively, to any members of the public injured thereby. Its non-liability cannot be made to rest upon the rule which renders an ordinary proprietor exempt from liability for the negligence of an independent contractor engaged to construct a certain building, or do other prescribed work for him. If the corporation is liable for the *results* of the work, then it is quite im-

§ 6349. **Cannot Escape Liability for Negligent Performance of Public Duties on This Ground.** — But where an individual or corporation engages, by contract with another, to perform a certain duty for his benefit, such individual or corporation cannot, on grounds which at once coincide with the common understanding, evade the liability thus assumed, under the plea that the obligor had let out the performance of the duty to an *independent contractor*, and that the independent contractor had failed in the performance of it. So, it has been said: "When certain powers and privileges have been specially conferred by the public upon an individual or corporation for private emolument, in consideration of which, certain duties affecting the public health or the safety of public travel have been expressly assumed, the individual in receipt of the emoluments cannot be relieved of liability by committing the performance of these duties to another. In such cases liability cannot be evaded, by showing that the injury resulted from the fault or neglect of a third person employed to perform these public duties."<sup>1</sup>

material by whose hand or how the work is done. The rule above quoted will exempt municipal corporations, in nearly all cases, from liability for damages growing out of the non-repair of their highways or the unsafe condition of their bridges, because the work of repairing highways and bridges is generally committed to independent contractors. But as municipal corporations rest under this liability in many jurisdictions, the rule in such jurisdictions is inapplicable, because it proves too much.

<sup>1</sup> Lancaster Avenue Imp. Co. v. Rhoads, 116 Pa. St. 377; s. c. 2 Am. St. Rep. 608; citing Wood on Master & Servant, 621, 624. There is an analogous rule that a master cannot evade the duty which the law casts upon him toward his servant, by delegating its performance to another,—as, for instance, the duty of seeing that the

appliances which it puts in the hands of its servants are reasonably safe for the purpose intended. Bushby v. New York & C. R. Co., 107 N. Y. 374; s. c. 1 Am. St. Rep. 844; see also Flike v. Boston & C. R. Co., 53 N. Y. 549; s. c. 13 Am. Rep. 545; Corcoran v. Holbrook, 59 N. Y. 517; s. c. 17 Am. Rep. 369; Lawler v. Androscoggin R. Co., 62 Me. 463; s. c. 16 Am. Rep. 492, and note. A distinction has been taken between the grounds of liability in case of a *public corporation*, which is a *gratuitous trustee* of public duties, and a private corporation, such as a toll-road company or a railroad company, which performs public duties for its own emolument. Davis v. Lamoille County Plank Road Co., 27 Vt. 602. See, further, as to the non-liability of *public corporations* for the neglects of subordinate trustees, or independent public officers,—Maximill-

§ 6350. **Liable to Servants for Negligence of Vice-principal.** — A corporation which has delegated to one of its agents the power and duty of appointing and removing employés, is liable to one of its employés for an injury accruing to him through the negligence of another employé so appointed, when the appointing agent has not used due care in selecting such employé, although the agent himself is possessed of competent skill and intelligence.<sup>1</sup> This is merely a branch of the general principle, applicable alike to natural persons and to corporations, that where the law casts upon a person an *absolute duty* in a given situation, or where such person assumes such a duty voluntarily, the hand by which he undertakes to perform that duty is his own hand, in conformity with the maxim *qui facit per alium, facit per se*. The law identifies the one who *commands* with the one who *executes*, and the negligence of the latter is imputed to the former. This principle applies with even greater force to corporations than to individuals, since these bodies, from their nature, can act only through agents. Many American courts accordingly hold that the officer or agent of the corporation, who has charge of its business, or of a particular part of it, must, for all practical purposes, be regarded as the corporation itself.<sup>2</sup> There is great

ian v. New York, 62 N. Y. 160; s. c. 20 Am. Rep. 468; Donovan v. Board of Education, 85 N. Y. 117; Donovan v. McAlpin, 85 N. Y. 185; s. c. 39 Am. Rep. 649.

<sup>1</sup> Tyson v. South &c. R. Co., 61 Ala. 554; s. c. 32 Am. Rep. 8.

<sup>2</sup> Brickner v. New York &c. R. Co., 2 Lans. (N. Y.) 506, 516; s. c. affirmed, 49 N. Y. 672; Mullan v. Philadelphia &c. R. Co., 78 Pa. St. 25, 32; s. c. 21 Am. Rep. 2; Spelman v. Fisher Iron Co., 56 Barb. (N. Y.) 151; Gormly v. Vulcan Iron-Works, 61 Mo. 492; Brothers v. Cartter, 52 Mo. 372; Devany v. Vulcan Iron-Works, 4 Mo. App. 236; Kansas Pacific R. Co. v. Little, 19 Kan. 267; Malone v. Hathaway, 64 N. Y. 5; s. c. 21 Am. Rep.

573; Frazier v. Pennsylvania R. Co., 38 Pa. St. 104; s. c. 80 Am. Dec. 467; Ardesco Oil Co. v. Gilson, 63 Pa. St. 146, 150; Cumberland &c. R. Co. v. Moran, 44 Md. 283; Cumberland &c. R. Co. v. Hogan, 45 Md. 229; Patterson v. Pittsburg &c. R. Co., 76 Pa. St. 389; s. c. 18 Am. Rep. 412; Railroad Co. v. Fort, 17 Wall. (U. S.) 553; affirming s. c. 2 Dill. (U. S.) 259; Grizzle v. Frost, 2 Post. & Fin. 622; Mann v. Oriental Print Works, 11 R. I. 152; Cooper v. Central R. Co., 44 Iowa, 134; Cook v. Hannibal &c. R. Co., 63 Mo. 397; Whalen v. Centenary Church, 62 Mo. 326; Louisville &c. R. Co. v. Bowler, 9 Heisk. (Tenn.) 866; Nashville &c. R. Co. v. Jones, 9 Heisk. (Tenn.) 27; Little Miami R.

difficulty, in many cases, in determining whether the agent or employé of the corporation, through whom it acts, is to be deemed its *vice-principal*, or is to be deemed a *fellow-servant* of the servant injured, within the well-known rule exempting the master from liability, as will be seen by the cases cited toward the end of the preceding note; but, as the question is one not peculiar to corporations, it will not be further enlarged upon.

§ 6351. **Contracts with Employés Releasing Damages.** —

There is a tendency in American legislation to make the relation between incorporated employers and their employés the subject of *police regulations*. This tendency exhibits itself, in several instances, in the form of *constitutional ordinances* and *legislative acts*, prohibiting corporations from entering into contracts with their injured employés, whereby the latter *release damages* to which they are entitled by reason of the negligence or fault of the corporation. The following is an instance of such a constitutional provision: "It shall be unlawful for any person, company, or corporation to require of its servants or employés, as a condition of their employment, or otherwise, any contract or agreement whereby such person, company, or corporation shall be released or discharged from liability or responsibility on account of personal injuries received by such servants or employés while in the service of such person, company, or corporation, by reason of the negligence of such person, company or corporation, or the agents or employés thereof; and such contracts shall be absolutely null and void."<sup>1</sup> An example of such a statute, relating to railroad corporations, is found on the statute books of Minnesota, where the provision is that, "no contract, rule, or regulation between such corporation and any agent or serv-

Co. v. Stevens, 20 Ohio, 415; Cleveland &c. R. Co. v. Keary, 3 Ohio St. 201; Berea Stone Co. v. Kraft, 31 Ohio St. 287, 292; s. c. 27 Am. Rep. 510; Louisville &c. R. Co. v. Collins, 2 Duvall (Ky.), 114; s. c. 87 Am. Dec.

486; Whaalan v. Mad River &c. R. Co., 8 Ohio St. 249, 251; Brabbitts v. Chicago &c. R. Co., 38 Wis. 289.

<sup>1</sup> Colo. Const. 1876, art. 15, § 15; Montana Const. 1889, art. 15, § 16.

ant shall impair or diminish such liability." The statute refers to liability for negligence, and contains the proviso that the act shall not apply to damages sustained by any servant, etc., while engaged in the construction of any *new road*, or any part thereof, not open to public travel or use.<sup>1</sup>

§ 6352. *Liability for Negligence under Statutes.*—Many statutes and municipal ordinances have been enacted, relating chiefly to railroad companies, prescribing rules for the running of their trains and for the conducting of their operations, intended to conserve the safety of individuals and of domestic animals. These statutes are in the nature of *police regulations*, and their *constitutionality* is generally upheld.<sup>2</sup> Some of them are merely *declaratory of the common law*.<sup>3</sup> To collect them, and to state fully the exposition which, in their various provisions and relations, they have received at the hands of the courts, would form a treatise of itself, and the treatise would relate almost exclusively to the management and operation of railroads. The scope of the present work will not admit of more than a reference to a few of them. One class of them prescribes certain *precautions in the running of railroad trains*,—regulating the rate of speed, the kind of signals at crossings, the look-out to be maintained on the engines, etc.<sup>4</sup> According to most judicial opinion, the viola-

<sup>1</sup> Minn. Act, Feb. 24, 1887; Gen. Laws Minn. 1887, ch. 13, p. 69.

<sup>2</sup> *Ante*, § 5504, *et seq.*; Missouri & C. R. Co. v. Humes, 115 U. S. 512. Thus, a statute of Kansas (Kan. Laws 1874, ch. 94, § 2), giving "a *reasonable attorney fee*" to the plaintiff in case of a recovery, for the prosecution of his suit against a railroad corporation for the value of stock killed or injured, is constitutional. Such provision is in the nature of a *penalty*, and is not beyond the power of the legislature. Kansas Pac. R. Co. v. Mower, 16 Kan. 573. See also Kansas Pac. R. Co. v. Yanz, 16 Kan. 583.

<sup>3</sup> Horne v. Memphis & C. R. Co., 1

Coldw. (Tenn.) 75; Louisville & C. R. Co. v. Connor, 9 Heisk. (Tenn.) 21; Burk v. Louisville & C. R. Co., 7 Heisk. (Tenn.) 451, 463; s. c. 19 Am. Rep. 618.

<sup>4</sup> Such, for instance, was section 1298 of the Code of Tennessee, providing that every railroad company shall keep some one on the locomotive, always upon the lookout ahead, and that when any person, etc., appears upon the road, whistle, put down brakes, and use every possible means to prevent an accident; and, therefore, a *declaration* in an action against a railroad company which avers that the company's servants

tion of these statutes is *negligence per se*,<sup>1</sup> and according to all opinion, it is at least *evidence of negligence* to go to the jury.<sup>2</sup> But such negligence must, of course, be the *proximate cause* of the injury complained of. Thus, violations by those in charge of a railroad train, of a city ordinance as to the rate of speed, head-lights, and bell-ringing, although amounting to negligence *per se*, do not render the company liable for damages, unless the accident was thereby produced.<sup>3</sup> But where the accident is brought to recover a *penalty* given by the statute for the negligent act prohibited, as, for instance, for the running of a railroad train at an unlawful rate of speed, — a recovery may be had, although *no actual damages* have resulted.<sup>4</sup>

§ 6353. **Negligence in the Performance of Ultra Vires Acts.** — Upon a principle elsewhere considered,<sup>5</sup> it will be no defense, on the part of a corporation, to an action to charge it with damages for the negligent injuries, that the injury was committed by its agents or servants while engaged in a business upon which it had *no power* under its charter or governing statute to enter. Thus, a passenger may recover for personal injuries occasioned to him by the negligence of a street railway corporation, which was transporting him on a railway which it had *leased unlawfully*, but which it was using and maintaining without objection from its owners or the Commonwealth.<sup>6</sup>

wrongfully and negligently ran its cars over plaintiff's intestate, thereby causing his death, gives notice that the killing was contrary to the statute, and requires the company to prove that it observed the statutory precautions, and was therefore not liable. *East Tenn. &c. R. Co. v. Pratt*, 85 Tenn. 9; *s. c.* 1 S. W. Rep. 618.

<sup>1</sup> *Keim v. Union &c. R. Co.*, 90 Mo. 314.

<sup>2</sup> *Liddy v. St. Louis R. Co.*, 40 Mo. 506; *Mahan v. Union Depot &c. R.*

*Co.*, 34 Minn. 29; *Wright v. Malden &c. R. Co.*, 4 Allen (Mass.), 283.

<sup>3</sup> *Karle v. Kansas City &c. R. Co.*, 55 Mo. 476; *Norton v. Ittner*, 56 Mo. 351.

<sup>4</sup> *Chicago &c. R. Co. v. People*, 120 Ill. 667; *s. c.* 12 N. E. Rep. 207.

<sup>5</sup> *Ante*, § 6282.

<sup>6</sup> *Feital v. Middlesex R. Co.*, 109 Mass. 398; *s. c.* 12 Am. Rep. 720. Compare *Bathe v. Decatur Co. Agric. Soc.*, 73 Iowa, 11; *s. c.* 5 Am. St. Rep. 651.



ARTICLE II. IN THE PERFORMANCE OF DUTIES VOLUNTARILY ASSUMED.

SECTION	SECTION
6357. The governing principle stated.	6362. Liability for the non-performance of statutory obligations.
6358. Private corporations owning public works for the use of which they receive tolls.	6363. Corporations exercising public offices.
6359. When liable on principle of nuisance or special damage.	6364. Corporations for the maintenance of public charities.
6360. Liability of turnpike and plank-road companies for non-repair.	6365. Payment of damages out of trust funds.
6361. Private corporations how liable for non-exercise of granted powers.	6366. Out of corporate funds in the hands of receivers.

§ 6357. **The Governing Principle Stated.** — The principle which governs the liability of a corporation for negligently failing to perform a duty voluntarily assumed, is precisely the same as that which governs the liability of an individual in the like case. That principle is this: Whenever a corporation undertakes the performance of a duty for another, whether for reward or gratuitously, it is bound to discharge such duty: where it is undertaken for a reward, with the skill and diligence of a good business or professional man who undertakes to perform like services; and where it is undertaken gratuitously, with ordinary care and skill, — that is, with the care which grows out of ordinary social relations, that which pertains to good neighborhood and fair dealing and with the skill which belongs to a good professor, or undertaker in the particular specialty; and that for a failure, in either of these cases, to perform with the requisite care and skill the duty undertaken, an action lies on behalf of the party in favor of whom such duty was undertaken. In all such cases, as stated by Mr. Justice Grier in a leading case, the confidence induced by undertaking to perform such a service is a sufficient consideration to create a duty in the performance of it.<sup>1</sup> This principle is of application only to those duties which the

<sup>1</sup> Philadelphia &c. R. Co. v. Derby, 14 How. (U. S.) 468, 485. The same principle is reaffirmed and applied in Glavin v. Rhode Island Hospital, 12 R. I. 411; s. c. 34 Am. Rep. 675; 9 Cent. L. J. 329.

corporation has assumed *towards individuals*: for the performance of those duties which it owes exclusively *to the State*, or to the public generally, it is not answerable to an individual.

§ 6358. **Private Corporations Owning Public Works for the Use of Which They Receive Tolls.** — In the year 1839 it appears to have been disputed for the first time in England, first in the Court of Queen's Bench and afterwards in the Court of Exchequer Chamber, by able counsel, whether a corporation which has undertaken to construct or maintain certain works (in the particular case, a canal), to be used by the public generally on payment of tolls, was liable to pay damages to a person so using the works, for a mere negligence or non-feasance in failing to keep such works in repair. It was held that an individual or a corporation undertaking such a duty is so liable, independently of statute.<sup>1</sup> As early as 1810 a similar liability had been declared in the United States, where the particular duty from the non-performance of which the damages resulted was enjoined by statute.<sup>2</sup> There the proprietors of the canal were bound by their act of incorporation to construct their canal so deep and wide that rafts of a certain description could pass through, when such rafts could pass the river with which the canal was connected. It was held that they were liable to the owner of a raft of such description, from whom they had received toll for the passage of such raft, for the damages sustained by him in consequence of the canal not being sufficient to admit of its passage. These cases express the undoubted law of England and America. The general rule may be stated thus: When a corporation is clothed by its charter, by an act of the legislature, or by prescription, which

<sup>1</sup> Parnaby v. Lancaster Canal Co., 11 Ad. & El. 223; s. c. 3 Nev. & P. 523; 3 Per. & Dav. 162; 1 Thomp. Neg. 541. An interesting question of pleading was also decided. The declaration was framed under a statute, but as it

contained allegations which showed a duty at common law, it was held good.

<sup>2</sup> Riddle v. Proprietors of Locks & Canals, 7 Mass. 169; s. c. 5 Am. Dec. 35.

presumes a charter, with power to construct or improve turnpikes,<sup>1</sup> plank roads,<sup>2</sup> bridges,<sup>3</sup> ferries,<sup>4</sup> railways,<sup>5</sup> canals,<sup>6</sup> docks,<sup>7</sup>

<sup>1</sup> *Brookville &c. Turnp. Co. v. Pumphrey*, 59 Ind. 78; *s. c.* 26 Am. Rep. 76; *Zuccarello v. Nashville &c. R. Co.*, 12 Heisk. (Tenn.) 364; *Southworth v. Lathrop*, 5 Day (Conn.), 237, where a second sub-contractor was held, under his contract, liable to pay damages which a traveler had recovered of a turnpike company for injuries resulting from non-repair, and which the company had recovered over from the principal contractor, the intermediate sub-contractor being insolvent. See further, as to the obligation of a turnpike company to repair,—*Goshen &c. Turnp. v. Sears*, 7 Conn. 86; *Com. v. Worcester Turn. Corp.*, 3 Pick. (Mass.) 327; *Orcutt v. Kittery Point Bridge Co.*, 53 Me. 500; *State v. Morris Turnp. Co.*, 4 N. J. L. 165; *s. c.* 7 Am. Dec. 579; *Ward v. Newark &c. Turnp. Co.*, 20 N. J. L. 323; *Board of Internal Improvement v. Scearce*, 2 Duvall (Ky.), 576.

<sup>2</sup> *Davis v. Lamoille County Plank Road Co.*, 27 Vt. 602; *Ireland v. Oswego &c. Plank Road Co.*, 13 N. Y. 526. Compare *Sims v. Yazoo &c. Plank Road Co.*, 38 Miss. 23.

<sup>3</sup> *Watson v. Lisbon Bridge*, 14 Me. 201; *s. c.* 31 Am. Dec. 49; *Tift v. Jones*, 52 Ga. 538; *Wayne County Turnp. Co. v. Berry*, 5 Ind. 286; *Hayes v. New York &c. R. Co.*, 9 Hun (N. Y.), 63; *Rex v. Lindsey*, 14 East, 317; *Rex v. Kent*, 13 East, 220; *Grigsby v. Chappell*, 5 Rich. L. (S. C.) 443; *Nicholl v. Allen*, 1 Best & S. 915.

<sup>4</sup> *Murray v. Hudson River R. Co.*, 47 Barb. (N. Y.) 196; *Oakland R. Co. v. Fielding*, 48 Pa. St. 321.

<sup>5</sup> *Oakland R. Co. v. Fielding*, 48 Pa. St. 320; *Cumberland Valley R. Co. v. Hughes*, 11 Pa. St. 141; *s. c.* 51 Am. Dec. 513.

<sup>6</sup> *Parnaby v. Lancaster Canal Co.*, 11 Ad. & El. 223; *s. c.* 3 Nev. & P. 223; 3 Per. & Dav. 162; *Weitner v. Delaware &c. Canal Co.*, 4 Robt. (N. Y.) 234; *Pennsylvania R. Co. v. Patterson*, 73 Pa. St. 491; *Saylor v. Smith*, 2 Week. Not. Cas. (Pa.) 687; *Walker v. Goe*, 4 Hurlst. & N. 350; *s. c.* 5 Jur. (N. s.) 739; 28 L. J. (Ex.) 184; *Winch v. Conservators*, 31 L. T. (N. s.) 128. See also *Manley v. St. Helen's Canal &c. Co.*, 2 Hurlst. & N. 840; *s. c.* 27 L. J. (Ex.) 159; *Witherley v. Regent's Canal Co.*, 12 C. B. (N. s.) 2; *s. c.* 6 L. T. (N. s.) 255; 3 Fost. & Fin. 61; *Pennsylvania &c. Canal Co. v. Graham*, 63 Pa. St. 290; *s. c.* 3 Am. Rep. 549; *Heacock v. Sherman*, 14 Wend. (N. Y.) 58.

<sup>7</sup> *Mersey Docks Trustees v. Gibbs*, L. R. 1 H. L. 93; *Gibbs v. Liverpool Docks*, 1 Hurlst. & N. 439; *s. c.* 3 Hurlst. & N. 164; *Mersey Docks &c. Board v. Penhallow*, 7 Hurlst. & N. 329; *Smith v. London &c. Docks Co.*, L. R. 3 C. P. 326; *s. c.* 37 L. J. (C. P.) 217; *Gibson v. Inglis*, 4 Camp. 72. This last was an action on the case against the London Dock Company for the negligence of their servants in unloading a pipe of wine, whereby it was staved. It appeared that the company provided men for the discharging of ships in the docks, and that no lumpers or laborers provided by the owners of the goods to be unloaded could be employed. The company derived no profit from the labor of the men by whom the vessels were actually discharged. On this ground, it was contended that they were not liable for the negligence of which these men might be guilty; but Lord Ellenborough held that, from the manner in which they provided the men, they

wharves,<sup>1</sup> water-works,<sup>2</sup> gas-works,<sup>3</sup> to improve navigable streams,<sup>4</sup> or to do other like work of a public nature for the benefit of members of the public distributively, and to take toll therefor,<sup>5</sup>—it is bound to keep them in repair, and is

must be considered to undertake for the safe delivery of the cargo, and that, on the principle of *Coggs v. Bernard*, 2 Ld. Raym. 909, they were liable, although they derived no advantage from the employment of their servants. It was allowed there had been negligence in unloading the pipe of wine in question, and the plaintiff had a verdict.

<sup>1</sup> *Wendell v. Baxter*, 12 Gray (Mass.), 494; *Radway v. Briggs*, 37 N. Y. 256; *Albany v. Cunliff*, 2 N. Y. 165. See also *Pittsburgh v. Grier*, 22 Pa. St. 54; *s. c.* 60 Am. Dec. 65; *Buckbee v. Brown*, 21 Wend. (N. Y.) 110; *Mersey Docks Trustees v. Gibbs*, L. R. 1 H. L. 93; *Gibbs v. Liverpool Docks*, 1 Hurlst. & N. 439; *s. c.* 3 Hurlst. & N. 164; *Mersey Docks &c. Board v. Penballow*, 7 Hurlst. & N. 329; *Prescott v. Duquesne*, 48 Pa. St. 118; *Jeffersonville v. Louisville Ferry Co.*, 27 Ind. 100; *s. c.* 89 Am. Dec. 495; 35 Ind. 19; *Seaman v. New York*, 3 Daly (N. Y.), 147.

<sup>2</sup> *Bayley v. Wolverhampton Water Works Co.*, 6 Hurlst. & N. 241. In *Atkinson v. Newcastle &c. Water Works Co.*, 2 Ex. Div. 441, it was ruled by the English Court of Appeal, reversing the Court of Exchequer (L. R. 6 Ex. 404), that an action would not lie against a water-works company for failing to keep its pipes charged as required by its governing statute, by reason of which neglect the plaintiff's premises burned down. The ground of the decision was that the statute creating the duty gave a penalty of £10, one-half to any informer and the other half to the over-

seers of the parish, for a neglect of this duty, and that the penalty excluded a right of action for damages. The court question the authority of *Couch v. Steel*, 3 El. & Bl. 402; *s. c.* 23 L. J. (Q. B.) 121, which governed the court below. In that case it was held that a statute (7 & 8 Vict., ch. 112, § 18) making it the duty of a ship-owner to have on board a proper supply of medicines for the voyage created a duty to each sailor, for the breach of which an action might be sustained by anyone thereby injured, although the statute gave a penalty.

<sup>3</sup> See *Holden v. Liverpool New Gas & Coke Co.*, 3 C. B. 1; *Mose v. Hastings &c. Gas Co.*, 4 Fost. & Fin. 324; *Burrows v. March Gas & Coke Co.*, L. R. 7 Ex. 96; *Laanen v. Albany Gas Light Co.*, 44 N. Y. 459; affirming *s. c.* 46 Barb. (N. Y.) 264; *Butcher v. Providence Gas Co.*, 18 Alb. L. J. 372; *Emerson v. Lowell Gas Light Co.*, 3 Allen (Mass.), 410; *Hunt v. Lowell Gas Light Co.*, 8 Allen (Mass.), 169; *s. c.* 85 Am. Dec. 697; *Bartlett v. Boston Gas Light Co.*, 122 Mass. 209; *Blenkiron v. Great Central Gas Consumers' Co.*, 2 Fost. & Fin. 437; *Flint v. Gloucester Gas Light Co.*, 9 Allen (Mass.), 552; *Holly v. Boston Gas Light Co.*, 8 Gray (Mass.), 123; *s. c.* 69 Am. Dec. 233; *Hutchinson v. Boston Gas Light Co.*, 122 Mass. 215; *Bartlett v. Boston Gas Light Co.*, 117 Mass. 533; *s. c.* 19 Am. Rep. 421; *Weld v. The Gas Light Co.*, 1 Stark. 189.

<sup>4</sup> *Rex v. Kent*, 13 East, 220.

<sup>5</sup> *Brown v. South Kennebec Agric. Soc.*, 47 Me. 275; *s. c.* 74 Am. Dec. 484.

liable in a civil action to an individual who has sustained damages in consequence of a failure of its duty in this particular.<sup>1</sup> Moreover, whenever a corporation,—as, for instance, a canal company,—in consideration of the franchises granted to it, becomes bound, by the express terms of the charter which it accepts, to perform a given duty,—as, for instance, to keep a road or a bridge in repair,—it is liable for damages for an injury resulting to a member of the public from the failure to perform this duty, whether the defect be patent or latent,—unless he be in default, or unless the defect arose from inevitable accident, tempest, or lightning, or the wrongful act of some third person, of which the company had no notice or knowledge.<sup>2</sup>

**§ 6359. When Liable on Principle of Nuisance or Special Damage.**—The liability of corporations for the non-repair of roads or bridges, which they are under a duty by their charter to keep in repair, is often put on the common-law ground that they are the authors of a *nuisance* which has resulted in *special damage* to the plaintiff.<sup>3</sup> Accordingly, where a charter of a *canal company* required it to “build and keep in good repair suitable and convenient bridges over the canal,” and one of the bridges, being defective, gave way while the plaintiff was driving over it, it was held that he might recover damages, upon this principle, for the injury thus received. Mr. Justice Sharswood, in giving the opinion of the court, said: “The charter is indeed a contract; but it is also a law imposing upon the defendants, as a corporation, the burden of performing a certain duty to the public. If that duty to the public has not been performed, they become thereby responsible to

<sup>1</sup> Most of the foregoing cases either sustain or illustrate the text. Some of them, however, were cases where the negligence amounted not to a mere non-feasance in the performance of a duty voluntarily assumed, but to a positive malfeasance. As to the duty of a street railroad to keep the

pavement between its tracks in repair, under the provisions of its charter, see *Troy v. Troy &c. R. Co.*, 3 Lans. (N. Y.) 270.

<sup>2</sup> *Pennsylvania &c. Canal Co. v. Graham*, 63 Pa. St. 290; s. c. 3 Am. Rep. 549.

<sup>3</sup> *Post*, § 6360.

all persons who may suffer any special injury in consequence of it. Upon the same principle, which has been settled law from the Year-books downward, if a party has sustained any special damage from a public nuisance beyond that which affects the public at large, whether it be direct or consequential, an action will lie against the author of the nuisance for redress. If the defendants, although under the authority of their charter, built a bridge over their canal, which was originally either rotten and unsafe, or became so subsequently, it was a public nuisance in the highway, and the plaintiff, having suffered a direct special injury, was entitled to recover of them the damages."<sup>1</sup> Where such an injury happens to the plaintiff through the negligent failure of the defendant to perform a duty enjoined upon it by its charter, to be performed on behalf of the public generally, an action for the injury which the plaintiff has received is supportable, not, indeed, on the theory of privity of contract, but as an action on the case for an injury which the plaintiff has sustained through the malfeasance of the defendant in failing to perform a duty toward him, though springing from a contract with another.<sup>2</sup>

**§ 6360. Liability of Turnpike and Plank-road Companies for Non-repair.**—Corporations chartered to improve public highways, by converting them into turnpikes or plank roads, for which service they are entitled to *exact tolls* from travelers, rest under an *implied duty* to keep the highways, which they thus occupy, in a state *reasonably safe* for the public travel;<sup>3</sup> and if they fail in the performance of this duty, they are liable in damages to any traveler injured, under a principle already stated.<sup>4</sup> According to one view, if they fail to perform

<sup>1</sup> Pennsylvania &c. Canal Co. v. 582; Baxter v. Winooski Turnp. Co., Graham, 63 Pa. St. 290; s. c. 3 Am. 22 Vt. 114, 122; s. c. 52 Am. Dec. 84. Rep. 549; citing Wilkes v. Hungerford Market Co., 2 Bing. N. C. 281; Hughes v. Heiser, 1 Binn. (Pa.) 463; s. c. 2 Am. Dec. 459; Pittsburgh v. Scott, 1 Pa. St. 309; Commissioners v.

<sup>2</sup> Reasoning of Sharswood, C. J., in Pennsylvania &c. Canal Co. v. Graham, 63 Pa. St. 290; s. c. 3 Am. Rep. 549.

<sup>3</sup> Sims v. Yazoo &c. Plank Road Co., 38 Miss. 23.

<sup>4</sup> Ante, § 6358; Davis v. Lamoille County Plank Road Co., 27 Vt. 602.

this duty, they cannot compel the traveler to *pay toll*;<sup>1</sup> but another view is that the traveler is *estopped*, by the fact of *using the road*, from defending an action for tolls on this ground.<sup>2</sup> On the other hand, a traveler who *pays no tolls* and is not liable to pay any, cannot maintain an action against such a corporation for the non-repair of its road, because it has assumed no duty *to him*, but he takes the road as he finds it.<sup>3</sup> Such a corporation is under an obligation to maintain *every part of the road* in a safe condition, and is liable for damages resulting from the non-performance of his duty.<sup>4</sup> In the discharge of this duty, such corporations are bound to exercise *ordinary care, skill, and diligence*, but they are not liable for accidents not caused by the want of such care, skill, and diligence,<sup>5</sup>—in other words, they are not liable as *insurers*. It has been held that, where a *bridge* upon a turnpike road becomes unsafe from the gradual *decay* of the timbers, and the danger is not open and visible, the owners of the road are *responsible* for the sufficiency of the bridge, so long as they continue to take toll and keep the road open to the public, *although notice is given* to those who pass *that there is danger*. In order to exonerate themselves, the company must give notice that there is danger for which they will not be responsible, and must refuse to take toll.<sup>6</sup> It is, of course, competent for the legislature to increase this rule of liability, at least where it does so prior to the granting of the charter or franchises, and to make the corporation liable substantially as an *insurer*. Accordingly, under a statute of Massachusetts<sup>7</sup> which provided that a turnpike corporation should be liable to pay all damages which might happen to any person from whom toll was demandable, from defects of its bridges, or

<sup>1</sup> *Sims v. Yazoo &c. Plank Road Co.*, 38 Miss. 23.

<sup>2</sup> *Ante*, § 5932.

<sup>3</sup> *Williams v. Hingham &c. Turnp. Corp.*, 4 Pick. (Mass.) 341.

<sup>4</sup> *Baltimore &c. Turnp. Co. v. Cas-sell*, 66 Md. 419; *s. c.* 59 Am. Rep. 175; 7 Atl. Rep. 805.

<sup>5</sup> *Townsend v. Susquehannah Turnpike Co.*, 6 Johns. (N. Y.) 90. And see *Wilson v. Susquehannah Turnp. Co.*, 21 Barb. (N. Y.) 68; *Goshen &c. Turnp. Co. v. Sears*, 7 Conn. 86.

<sup>6</sup> *Randall v. Cheshire Turnp.*, 6 N. H. 147; *s. c.* 25 Am. Dec. 453.

<sup>7</sup> Mass. Stat. 1804, ch. 125, § 6.

want of repair of its road, it was held that such a corporation was liable for damage sustained by a traveler in consequence of a defect in the road, although the defect was a *latent* one, and the corporation used *due diligence* to discover defects, and keep the road in repair.<sup>1</sup> But such a statute will not be allowed to have the unjust operation of requiring the corporation to pay damages occasioned by the *negligence of the traveler*; and therefore it has been held that where there is a failure, on the part of a turnpike company, to comply with an express requirement of the statute, either as to the width of the road, or the mode of its construction, and a person traveling over it sustains an injury in consequence of such omission,—the turnpike company is liable, *unless* it appears that the plaintiff could have avoided the injury by the exercise of ordinary care and prudence. But if the plaintiff's injury is not chargeable to such omission, the corporation is not liable.<sup>2</sup> So, a turnpike company, which is made liable by its charter to pay all damages accruing from the neglect of a bridge, is not liable for damages sustained by one who *overloads* the bridge, if it be of sufficient ordinary strength.<sup>3</sup> It has been held that where, in pursuance of an agreement between a plank-road company and a town, a public highway in the limits of the latter is superseded by a plank road constructed by the company, the latter, and *not the town*, becomes liable for injuries occasioned by its insufficient repair.<sup>4</sup> Although a turnpike company has a lawful right to repair its road in such a way as to ward off the effect of rains and freshets, yet, in the exercise of that right, they must not injure adjoining land. If a damage arises from their negligence in this respect, the landowner may recover against them from the company.<sup>5</sup>

§ 6361. **Private Corporations how Liable for Non-exercise of Granted Powers.** — It does not follow, however, that because power to construct or maintain a railway, or other pub-

<sup>1</sup> *Yale v. Hampden &c. Turnp. Corp.*, 18 Pick. (Mass.) 357.

<sup>3</sup> *Richardson v. Royalton &c. Turnp. Co.*, 5 Vt. 580.

<sup>2</sup> *Wilson v. Susquehannah Turnp. Co.*, 21 Barb. (N. Y.) 68.

<sup>4</sup> *Davis v. Lamoille Co. Plank Road Co.*, 27 Vt. 602.

<sup>5</sup> *Boughton v. Carter*, 18 Johns. (N. Y.) 405.



lic work, is granted to a person or corporation for his or its private emolument, such person or corporation will be compelled by *mandamus* to execute the power, or be liable to a private action for a *non-exercise* of such power. Such a statute will, it seems, be deemed permissive unless its terms plainly import the contrary.<sup>1</sup> But a railway company which has so far entered upon the execution of its statutory powers as to condemn land to build part of its line, will be compelled by *mandamus* to complete it, unless it shows that it has become impossible for it to do so;<sup>2</sup> and if after such a railway has been built the company takes up its rails, a *mandamus* will lie to compel it to reinstate them.<sup>3</sup> So, the proprietor of a toll-bridge must keep the same in repair so long as he exercises the privilege accorded him by a statute of receiving tolls, or else he must pay damages to anyone thereby specially injured. He cannot escape this liability by maintaining a ferry, and collecting ferriage in lieu of the statutory pontage.<sup>4</sup> It seems that a corporation created by the legislature of a State, and which, under a contract with the State, has assumed the exclusive duty of *repairing the levees* upon a certain river within the State, for the purpose of preventing the overflow of cultivable lands, is liable for damages to a private landowner for the non-performance of the duty; but where sufficient time had not elapsed between the date at which the corporation became empowered to enter upon the discharge of the duty so assumed and the happening of the injury for which the plaintiff brought his action, it was held that the corporation was not liable.<sup>5</sup>

§ 6362. **Liability for the Non-performance of Statutory Obligations.** — It is a general rule, subject to some exceptions,

<sup>1</sup> *Rex v. Birmingham Canal Nav.*, 2 W. Black. 708, *per* Lord Mansfield, C. J., and Action, J.; *Regina v. York &c. R. Co.*, 1 El. & Bl. 178, *per* Erle, J.; *Nicholl v. Allen*, 1 Best & S. 915, 932, *per* Crompton, J.

<sup>2</sup> *Regina v. York &c. R. Co.*, 1 El. & Bl. 178. Compare *Edinburgh &c.*

*R. Co. v. Phillip*, 2 Macq. H. L. Cas. 514; s. c. 29 Sc. Jur. 242; 1 Pat. Sc. App. 681.

<sup>3</sup> *Rex v. Severn &c. R. Co.*, 2 Barn. & Ald. 646.

<sup>4</sup> *Nicholl v. Allen*, 1 Best & S. 916.

<sup>5</sup> *Loque v. Louisiana Levee Co.*, 27 La. An. 134.

that where an obligation is imposed upon a person *by statute*, he is liable to anyone who may have been injured by its having been negligently performed;<sup>1</sup> and this, whether it was performed by himself or by an independent contractor employed by him.<sup>2</sup> Familiar illustrations of this principle are found in the running of railroad trains at a rate of speed prohibited by statute, — the courts holding that this constitutes negligence *per se*;<sup>3</sup> in the omission of such a company to maintain the statutory signals at a highway-crossing;<sup>4</sup> in a farmer running a threshing-machine without having the tumbling-rods “boxed and secured while running,” as required by a statute;<sup>5</sup> and in a person keeping a sign suspended over a sidewalk, in violation of a city ordinance, so that it is blown down by a violent gale, inflicting injury.<sup>6</sup> Upon the same principle, where the charter of a corporation, or other governing statute, makes it the duty of the corporation to keep in repair a bridge, dike, canal, or other public work, an individual injured by a neglect of the statutory duty may maintain an action therefor.<sup>7</sup> The same rule, we shall see, is applicable to chartered municipal corporations.<sup>8</sup>

<sup>1</sup> *Gray v. Pullen*, 5 Best & S. 970; s. c. 34 L. J. (Q. B.) 265; 13 Week. Rep. 257; 11 L. T. (N. S.) 569; *Mersey Docks Trustees v. Gibbs*, L. R. 1 H. L. 93; *Coe v. Wise*, L. R. 1 Q. B. 711; s. c. 7 Best & S. 831; 37 L. J. (Q. B.) 262; *Bessant v. Great Western R. Co.*, 8 C. B. (N. S.) 368.

<sup>2</sup> *Gray v. Pullen*, *supra*.

<sup>3</sup> *Correll v. Burlington &c. R. Co.*, 38 Iowa, 120; s. c. 18 Am. Rep. 22; *Jetter v. New York &c. R. Co.*, 2 Keyes (N. Y.), 154.

<sup>4</sup> *Dodge v. Burlington &c. R. Co.*, 34 Iowa, 276.

<sup>5</sup> *Reynolds v. Hindman*, 32 Iowa, 146; *Messenger v. Pate*, 42 Iowa, 443.

<sup>6</sup> *Salisbury v. Herchenroder*, 106 Mass. 458; s. c. 8 Am. Rep. 354.

<sup>7</sup> *Riddle v. Proprietors of Locks &*

*Canals*, 7 Mass. 169; s. c. 5 Am. Dec. 35; *Pennsylvania &c. Canal Co. v. Graham*, 63 Pa. St. 290; *Pennsylvania R. Co. v. Patterson*, 73 Pa. St. 491; *Harrison v. Great Northern R. Co.*, 3 Hurlst. & C. 231; s. c. 10 Jur. (N. S.) 992; 33 L. J. (Ex.) 266; 12 Week. Rep. 1081; 10 L. T. (N. S.) 621; *Bayley v. Wolverhampton Water Works Co.*, 6 Hurlst. & N. 241. In this case the water-works company was held liable to a traveler whose horse was injured by their failing to keep a fire-plug in repair, as directed by a statute, although the plug belonged to the local board of health, which was liable to the water-works company for the expenses of the repairs.

<sup>8</sup> *Erie City v. Schwingle*, 22 Pa. St. 384; s. c. 60 Am. Dec. 87.

§ 6363. **Corporations Exercising Public Offices.**—A public office may well be vested in a corporation.<sup>1</sup> It is scarcely necessary to suggest illustrations of this. In this country the power of eminent domain is constantly exercised in behalf of corporations, on the ground that the use for which the land is required is a *public* use. In England the duties formerly discharged by overseers of highways and turnpike trustees appear now to be generally committed by statute to incorporated boards called, for what reason the writer does not know, “local boards of health.” Now, public officers who are charged by law with duties toward such individuals as apply to them for the performance of them and pay the statutory fee, are liable in damages to such individuals for failing to perform such duties. Of this class of officers, clerks of courts, notaries public, recorders of deeds, sheriffs, constables, coroners when executing civil process, and inspectors of meats, are examples.<sup>2</sup> The relations of these officers to an individual who thus requests them to act is analogous to a relation resting in contract. The liability of the officer is the same as though he had agreed with the individual to do the particular work for the stipulated fee, and then had failed wholly or in part to do it. A privity exists between them corresponding to what is called privity of contract, and the individual may recover of the officer the damages he has suffered from the failure of the officer to perform the required duty. Although there are many officers, such as surveyors of highways,<sup>3</sup> the Postmaster-

<sup>1</sup> Mr. Justice Blackburn, in *Mersey Docks Trustees v. Gibbs*, L. R. 1 H. L. 93.

<sup>2</sup> See *Houseman v. Girard & Co. Build. Asso.*, 81 Pa. St. 256; *M'Caraher v. Com.*, 5 Watts & S. (Pa.) 21; *s. c.* 39 Am. Dec. 106; *Com. v. Harmer*, 6 Phila. (Pa.) 90.

<sup>3</sup> *Young v. Davis*, 7 Hurlst. & N. 760; *s. c.* affirmed in *Exchequer Chamber*, 2 Hurlst. & C. 197. Chief Baron Pollock, in the court below, ruled the case on the authority of *M'Kinnon v. Penson*, 8 Ex. 319;

*s. c.* in error, 9 Ex. 609. This view of the non-liability of such officers is taken by some courts in this country: *Bartlett v. Crozier*, 17 Johns. (N. Y.) 439; reversing *s. c.* 15 Johns. (N. Y.) 250; *Garlinghouse v. Jacobs*, 29 N. Y. 297; *Young v. Commissioners of Roads*, 2 Nott & McC. (S. C.) 537; *Nobles v. Langley*, 66 N. C. 287; *Tyson v. Baltimore County*, 28 Md. 510; *Walter v. Wicomico County*, 35 Md. 385; *Ball v. Winchester*, 32 N. H. 435. But denied by others: *Hover v. Barkhoof*, 44

General,<sup>1</sup> and the trustees of a school district, who are not so liable;<sup>2</sup> yet in England *quasi*-public corporations, charged

N. Y. 113; *Robinson v. Chamberlain*, 34 N. Y. 389; *s. c.* 90 Am. Dec. 713; *Smith v. Wright*, 24 Barb. (N. Y.) 170; *Bryan v. Landon*, 3 Hun (N. Y.), 500; *s. c.* 5 *Thomp. & C.* (N. Y.) 594; *Rector v. Pierce*, 3 *Thomp. & C.* (N. Y.) 416; *Day v. Crossman*, 4 *Thomp. & C.* (N. Y.) 122; *Bostwick v. Barlow*, 14 Hun (N. Y.), 177; *McCord v. High*, 24 Iowa, 336. It was also ruled in England that turnpike trustees were not personally liable for damages happening to travelers in consequence of the negligence of those whom they were obliged to employ to keep the turnpike in repair: they were answerable only for their own personal defaults. *Harris v. Baker*, 4 Maule & S. 27; *Humphreys v. Mears*, 1 Man. & Ry. 187; *Hall v. Smith*, 2 Bing. 156. And the same rule has been declared by the House of Lords under the law of Scotland, which in this respect is the same as the law of England. *Duncan v. Findlater*, 6 Clark & Fin. 894. An exception to this rule has been declared in New York with reference to the liability of contractors for the repair of public canals belonging to the State. These persons are held by the courts of that State, on grounds not sound in principle, but sustained, perhaps, by views of public policy, liable in damages to any person using the canal, for any injury he may have sustained by their neglect to perform the duty of keeping their respective sections of the canal in repair. *Adsit v. Brady*, 4 Hill (N. Y.), 630; *s. c.* 40 Am. Dec. 305; *Fulton Fire Ins. Co. v. Baldwin*, 37 N. Y. 648; *Robinson v. Chamberlain*, 34 N. Y. 389; *s. c.* 90 Am. Dec. 713; *Conroy v. Gale*, 5 Lans. (N. Y.) 344; *s. c.* affirmed, 47 N. Y. 665;

*Stack v. Bangs*, 6 Lans. (N. Y.) 262; *Johnson v. Belden*, 2 Lans. (N. Y.) 433; *s. c.* affirmed, 47 N. Y. 130. Under the statutes of Mississippi, bridge contractors who engage with the police boards of the counties to keep the county bridges in repair for stated periods, and who seem to occupy, with reference to what they undertake, substantially the same position as canal contractors in New York, are liable to travelers for the damages they may sustain in consequence of their bridges being suffered to get out of repair. *Sutton v. Board of Police*, 41 Miss. 236.

<sup>1</sup> *Lane v. Cotton*, 1 *Ld. Raym.* 646; *Whitfield v. Le Despencer*, *Cowp.* 754. So, a local deputy postmaster is regarded as an officer of the public and not as an agent of the principal postmaster. *Schroyer v. Lynch*, 8 Watts (Pa.), 453; *Wiggins v. Hathaway*, 6 Barb. (N. Y.) 632; *Dunlop v. Munroe*, 7 Cranch (U. S.), 242; *Bolan v. Williamson*, 1 Brev. (S. C.) 181. But in apparent conflict with this doctrine it has been held in Virginia, that a mail contractor is responsible in a civil action to the owner of a letter for the negligence of his servant in losing it. *Sawyer v. Corse*, 17 *Gratt.* (Va.) 230. In this case Joynes, J., made the following statement, which is evidently too broad: "It is well settled that a public officer, or other person who takes upon himself a public employment, is liable to third persons, in an action on the case, for any injury occasioned by his own personal negligence or default in the discharge of his duties."

<sup>2</sup> *Bassett v. Fish*, 75 N. Y. 303; *s. c.* 19 Alb. L. J. 160; reversing *s. c.* 12 Hun (N. Y.), 209.

by statute with the duty of keeping the highways, docks, and other public works in repair, and provided with funds for this purpose, are liable in civil actions for damages to any person injured by a neglect of their duties; but the action lies against them only as a corporation, and the damages are leviable only out of their corporate funds.<sup>1</sup> Nor will *want of funds* with which to repair be a defense to such actions, where the commissioners possess the means of raising the necessary funds,—as, by levying a tax.<sup>2</sup> It is not necessary to show affirmatively that the commissioners had funds, or the means of raising funds, to meet any damages which might be recovered against them.<sup>3</sup>

<sup>1</sup> *Mersey Docks Trustees v. Gibbs*, L. R. 1 H. L. 93; *Coe v. Wise*, 37 L. J. (Q. B.) 262; *s. c.* 7 Best & S. 831; L. R. 1 Q. B. 711; 14 L. T. (N. S.) 891; *Smith v. West Derby Local Board*, 3 C. P. Div. 423; *Winch v. Conservators of the Thames*, L. R. 7 C. P. 458; *s. c.* affirmed in Exchequer Chamber, L. R. 9 C. P. 378; *White v. Hindley Local Board*, L. R. 10 Q. B. 219; *s. c.* 44 L. J. (Q. B.) 114; 32 L. T. (N. S.) 460; 23 Week. Rep. 651; *Hartnall v. Ryde Comm'rs*, 4 Best & S. 361; *s. c.* 10 Jur. (N. S.) 257; 33 L. J. (Q. B.) 39; distinguishing *Young v. Davis*, 7 Hurlst. & N. 760; *Metcalf v. Hetherington*, 11 Ex. 257; *s. c.* 25 L. J. (Ex.) 314; *Ohrby v. Ryde Comm'rs*, 5 Best & S. 743; *s. c.* 10 Jur. (N. S.) 1048; *Clothier v. Webster*, 12 C. B. (N. S.) 790; *s. c.* 9 Jur. (N. S.) 231; *Whitehouse v. Fellowes*, 10 C. B. (N. S.) 765; *s. c.* 30 L. J. (C. P.) 306; *Hardwick v. Moss*, 7 Hurlst. & N. 136; *s. c.* 31 L. J. (Ex.) 314; 7 Jur. (N. S.) 804; *Davis v. Curling*, 8 Q. B. 286; *s. c.* 10 Jur. 69; 15 L. J. (Q. B.) 56; 12 Week. Rep. 1079; *Foreman v. Canterbury*, L. R. 6 Q. B. 214; *s. c.* 40 L. J. (Q. B.) 138; 24 L. T. (N. S.) 385; *Ruck v. Williams*, 3 Hurlst. & N. 308; *s. c.* 27 L. J. (Ex.) 359; *Ward v. Lee*, 7 El. & Bl. 426; *Southampton &c.*

*Bridge Co. v. Local Board*, 8 El. & Bl. 801; *Meek v. Whitechapel Board*, 2 Fost. & Fin. 144; *Brownlow v. Metropolitan Board*, 16 C. B. (N. S.) 546; affirming *s. c.* 13 C. B. (N. S.) 768.

<sup>2</sup> *Hartnall v. Ryde Comm'rs*, 4 Best & S. 361. This is in conformity with the general American doctrine applicable to the liability of overseers of highways (*Hover v. Barkhoof*, 44 N. Y. 113), and to the rule applicable to the liability of municipal corporations. *Henley v. Mayor of Lyme Regis*, 5 Bing. 91; *s. c.* 3 Moo. & P. 278; in error to King's Bench, 3 Barn. & Adol. 77; in the House of Lords, 2 Clark & Fin. 331; 1 Bing. N. C. 222; 8 Bli. N. R. 690; 1 Scott, 29; *Erie City v. Schwingle*, 22 Pa. St. 384; *s. c.* 60 Am. Dec. 87; *Hines v. Lockport*, 50 N. Y. 236; affirming *s. c.* 41 How. Pr. (N. Y.) 435; 5 Lans. (N. Y.) 16; 60 Barb. (N. Y.) 378; *Hyatt v. Rondout*, 44 Barb. (N. Y.), 385; *s. c.* affirmed, see 41 N. Y. 619; *Peach v. Utica*, 10 Hun (N. Y.), 477; *Hutson v. New York*, 9 N. Y. 163; *s. c.* 59 Am. Dec. 526; 5 Sandf. (N. Y.) 289; *Milledgeville v. Cooley*, 55 Ga. 17. See *Smith v. Wright*, 27 Barb. (N. Y.) 621.

<sup>3</sup> *Ohrby v. Ryde Comm'rs*, 5 Best & S. 743; *s. c.* 10 Jur. (N. S.) 1048; 33 L. J. (Q. B.) 296; 12 Week. Rep. 1079.

**§ 6364. Corporations for the Maintenance of Public Charities.**—The Supreme Court of Rhode Island has decided that a corporation which maintains a hospital as a public charity, receiving its income mainly from endowments and voluntary contributions, charging patients only for board, warmth, washing, and nursing, and furnishing them medical and surgical attendance gratuitously, — that is, calling in for them, when necessary, certain physicians and surgeons who give their services to patients of the hospital without charge, — is liable in damages out of its corporate funds for an injury to a patient by the negligence of its surgical *interne*, the same being a medical student who is required to attend constantly at the hospital, but who receives no other compensation for his services than his board, lodging, and the experience thereby acquired.<sup>1</sup> This decision acquires interest from the fact that the Supreme Judicial Court of Massachusetts decided otherwise in a much similar case.<sup>2</sup> In the Rhode Island case, a hospital patient sued the corporation for unskillful surgical treatment by a house pupil, a functionary similar to a surgical *interne*. There was no evidence of any want of care in selecting the house pupil, and the court held that, without such evidence, the action could not be maintained, and at the same time strongly intimated an opinion that it could not be maintained even with such evidence, for the reason that the corporation could not be held to have agreed to do more than furnish hospital accommodations, which the plaintiff had had, and for the further reason that any judgment recovered against the corporation could only be satisfied out of funds which, being dedicated to the charity, could not be lawfully used to pay it. The Massachusetts court proceeded on the authority of *Holliday v. St. Leonard*,<sup>3</sup> a case the doctrine of which has been since overturned by a case in the House of Lords, and other cases in the same country cited in the pre-

<sup>1</sup> *Glavin v. Rhode Island Hospital*, 2 R. I. 411; s. c. 34 Am. Rep. 675; Cent. L. J. 329; opinions by Durpe, C. J., and Potter, J.

<sup>2</sup> *McDonald v. Massachusetts Gen-*

*eral Hospital*, 120 Mass. 432; s. c. 21 Am. Rep. 529.

<sup>3</sup> 11 C. B. (N. S.) 192; s. c. 8 Jur. (N. S.) 79; 30 L. J. (C. P.) 361; 9 Week. Rep. 604; 4 L. T. (N. S.) 406.

ceding section.<sup>1</sup> These cases hold that a board or body, having work to do for the public *gratuitously*, are liable for the torts of their servants or employés, the same as a private business corporation, provided they have funds, or are in receipt of an income, out of which a judgment against them can be satisfied. But a corporation the membership in which is limited to officers and agents of *fire insurance companies* doing business in a certain city, having power to provide for and assist in the saving of life and property at fires, the funds of which are raised by assessments upon the companies doing business in such city, is a private, and not a public, corporation, nor is it a public charity; and it is liable in damages for injuries resulting from the negligence of its servants in driving through the public streets; notwithstanding the facts that the saving of life and property are referred to in its charter in general terms, and that it in fact makes no distinction in its efforts to save property between the insured and the uninsured.<sup>2</sup>

§ 6365. **Payment of Damages out of Trust Funds.**—The real stress of the Rhode Island case, considered in the previous section,<sup>3</sup> lies in the doctrine there announced that a *trust fund*, specifically devoted by law, or by the terms on which it was donated, to one object, can be diverted by the judicial courts to a totally different object. It must be conceded that there is no principle of strict reason or of strict justice which will take a fund devoted specifically to one object, or belonging to a class of innocent beneficiaries, and give it to a third person, simply because he has been injured by the wrong of the custodian of such fund, or of his servant. It is impossible to escape the force of Lord

<sup>1</sup> *Mersey Docks Trustees v. Gibbs*, 11 H. L. Cas. 686; s. c. L. R. 1 H. L. 93; *Foreman v. Mayor of Canterbury*, L. R. 6 Q. B. 214; *Coe v. Wise*, L. R. 1 Q. B. 711; s. c. 5 Best & S. 440, 458; *Winch v. Conservators of the Thames*, L. R. 7 C. P. 458; s. c. L. R. 9 C. P. 378.

<sup>2</sup> *Newcomb v. Boston Protective Department*, 151 Mass. 215; s. c. 2 N. E. Rep. 39; 6 L. R. A. 778.

<sup>3</sup> *Glavin v. Rhode Island Hospital*, 12 R. I. 411; s. c. 34 Am. Rep. 675; 9 Cent. L. J. 329.

Cottenham's reasoning upon this question, in the case of the Feoffees of Heriot's Hospital *v.* Ross,<sup>1</sup> although the case may not have called for those observations. The question was greatly discussed in the case of Mersey Docks Trustees *v.* Gibbs,<sup>2</sup> and the result was that a fund specifically appropriated by several acts of Parliament to the keeping in repair of the docks, the payment of interest on an indebtedness which had been created in the building of them, and the creation of a sinking fund for the gradual liquidation of such indebtedness, was diverted to the payment of damages which had accrued to a ship from the negligence of a servant whom the trustees of the docks had employed to take charge of them. After reading attentively the various judgments which were delivered in that celebrated case, one can hardly escape the conclusion that, whatever reasons were actually put forth in support of this doctrine, the real consideration which weighed upon the minds of the judges and law lords was that it was necessary to prevent a failure of justice. The rule thus declared rests, then, upon large views of justice and public policy. It is closely analogous to the rule of admiralty which makes the *thing* — the ship — answerable for the wrongs done by those who have the management of it. The principle is really much older than Mersey Docks Trustees *v.* Gibbs. It has been applied for many years in England and this country in case of *municipal corporations*.<sup>3</sup> These bodies, in the United States, are organized either under special charters or general statutes which provide specifically the purposes for which revenue may be raised and to which it may be applied. Revenue thus raised is directly charged with the public trusts named in the governing statutes. It is believed that very few of these statutes provide specifically for the use of such revenues for the payment of damages arising from the torts and neg-

<sup>1</sup> 12 Clark & Fin. 507.

<sup>2</sup> L. R. 1 H. L. 93.

<sup>3</sup> *Lynn v. Turner*, Cowp. 86; *Henley v. Mayor of Lyme Regis*, 5 Bing. 91; *s. c.* 3 Moo. & P. 278; in error to

King's Bench, 3 Barn. & Adol. 77; in the House of Lords, 2 Clark & Fin. 331; 1 Bing. N. C. 222; 8 Bli. N. R. 690; 1 Scott, 29. The American cases are too numerous to cite.



lects of the servants of the corporation; and yet we know that such revenues are constantly diverted to this end by the judgments of the courts.

§ 6366. **Out of Corporate Funds in the Hands of Receivers.**—The same may be said in regard to a *receiver of a railway*. This officer, under the orders of a court of equity, takes charge of all the property of the railway company. The real owners of the property, and those beneficially interested in it, are held at arm's length. He is not their agent in any sense, but is exclusively the officer of the court.<sup>1</sup> They are not, in general, liable in damages for his negligence.<sup>2</sup> The only remedy is an action against the receiver, and this can only be brought by permission of the court appointing him,<sup>3</sup> unless the statute law has changed the rule.<sup>4</sup> No principle of logic can be discovered which will justify the diversion of funds which belong in equity to them, to the payment of damages committed by him, or by those whom he employs and who are responsible only to him. And yet actions for such damages are constantly prosecuted against such receivers, and judgments rendered against them in such actions are paid out of the trust funds in their hands, under the sanction of doctrines announced in the highest judicial tribunals.<sup>5</sup> Moreover, those courts which have appointed such receivers are, it is believed, in the universal practice of directing the payment of such damages, where the circumstances are such that they would have been payable by the corporation itself had the property remained in its hands.

<sup>1</sup> *Post*, § 6940, *et seq.*

<sup>2</sup> *Post*, § 7148, *et seq.*; *Metz v. Buffalo & c. R. Co.*, 58 N. Y. 61; *s. c.* 17 Am. Rep. 201; *Turner v. Hannibal & c. R. Co.*, 74 Mo. 602.

<sup>3</sup> *Barton v. Barbour*, 104 U. S. 126; *post*, § 7128.

<sup>4</sup> As in the case of Federal court receivers: *Post*, § 7131.

<sup>5</sup> *Murphy v. Holbrook*, 20 Ohio St. 137; *s. c.* 5 Am. Rep. 633. There is a statute giving such an action in Indiana for stock killed. 1 Stat. Ind. 1876, p. 751, § 1; *Ohio & c. R. Co. v. Fitch*, 20 Ind. 498, 500; *post*, § 7155.

## CHAPTER CXLI.

### RULES OF DAMAGES.

ART. I. CONSEQUENTIAL AND SPECIAL DAMAGES. §§ 6370-6374.

II. EXEMPLARY DAMAGES. §§ 6377-6395.

#### ARTICLE I. CONSEQUENTIAL AND SPECIAL DAMAGES.

##### SECTION

6370. Consequential damages for injuries to land: doctrine that damages not recoverable where work authorized by statute.

6371. Doctrine that damages recover-

##### SECTION

able although work authorized by legislature.

6372. When such damages recoverable upon either theory.

6373. Special damages.

6374. Further of this subject.

§ 6370. **Consequential Damages for Injuries to Land: Doctrine that Damages not Recoverable where Work Authorized by Statute.**—Upon the question whether corporations will be liable to pay *consequential damages* which the owners of *land* suffer in consequence of the execution by such corporations of public works authorized by the legislature, there are two theories: 1. The first is the narrow and unjust theory of the English law<sup>1</sup> that such damages, if committed without negligence or other fault on the part of the corporation, are *damnum absque injuria*, so that the land-owner must suffer without compensation, for the benefit of the public;<sup>2</sup> and mod-

<sup>1</sup> See *British Cast Plate Manufacturers v. Meredith*, 4 T. R. 794; *Sutton v. Clarke*, 6 Taunt. 29; *Boulton v. Crowther*, 2 Barn. & C. 703; *s. c.* 4 Dowl. & Ry. 195; followed in such cases as *Green v. Reading*, 9 Watts (Pa.), 382, 384; *s. c.* 36 Am. Dec. 127; *O'Connor v. Pittsburgh*, 18 Pa. St. 187; *Callender v. Marsh*, 1 Pick. (Mass.) 417; *Smith v. Washington*, 20 How. (U. S.) 135.

<sup>2</sup> *Schuykill Nav. Co. v. McDonough*, 33 Pa. St. 73; *Bordentown & C. Turnp. Co. v. Camden & C. R. Co.*, 17 N. J. L. 314; *Hatch v. Vermont & C. R. Co.*, 25 Vt. 49; *Sutton v. Clarke*, 6 Taunt. 29; *Boulton v. Crowther*, 2 Barn. & C. 703; *Whitehouse v. Birmingham Canal Co.*, 25 L. J. (Ex.) 27; *Henry v. Pittsburgh & C. Bridge Co.*, 8 Watts & S. (Pa.) 85; *Shrunk v. Schuykill Nav. Co.*, 14 Serg. & R.

ern decisions are not wanting where this unjust doctrine is defended as being compatible with reason and justice.<sup>1</sup> This doctrine rests, in Great Britain, upon the theory of the British constitution that, Parliament being supreme, whenever Parliament authorizes the doing of a thing, the doing of that thing is, for that reason alone, rightful, and cannot hence be made the ground of damages. Under that rule, whenever the subject or citizen appeals to the courts of his country for justice, the judge, with owl-like gravity, parries his demand with a Latin quotation, by telling him that what he has suffered is *damnum sine injuria*.<sup>2</sup> This doctrine should have no place whatever under those recent American constitutions which provide that private property shall not be taken or damaged for public use without just compensation; and yet the rule is kept up, even in the face of such constitutional provisions.

(Pa.) 71; Com. v. Fisher, 1 Penr. & W. (Pa.) 462, 467; Monongahela Nav. Co. v. Coons, 6 Watts & S. (Pa.) 101; Susquehanna Canal Co. v. Wright, 9 Watts & S. (Pa.) 9; s. c. 42 Am. Dec. 312; Lansing v. Smith, 8 Cow. (N. Y.) 146; Cleveland &c. R. Co. v. Speer, 56 Pa. St. 325, 334; s. c. 94 Am. Dec. 84; Stowell v. Flagg, 11 Mass. 364; Stevens v. Middlesex Canal Co., 12 Mass. 466; Piscataqua Bridge v. New Hampshire Bridge, 7 N. H. 35; Hollister v. Union Co., 9 Conn. 436; s. c. 25 Am. Dec. 36; Burroughs v. Housatonic R. Co., 15 Conn. 124; s. c. 38 Am. Dec. 64; Sumner v. Richardson Lake Dam Co., 71 Me. 106.

<sup>1</sup> Northern Transportation Co. v. Chicago, 99 U. S. 635; s. c. 2 Thomp. Neg. 692.

<sup>2</sup> In the leading case of Mersey Docks Trustees v. Gibbs, in the House of Lords, L. R. 1 H. L. 93, 112, Mr. Justice Blackburn, in giving the opinion of the judges, said: "If the legislature directs or authorizes the doing of a particular thing, the doing of it cannot be wrongful; if damage

results from the doing of that thing, it is just and proper that compensation should be made for it, and that is generally provided for in the statutes authorizing the doing of such things. But no action lies for what is *damnum sine injuria*; the remedy is to apply for compensation under the provision of the statutes legalizing what would otherwise be a wrong. This, however, is the case, whether the thing is authorized for a public purpose or a private profit. No action will lie against a railway company for erecting a line of railway authorized by its acts, so long as the directors pursue the authority given them, any more than it would lie against the trustees of a turnpike road for making their road under their acts, though the one road is made for the profit of the shareholders in the company, and the other is not. The principle is, that the act is not wrongful, not because it is for a public purpose, but because it is authorized by the legislature."

§ 6371. **Doctrine that Damages Recoverable although Work Authorized by Legislature.**—2. The other doctrine, founded on the soundest considerations of reason and justice, and the only doctrine that is entitled to be mentioned in terms of respect, is that, whenever the legislature authorizes a corporation, for its own profit, to do a work, the doing of which, whether done carefully or negligently, may be attended with damages to adjacent land-owners, there is always an implication that, if damages do ensue, they will make just compensation. “It is by no means true,” said Green, C. J., “that an act constituting a nuisance must necessarily be in itself unlawful. On the contrary, acts which in themselves are perfectly lawful may, and frequently do, in their consequences, work actionable injuries to others. To construct a mill-dam upon one’s own property is a perfectly lawful act; but if, by means of such dam, the natural current of the water is obstructed and thrown back upon the land of another, it becomes actionable as a nuisance. . . . It is well settled that an injury to private property, resulting from an act authorized by law, and done in pursuance of the statute, cannot be justified, unless the act were done by one acting as an agent, or in behalf of government, or to effect a public interest; and the statute is no bar to an action for damages resulting from such act, unless it provide a different mode of compensation.”<sup>1</sup> In such a case the grantee is justly deemed to accept the grant from the legislature, subject to the maxim *Sic utere tuo ut alienum non lædas*.<sup>2</sup> One court has gone so far as to hold that,

<sup>1</sup> Delaware &c. Canal Co. v. Lee, 22 N. J. L. 243, 247; qualifying the language of Nevius, J., in Van Schoick v. Delaware &c. Canal Co., 20 N. J. L. 249. This view of the law is supported by Sinnickson v. Johnson, 17 N. J. L. 129; s. c. 34 Am. Dec. 184; Dayton and Nevius, JJ., giving forcible opinions. Compare Rogers v. Bradshaw, 20 Johns. (N. Y.) 735; Stevens v. Middlesex Canal Co., 12 Mass. 466; Shrunk v. Schuylkill Nav.

Co., 14 Serg. & R. (Pa.) 71; Com. v. Fisher, 1 Penr. & W. (Pa.) 462.

<sup>2</sup> Crittenden v. Wilson, 5 Cow. (N. Y.) 165; s. c. 15 Am. Dec. 462, per Sutherland, J.; Hooker v. New Haven &c. Co., 14 Conn. 146; Baltimore &c. R. Co. v. Reaney, 42 Md. 117; Delaware &c. Canal Co. v. Lee, 22 N. J. L. 243; Gardner v. Newburgh, 2 Johns. Ch. (N. Y.) 162; s. c. 7 Am. Dec. 526; Sinnickson v. Johnson, 17 N. J. L. 129; s. c. 34 Am. Dec. 184.

although the constitution of the State is silent upon the question, and although the fifth amendment to the Federal constitution is restrictive on the United States merely,—the State cannot damnify private persons, even for the public benefit, without making compensation.<sup>1</sup>

**§ 6372. When Such Damages Recoverable upon either Theory.**—Even under the former of these theories, a corporation is exempt from consequential damages only where, being clothed with the State's right of eminent domain, it takes private property for public use, on making proper compensation, and where such damages are not part of the compensation required.<sup>2</sup> And consequential damages may, of course, be assessed against the corporation if the governing statute requires it; and where the statute requires the payment of damages, this ought to be construed as including all substantial damages suffered by the private individual, whether direct or consequential. Where it was provided in the charter of a bridge company that referees should assess the damages, if any, which the owner of a contiguous ferry

*Contra*, *Dodd v. Williams*, 3 Mo. App. 278. Thus, a statute authorized John Denn to build a dam across a navigable creek, for his own private advantage. This protected him against an indictment for obstructing the navigation, but not against an action for damages for flowing the lands of an adjacent owner. He proceeded to execute the power conferred upon him by the statute, at the peril of paying the damages he might thereby cause to others. *Sinnickson v. Johnson*, *supra*.

<sup>1</sup> *Ten Eyck v. Delaware & C. Canal Co.*, 18 N. J. L. 200; *s. c.* 37 Am. Dec. 233. In *Sinnickson v. Johnson*, 17 N. J. L. 129, 146; *s. c.* 34 Am. Dec. 184, Dayton, J., declared the fifth amendment to the Federal constitution, though not binding on the States (*Barron v. Baltimore*, 7 Pet. (U. S.)

243; *Livingston v. Moore*, 7 Pet. (U. S.) 469, 551), "operative as a principle of universal law." The same view of the subject was taken by the Supreme Court of North Carolina, in the absence of a similar constitutional provision. *Raleigh & C. R. Co. v. Davis*, 2 Dev. & B. (N. C.) 451. Under like circumstances the Supreme Court of South Carolina, by a divided court, ruled that compensation was not indispensable. *State v. Dawson*, 3 Hill (S. C.), 100. In a leading case in Vermont (*Hatch v. Vermont & C. R. Co.*, 25 Vt. 49), Redfield, J., expressed the view that the decision of the minority of the South Carolina court, as expressed by Richardson, J., is the better view.

<sup>2</sup> *Pottstown Gas Co. v. Murphy*, 39 Pa. St. 257.

should sustain by the erection of the bridge,—it was held that the words of the act required the payment of damages for all injurious consequences, proximate and remote, to the owner of the ferry.<sup>1</sup>

§ 6373. **Special Damages.**—Another rule, which is found in many judicial decisions, is that where a corporation, in executing public works, inflicts damage upon an adjacent land-owner, such a land-owner cannot recover except what are called *special damages*, which are those damages which are *peculiar to him*, and which he does not suffer in common with the rest of the public.<sup>2</sup> In the application of this rule, there is much difficulty in distinguishing between the *general damages* for which the law makes no compensation, and the *special damages* for which it makes compensation. Speaking with reference to this distinction, it was said: “The question in all such cases is, whether the inconvenience complained of is general, or a particular inconvenience of the party complaining.”<sup>3</sup> Special damages are constantly recovered against

<sup>1</sup> Buckwalter v. Black Rock &c. Co., 38 Pa. St. 281.

<sup>2</sup> Indiana &c. R. Co. v. Eberle, 110 Ind. 542; s. c. 59 Am. Rep. 225.

<sup>3</sup> Burrough, J., in Greasley v. Codling, 2 Bing. 263, 266. The reader who desires further to pursue this distinction might consult the following authorities: Meynell v. Saltmarsh, 1 Keb. 847; Hart v. Bassett, Sir T. Jones, 156; 4 Vin. Abr. 519; Iveson v. Moore, 1 Ld. Raym. 486; Rose v. Miles, 4 Maule & S. 401; Rose v. Groves, 5 Man. & G. 613; Myers v. Malcolm, 6 Hill (N. Y.), 292; s. c. 41 Am. Dec. 744; Lansing v. Smith, 4 Wend. (N. Y.) 9; s. c. 21 Am. Dec. 89; Linsley v. Bushnell, 15 Conn. 225; s. c. 38 Am. Dec. 79; Houck v. Wachter, 34 Md. 265; s. c. 6 Am. Rep. 332; Baltimore v. Marriott, 9 Md. 160, 178; s. c. 66 Am. Dec. 326; Smith v. Smith, 2 Pick. (Mass.) 621; s. c. 13 Am. Dec.

464; Stetson v. Faxon, 19 Pick. (Mass.) 147; Barron v. Baltimore, 7 Pet. (U. S.) 243; s. c. 2 Am. Jur. 201; Weick v. Lander, 75 Ill. 93; Delzell v. Indianapolis &c. R. Co., 32 Ind. 45; Kessel v. Butler, 53 N. Y. 612; Rockwell v. Third Ave. R. Co., 64 Barb. (N. Y.) 438; Hathaway v. Hinton, 1 Jones L. (N. C.) 243; Hundhausen v. Bond, 36 Wis. 29; Manley v. St. Helen's Canal Co., 2 Hurlst. & N. 840; s. c. 27 L. J. (Ex.) 159; Kirby v. Boylston Market Asso., 14 Gray (Mass.), 249, 251; s. c. 74 Am. Dec. 682; Dobson v. Blackmore, 9 Ad. & El. (N. s.) 991; Shipley v. Fifty Associates, 101 Mass. 254; Pennsylvania &c. R. Co. v. Graham, 63 Pa. St. 290; s. c. 3 Am. Rep. 549; Farnum v. Concord, 2 N. H. 392; Eastman v. Meredith, 36 N. H. 284; s. c. 72 Am. Dec. 302; Ball v. Winchester, 32 N. H. 435; Griffin v. Sanborton, 44 N. H.

individuals and private corporations, who, prosecuting work for private gain, have obstructed a public highway, and have failed to exercise the duty under which they stand, of restoring the same so that the public easement shall not be substantially impaired or endangered;<sup>1</sup> and where the relation of the plaintiff to the easement is such that he sustains an injury special to himself, and different from that sustained by the public generally. Thus, if a person or corporation cuts a canal or mill-race across a highway, he or it must bridge the highway in a substantial manner and keep the bridge in repair;<sup>2</sup> and for special damages happening through a failure of this duty, the person or corporation is liable.<sup>3</sup> In like manner, if a person or corporation makes an excavation in the highway, and fills it up negligently, or fails properly to restore the roadway, so that a person or an animal is killed or injured in crossing it, he or it must pay damages.<sup>4</sup> So, where a corporation, whose canal had cut off a highway, restored the public easement by means of a *drawbridge*, it was held that it was bound to keep it *guarded* and *lighted*, so that a traveler would not walk into the canal at night, when the bridge was turned to admit the passage of boats.<sup>5</sup> But a person or corporation, thus obstructing a highway, is under no greater duty than to keep in repair a sufficient way, such as

246; *Holman v. Townsend*, 13 Met. (Mass.) 297; *Tisdale v. Norton*, 3 Met. (Mass.) 388; *Harwood v. Lowell*, 4 Cush. (Mass.) 310; *Brailey v. Southborough*, 6 Cush. (Mass.) 141; *Tomlinson v. Derby*, 43 Conn. 562; *Williams v. Tripp*, 11 R. I. 447.

<sup>1</sup> As to this duty, see *Hyams v. Webster*, L. R. 4 Q. B. 138; affirming *s. c.* L. R. 2 Q. B. 264; 8 Best & S. 272; 36 L. J. (Q. B.) 166; 28 L. J. (Q. B.) 21; 16 L. T. (N. S.) 118; 17 Week. Rep. 232.

<sup>2</sup> *Dygert v. Schenck*, 23 Wend. (N. Y.) 446; *Rex v. Kent*, 13 East, 220; *Rex v. Lindsey*, 14 East, 317. Compare *Meadville v. Erie Canal Co.*, 18 Pa. St. 66.

<sup>3</sup> *Bow-Bridge v. Le Prior*, 1 Roll. Abr. 368; *Dygert v. Schenck*, *supra*; *Phoenixville v. Phoenix Iron Co.*, 45 Pa. St. 135; *Perley v. Chandler*, 6 Mass. 454; *s. c.* 4 Am. Dec. 159; *Woodring v. Forks Township*, 28 Pa. St. 355; *s. c.* 70 Am. Dec. 134.

<sup>4</sup> *Hays v. Gallagher*, 72 Pa. St. 136; *Duffy v. Chicago & C. R. Co.*, 32 Wis. 269; *Roberts v. Chicago & C. R. Co.*, 35 Wis. 679; *Buesching v. St. Louis Gas Light Co.*, 73 Mo. 219; *s. c.* 39 Am. Rep. 503.

<sup>5</sup> *Manley v. St. Helen's Canal Co.*, 2 Hurlst. & N. 840. And see *Wiggins v. Bodding*, 3 Car. & P. 544.

existed before the obstruction. If the public authorities afterwards lay out a broader highway, and build a larger bridge over it, such person or corporation will not be liable for not keeping the larger bridge in repair.<sup>1</sup>

§ 6374. **Further of This Subject.**—It may be stated, as a general rule to which there is probably no exception, that a person who, without fault on his part, sustains an injury through *direct contact* with an obstruction of the highway, may maintain an action against the obstructor for the injury.<sup>2</sup> Nor is it necessary in all cases that he should have come in direct contact with the obstruction. If he is traveling the highway, and his *horse takes fright* at the obstruction, it being of a nature to frighten ordinarily gentle horses, and in consequence thereof he is injured, he may maintain an action for damages.<sup>3</sup> So, where a *railway company* has located and operated its road on a certain *street in a town* or city, for a considerable time, but thereafter, without authority of law, relocates its road within a few feet of the premises of a person, which are occupied for his dwelling and for a grocery store, thus impairing the value of his house as a dwelling and ruining it for the purposes of business, he, it has been held, may recover damages from the corporation.<sup>4</sup> Again, if a *railway company*, although having a right of way over a particular *street*, unreasonably obstructs the use of the street as an easement, by allowing its cars to stand thereon, whereby an abutting property-owner sustains special damage, the latter may maintain an action against the corporation therefor.<sup>5</sup>

<sup>1</sup> *Phoenixville v. Phoenix Iron Co.*, 45 Pa. St. 135. When non-repair is *negligence as matter of law*, see 1 Thomp. Neg. (1st ed.), p. 344, § 6. How in respect of *areas under sidewalks*: *Ibid.*, p. 345, § 7.

<sup>2</sup> *Manley v. St. Helen's Canal Co.*, 2 Hurlst. & N. 840; *Kessel v. Butler*, 53 N. Y. 612; *Fox v. Sackett*, 10 Allen (Mass.), 535; s. c. 87 Am. Dec. 682.

<sup>3</sup> 1 Thomp. Neg. 349, § 14.

<sup>4</sup> *Little Miami R. Co. v. Naylor*, 2 Ohio St. 235; s. c. 59 Am. Dec. 667.

<sup>5</sup> *Lackland v. North Missouri R. Co.*, 31 Mo. 180. See also *Tate v. Missouri & C. R. Co.*, 64 Mo. 149. If an alteration merely renders the highway *less convenient* for travel, without directly impairing the access of the plaintiff to or from the im-



## ARTICLE II. EXEMPLARY DAMAGES.

SECTION	SECTION
6377. Grounds on which exemplary damages awarded.	be awarded against an individual principal for the tort of his agent.
6378. When such damages given for negligence.	6388. View that exemplary damages may be awarded against corporations where they would be awarded against an individual if acting for himself.
6379. Whether given in case of indictable offenses.	6389. The Federal doctrine on this question.
6380. Whether evidence warrants such damages a preliminary question for the court.	6390. Such damages given against carriers for the wanton expulsion of passengers.
6381. Acting under a mistaken sense of duty.	6391. Cases not within the principle.
6382. Positive proof of malice or oppression not necessary.	6392. Cases where such damages have been awarded on the principle of direct authorization or subsequent ratification.
6383. When corporations liable for exemplary damages.	6393. Statutes giving such damages.
6384. Difference of opinion as to circumstances under which such damages awarded against corporations.	6394. Such damages given in the case of malicious libel published by corporations.
6385. Comments upon these different theories.	6395. Some illustrative cases where such damages have been affirmed.
6386. Further comments.	
6387. View that exemplary damages may be awarded against corporations where they would	

### § 6377. Grounds on Which Exemplary Damages Awarded.

Before commencing the subject of the liability of corporations for exemplary damages, it may not be amiss to take a general survey of the grounds upon which such damages are awarded, without special reference to the question whether the injury was done by a corporation or an individual. The general rule is that, in order to warrant the giving of exemplary damages, which are founded in the idea of *punishing* the wrong-doer in the interest of society, rather than of compensating the person injured, the element of *fraud, malice, oppression, or gross negligence* must exist.<sup>1</sup> The rule has been roundly stated by saying that the measure of damages, in torts

provements on his land, no right of recovery will exist. *Jackson v. Jackson*, 16 Ohio St. 163, 168.

<sup>1</sup> *Dougherty v. Shown*, 1 Heisk.

(Tenn.) 306; *Railroad Co. v. Garrett*, 8 Lea (Tenn.), 439; *Cox v. Crumley*, 5 Lea (Tenn.), 529.

committed through mistake, ignorance, or mere negligence, is compensation only; but in such as are committed *willfully, maliciously, or so negligently as to indicate a wanton disregard of the rights of others*, the jury are not restricted to compensation merely, but may, if the evidence justifies it, award vindictive or exemplary damages.<sup>1</sup> It has also been said, in a case where the defendant was a railway company: "If the defendant, in good faith, act under a mistaken sense of duty, or erroneous belief of right, without any intention to oppress or defraud, or without any actual oppression or indignity, the case is one for compensatory, not exemplary, damages. If what is done be done with a fraudulent, malicious, or oppressive intent on the part of the wrong-doer, there would be ground for exemplary damages, although, to use the language of the trial judge, in his charge, 'the act be done in a quiet and gentlemanly way.' So, on the other hand, although there be neither malice nor fraud, nor intent to oppress on the part of the wrong-doer, yet if the act be done in a rude, insulting, or reckless manner, in disregard of social obligations, or with such gross negligence as to amount to positive misconduct, there would be ground for exemplary damages. There must be a wrong intent, or a wrongful execution of an honest intent."<sup>2</sup> It has been ruled that a railway company is not liable to such damages, unless the act of its agent was wanton or malicious.<sup>3</sup> And in general it may be said that exemplary damages are recoverable for *gross or willful negligence* and for *malicious acts*;<sup>4</sup> for acts involving *moral turpitude, in addition to*

<sup>1</sup> *Pittsburg &c. R. Co. v. Lyon*, 123 Pa. St. 140, 146; *s. c.* 10 Am. St. Rep. 517.

<sup>2</sup> *Louisville &c. R. Co. v. Guinan*, 11 Lea (Tenn.), 98; *s. c.* 47 Am. Rep. 279, 283.

<sup>3</sup> *Doss v. Missouri &c. R. Co.*, 59 Mo. 27; *s. c.* 21 Am. Rep. 371.

<sup>4</sup> *Seely v. Alden*, 61 Pa. St. 302; *s. c.* 100 Am. Dec. 642; *Peoria Bridge Asso. v. Loomis*, 20 Ill. 235; *s. c.* 71 Am. Dec. 263 (willful negligence or malice); *Barnett v. Reed*, 51 Pa. St.

190; *s. c.* 88 Am. Dec. 574 (malicious abuse of legal process); *Selden v. Cashman*, 20 Cal. 56; *s. c.* 81 Am. Dec. 93 (not given for innocent seizure of goods under void judgment and advice of counsel); *Doss v. Missouri &c. R. Co.*, 59 Mo. 27; *s. c.* 21 Am. Rep. 371; *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304; *s. c.* 2 Am. Rep. 229 (gross negligence by common carrier); *Meibus v. Dodge*, 38 Wis. 300; *s. c.* 20 Am. Rep. 6 (gross negligence in keeping a vicious dog).

*negligence*,<sup>1</sup> for *negligence in the discharge of a public duty*, such as that of a carrier of passengers, accompanied with circumstances of *insult, injury, or suffering*;<sup>2</sup> and some cases affirm the principle that exemplary damages may be awarded against a railroad company for an injury to a passenger arising from the *gross negligence* of its servants.<sup>3</sup> Conversely, in the absence of gross negligence, malice, recklessness, insult, wantonness, moral turpitude, or other aggravating circumstances, the damages will be limited to *compensation*, and exemplary damages will not be given;<sup>4</sup> nor in such a case, where there is negligence, but not so gross as to amount to recklessness, that is, as to be tantamount to a malicious or malignant purpose, careless of consequences.<sup>5</sup>

§ 6378. **When Such Damages Given for Negligence.**—The negligence which will warrant an award of exemplary damages must clearly be in the nature of *criminal negligence*; that is to say, it must either consist in such willful misconduct, or of such an entire want of care, as raises the presumption of a conscious and reckless indifference to consequences.<sup>6</sup> It has

<sup>1</sup> *Ohio &c. R. Co. v. Tindall*, 13 Ind. 366; *s. c.* 74 Am. Dec. 259.

<sup>2</sup> *Southern R. Co. v. Kendrick*, 40 Miss. 374; *s. c.* 90 Am. Dec. 332.

<sup>3</sup> *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304; *s. c.* 2 Am. Rep. 229.

<sup>4</sup> *Hunt v. St. Louis &c. R. Co.*, 94 Mo. 255; *s. c.* 4 Am. St. Rep. 374; *Heil v. Glanding*, 42 Pa. St. 493; *s. c.* 82 Am. Dec. 537; *Hoy v. Gronoble*, 34 Pa. St. 9; *s. c.* 75 Am. Dec. 628; *Chicago v. Martin*, 49 Ill. 241; *s. c.* 95 Am. Dec. 590; *Barnett v. Reed*, 51 Pa. St. 190; *s. c.* 88 Am. Dec. 574. For valuable discussions of the subject of exemplary damages, showing when and when not such damages are recoverable, see notes to the following cases, as republished in the *American Decisions*; *Stutz v. Chicago &c. R. Co.*, 73 Wis. 147; *s. c.* 9 Am. St. Rep. 769; *Southern R. Co. v.*

*Kendrick*, 40 Miss. 374; *s. c.* 90 Am. Dec. 332, 344; *Freidenheit v. Edmundson*, 36 Mo. 227; *s. c.* 88 Am. Dec. 141; *Hagan v. Providence &c. R. Co.*, 3 R. I. 88; *s. c.* 62 Am. Dec. 377, 379; *Rowe v. Moses*, 9 Rich. L. (S. C.) 423; *s. c.* 67 Am. Dec. 560, 562; *Austin v. Wilson*, 4 Cush. (Mass.) 273; *s. c.* 50 Am. Dec. 766, 768; *Merriells v. Tariff Man. Co.*, 10 Conn. 384; *s. c.* 27 Am. Dec. 682, 688; also *Ross v. Leggett*, 61 Mich. 445; *s. c.* 1 Am. St. Rep. 608, and note 616.

<sup>5</sup> *New Orleans &c. R. Co. v. Statham*, 42 Miss. 607; *s. c.* 97 Am. Dec. 478.

<sup>6</sup> *Chattanooga &c. R. Co. v. Liddell*, 85 Ga. 482; *s. c.* 21 Am. St. Rep. 169; 8 Rail. & Corp. L. J. 296; 11 S. E. Rep. 853. Substantially to the same effect, see *Milwaukee &c. R. Co. v. Arms*, 91 U. S. 489.

been held that such damages cannot be predicated upon the mere negligence of a railroad company in respect of the condition of the cross-ties of its roadway, where there has been a recent inspection,<sup>1</sup> especially where at the time of the injury the company is engaged in putting the track in better repair;<sup>2</sup> nor for an injury caused by two co-operating and independent causes, the existence of one of which was unknown to the defendant, where the other, though known, was insufficient of itself to produce the result.<sup>3</sup> On the contrary, it has been held that the fact that the cross-ties under the track at the point where a train was derailed by a broken rail were unsound, decayed, and rotten, and that the rail which broke was old, and the company constantly repaired the old track with old rails, — indicates such gross negligence as authorizes a verdict for exemplary damages.<sup>4</sup> According to one theory, hereafter considered,<sup>5</sup> the negligence upon which alone exemplary damages can be predicated must be the *negligence of the governing body* of the corporation; but the general theory of those courts which allow such damages on the ground of want of negligence, ascribes the right to recover them in case of injuries happening through the reckless conduct of the *servants* of the corporation.<sup>6</sup> Judicial *dicta* will be found to the effect that, if a railroad company know-

<sup>1</sup> *Richmond &c. R. Co. v. Vance*, 93 Ala. 144; *s. c.* 30 Am. St. Rep. 41; 9 South. Rep. 574.

<sup>2</sup> *International &c. R. Co. v. Brazzil*, 78 Tex. 314; *s. c.* 44 Am. & Eng. Rail. Cas. 437; 14 S. W. Rep. 609.

<sup>3</sup> *Chattanooga &c. R. Co. v. Liddell*, 85 Ga. 482; *s. c.* 21 Am. St. Rep. 169; 8 Rail. & Corp. L. J. 296; 11 S. E. Rep. 853.

<sup>4</sup> *Alabama &c. R. Co. v. Hill*, 90 Ala. 71; *s. c.* 9 L. R. A. 442; 31 Cent. L. J. 376; 44 Am. & Eng. Rail. Cas. 441; 8 South. Rep. 90. Under the Georgia Code, "exemplary damages can never be allowed in cases arising on contracts." Ga. Code, § 2943. For an illustration where it was held

that a railroad company could not be held to such damages for *maliciously removing a stock-gap*, which it had contracted with the plaintiff to maintain, and where her action was upon the contract, — see *Chattanooga &c. R. Co. v. McLendon*, 86 Ga. 517; *s. c.* 12 S. E. Rep. 941.

<sup>5</sup> *Post*, §§ 6387, 6389.

<sup>6</sup> Thus, it has been held that where a railway corporation has leased its railway and franchises to another such company, the lessor company becomes liable for the reckless conduct of the *servants* of the lessee company in the management of one of its trains through which the plaintiff received personal inju-

ingly and wantonly employs a drunken engineer or switchman, or retains one after a knowledge of his habits is clearly brought home to the company, or to the superintending agent authorized to employ or discharge him, and an injury occurs by reason of such habits, the company may and ought to be amendable to the severest rule of exemplary damages. The principle has been directly adjudged in a case which probably carries it further than the above *dicta*, and which asserts the proposition that, although a malicious tort of a servant of a corporation may have been done out of mere wantonness *to effect some purpose or gratify some feeling of the servant*, yet the corporation may none the less be liable in exemplary damages for the same, if the corporation knew of the reckless character of the servant and still retained him in its service. It was so held where the plaintiff was crossing the defendant's railway with his team, and the person in charge of an engine, standing on the track, *willfully and maliciously blew the whistle* and made a great noise, frightening the plaintiff's horses and causing them to run away, whereby the plaintiff was injured.<sup>1</sup>

§ 6379. **Whether Given in Case of Indictable Offenses.** — Such damages may, according to some opinion, be given for an injury which is also punishable by *indictment*,<sup>2</sup> — as for a wanton and unprovoked attack with a deadly weapon,<sup>3</sup> or for the willful killing of another under a statute giving damages for death occasioned “by the wrongful act, neglect, or default of any person or corporation.”<sup>4</sup> But, according to other opinion, such damages cannot be given for an indictable offense, since this would result in a *double punishment* for the same offense.<sup>5</sup> In some jurisdictions it has been held that exem-

ries. *Hart v. Railroad Co.*, 33 S. C. 427; *s. c.* 10 L. R. A. 794; 12 S. E. Rep. 9. Compare *ante*, § 6293.

<sup>1</sup> *Nashville &c. R. Co. v. Starnes*, 9 Heisk. (Tenn.) 52; *s. c.* 24 Am. Rep. 296.

<sup>2</sup> *Chiles v. Drake*, 2 Met. (Ky.) 146; *s. c.* 74 Am. Dec. 406; *Fry v. Bennett*, 4 Duer (N. Y.), 247; *Cole v.*

*Tucker*, 6 Tex. 266. Compare *Cook v. Ellis*, 6 Hill (N. Y.), 466; *s. c.* 41 Am. Dec. 757.

<sup>3</sup> *Porter v. Seiler*, 23 Pa. St. 424; *s. c.* 62 Am. Dec. 341.

<sup>4</sup> *Matthews v. Warner*, 29 Gratt. (Va.) 570; *s. c.* 26 Am. Rep. 396.

<sup>5</sup> *Austin v. Wilson*, 4 Oush. (Mass.) 273; *s. c.* 50 Am. Dec. 766; *Nossaman*

plary damages may be given although the defendant has been prosecuted criminally,<sup>1</sup> and although he has been convicted and fined for the same offense.<sup>2</sup> An instruction authorizing the jury to give exemplary damages for a "*violation of faith*," in an action for a *breach of contract*, is erroneous.<sup>3</sup>

**§ 6380. Whether Evidence Warrants Such Damages a Preliminary Question for the Court.**—There is here, as in every other case, a preliminary question for the court to determine, before it is submitted to the jury to say whether exemplary damages shall be given. The question is whether there is evidence which, if believed by the jury, makes out a case which authorizes an award of exemplary damages, as matter of law.<sup>4</sup> Thus, where the theory on which it is sought to support an award of exemplary damages is that the defendant has been guilty of *gross negligence*, there must be evidence of gross negligence, or it will be error to instruct the jury that they may award such damages.<sup>5</sup>

**§ 6381. Acting under a Mistaken Sense of Duty.**—If a person act under a mistaken sense of duty, and without any intention of oppression, it is a case for *compensatory*, and not for exemplary, damages.<sup>6</sup> This is well illustrated by a case where a railway conductor, in the confusion which arose from an altercation with some passengers, neglected to stop the train at the station to which the plaintiff was bound, but carried him eight miles beyond, and then courteously apologized and gave him a free return ticket to his place of destination. There

*v. Rickert*, 18 Ind. 350; *Humphries v. Johnson*, 20 Ind. 190.

<sup>1</sup> *Roberts v. Mason*, 10 Ohio St. 277.

<sup>2</sup> *Corwin v. Walton*, 18 Mo. 71; *s. c.* 59 Am. Dec. 285.

<sup>3</sup> *Hoy v. Grenoble*, 34 Pa. St. 9; *s. c.* 75 Am. Dec. 628.

<sup>4</sup> See 2 Thomp. Neg. (1st ed.), 1264; *Chicago R. Co. v. Scurr*, 59 Miss. 456; *s. c.* 42 Am. Rep. 373; *Chicago v. Martin*, 49 Ill. 241; *s. c.*

95 Am. Dec. 590; *Heil v. Glanding*, 42 Pa. St. 493; *s. c.* 82 Am. Dec. 537; *Kennedy v. North Missouri R. Co.*, 36 Mo. 351; *Illinois Cent. R. Co. v. Welch*, 52 Ill. 183; *s. c.* 4 Am. Rep. 593.

<sup>5</sup> *Milwaukee & c. R. Co. v. Arms*, 91 U. S. 489.

<sup>6</sup> *Wiggin v. Coffin*, 3 Story (U. S.), 1; *Louisville & c. R. Co. v. Guinan*, 11 Lea (Tenn.), 98; *s. c.* 47 Am. Rep. 279, 282.

was no evidence of damage or of personal inconvenience or injury, except that the plaintiff suffered somewhat from the cold. It was held that this was a case for compensatory damages only, and accordingly a verdict of \$833.33 was set aside.<sup>1</sup>

§ 6382. **Positive Proof of Malice or Oppression not Necessary.**—Positive proof of malice, or of an intent to oppress the plaintiff, is not necessary to support an award of exemplary damages, if the transaction, or the consequent circumstances, fairly imply the existence of such a motive.<sup>2</sup> And it is left to the jury, where there is evidence fairly tending to show the existence of such a motive, to look at all the circumstances, in order to see whether there was anything in the conduct of the defendant so to aggravate the damages.<sup>3</sup>

§ 6383. **When Corporations Liable for Exemplary Damages.**—Most of the American courts now agree that exemplary damages may be given against a corporation in any cases where such damages might be awarded against an individual under like circumstances.<sup>4</sup> The courts have come gen-

<sup>1</sup> *Chicago R. Co. v. Scurr*, 59 Miss. 456; *s. c.* 42 Am. Rep. 373. Similarly, see *Georgia R. & C. Co. v. Eskew*, 86 Ga. 641; *s. c.* 22 Am. St. Rep. 490; 12 S. E. Rep. 1061; *Hoffman v. Northern Pac. R. Co.*, 45 Minn. 53; *s. c.* 47 N. W. Rep. 312.

<sup>2</sup> *Magee v. Holland*, 27 N. J. L. 86; *s. c.* 72 Am. Dec. 341.

<sup>3</sup> *Byram v. McGuire*, 3 Head (Tenn.), 530; *Louisville & C. R. Co. v. Guinan*, 11 Lea (Tenn.), 98; *s. c.* 47 Am. Rep. 279.

<sup>4</sup> *Lake Shore & C. R. Co. v. Prentice*, 147 U. S. 101; *Rouse v. Metropolitan Street R. Co.*, 41 Mo. App. 298; *Malecek v. Tower Grove & C. R. Co.*, 57 Mo. 17; *Graham v. Pacific R. Co.*, 66 Mo. 536; *Pittsburg & C. R. Co. v. Slusser*, 19 Ohio St. 157; *Atlantic & C. R. Co. v. Dunn*, 19 Ohio St. 162; *s. c.* 2 Am. Rep. 382; *Perkins v. Missouri*

*& C. R. Co.*, 55 Mo. 201; *Gillette v. Missouri Valley R. Co.*, 55 Mo. 315; *s. c.* 17 Am. Rep. 653; *Doss v. Missouri & C. R. Co.*, 59 Mo. 27, 33; *s. c.* 21 Am. Rep. 371; *Springer Transportation Co. v. Smith*, 16 Lea (Tenn.), 498; *s. c.* 1 S. W. Rep. 281; *Goddard v. Grand Trunk R. Co.*, 57 Me. 202; *s. c.* 2 Am. Rep. 39; 10 Am. Law Reg. 33; *Hanson v. European & C. R. Co.*, 62 Me. 84; *Caldwell v. New Jersey Steam Nav. Co.*, 47 N. Y. 282; *Cleg-horn v. New York & C. R. Co.*, 56 N. Y. 44; *s. c.* 15 Am. Rep. 375; *Townsend v. New York & C. R. Co.*, 56 N. Y. 295; *s. c.* 15 Am. Rep. 419; *Bowler v. Lane*, 3 Met. (Ky.) 311; *Singer Man. Co. v. Holdfodt*, 86 Ill. 455; *s. c.* 29 Am. Rep. 43; *Western Union Tel. Co. v. Eyser*, 2 Colo. 141; *s. c.* reversed, 91 U. S. 495, note; *Samuels v. Evening Mail Asso.*, 9 Hun (N. Y.), 288; *Hopkins*

erally to this conclusion, through the abandonment of the old idea that a corporation is not liable for the torts of its servants when they act out of *malice*.<sup>1</sup> The fact that such damages, in proper cases, are now generally given against private corporations, shows how thoroughly the idea that a corporation cannot have any *intent* is exploded. Such damages are given where *fraud*, *malice*, *gross negligence*, or *oppression* intervenes, whether the act be done by an individual acting as principal, or by a servant, agent, or officer of a principal or superior; and the rule applies to corporations as well as to individuals. If the servant, agent, or officer is, at the time of the doing of the wrongful act, acting under such circumstances as to bind his principal or superior, his evil intent is imputed to such principal or superior.<sup>2</sup>

**§ 6384. Difference of Opinion as to Circumstances under Which Such Damages Awarded against Corporations.—**

While the American courts are almost unanimous in holding that exemplary damages may be awarded against a private corporation, there is, as we shall discover, much diversity of opinion as to the circumstances under which such damages may be awarded. There are two theories upon which all the courts, which concede that exemplary damages may be awarded *against individuals*, seem to agree: 1. That exemplary damages may be awarded against a corporation under circumstances where such damages would be awarded against an individual,

*v. Atlantic &c. Railroad*, 36 N. H. 9; *s. c.* 72 Am. Dec. 287; *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304; *s. c.* 2 Am. Rep. 229; *Belknap v. Boston &c. R. Co.*, 49 N. H. 358; *Baltimore &c. R. Co. v. Blocher*, 27 Md. 277; *Philadelphia &c. R. Co. v. Larkin*, 47 Md. 155; *s. c.* 28 Am. Rep. 442; *Gasway v. Atlantic &c. R. Co.*, 58 Ga. 216; *New Orleans &c. R. Co. v. Bailey*, 40 Miss. 395; *Memphis &c. R. Co. v. Whitfield*, 44 Miss. 466; *s. c.* 7 Am. Rep. 699; *Beals v. Railway Co.*, 1 Dillon (U. S.), 568; *Hays v. Houston &c. R. Co.*, 46

Tex. 272; *Commercial Gazette Co. v. Grooms* (Ohio Super. Ct.), 21 Week. L. Bul. 292; *Jeffersonville R. Co. v. Rogers*, 28 Ind. 1; *s. c.* 92 Am. Dec. 276; *Louisville &c. R. Co. v. Guinan*, 11 Lea (Tenn.), 98; *s. c.* 47 Am. Rep. 279 (doctrine recognized); *Haley v. Mobile &c. R. Co.*, 7 Baxt. (Tenn.) 240; *Louisville &c. R. Co. v. Garrett*, 9 Lea (Tenn.), 438.

<sup>1</sup> *Ante*, § 6298, *et seq.*

<sup>2</sup> See, for illustration, *Springer Transportation Co. v. Smith*, 16 Lea (Tenn.), 498.



if the injurious act was previously *authorized or subsequently ratified*, by the *board of directors* or other governing body of the corporation,—in which case the act is deemed to be the act of the corporation, in the same sense as when a natural person acts for himself without the intervention of an agent.<sup>1</sup>

2. Where the injurious act is done by a subordinate agent or servant, but is done under such circumstances that the rule of damages in the particular jurisdiction would, under like circumstances, authorize exemplary damages *against an individual for an act done by his agent or servant*. An examination of the cases which state these two principles will disclose that the two rules are coincident, or nearly so.<sup>2</sup> 3. A third doctrine, and the one which presents a conflict of judicial opinion, is the doctrine, maintained, it is believed, by the majority of the State courts, that the rule of *respondeat superior*, which makes a corporation liable for the *malicious torts* of its agents or servants, makes it liable in *exemplary damages* for such torts, whether the act were originally authorized or subsequently ratified by its governing body, or not. Stated in another way, this rule is, that the rule of *respondeat superior* applies to private corporations, not only in respect of their liability for damages for the malicious torts of their agents and servants, but *equally* in respect of the measure of damages for such torts. This rule identifies the corporation with the agent or servant committing the tortious act, not only in respect of liability, but also in respect of the measure of liability; and it makes a malicious act of such agent or servant the ground of exemplary damages, irrespective of a previous authorization or of a subsequent ratification.

§ 6385. **Comments upon These Different Theories.**—The writer is of opinion that the last-named rule is the only rule compatible with public policy and safety. It is just as capable of being defended on logical grounds as are the two preceding rules; for while the reasons are undoubtedly stronger, and more satisfactory to the moral sense, for holding a cor-

<sup>1</sup> *Post*, § 6389.

<sup>2</sup> *Post*, § 6387.

poration liable in exemplary damages where the injurious act has been previously authorized or subsequently ratified by its governing body, yet in strict logic the reason is no stronger than where the act has been committed by a mere ministerial officer, agent, or servant, acting within the general scope of his agency or employment. For it must be remembered that every private corporation consists, in a primary sense, of the aggregate body of its members; and that its board of directors are merely the *agents* of this aggregate body.<sup>1</sup> In strict logic, there is hence just as little propriety in imputing the malice of the directors to the stockholders, as there is in imputing the malice of the ministerial officer, agent, or servant to the directors, and through them to the stockholders. Nothing is more vain and trivial than the refinements upon which some courts have entered upon this subject of exemplary damages. It is not a rule of logic at all, but it is wholly a rule of public policy, expediency, and safety. If the rules of law are to be made to conform to logic, then this rule of damages must be abolished, not only in regard to corporations, but in regard to individuals; for it is conceded on all hands that it is illogical to import into civil actions for damages the sanctions of the criminal law.<sup>2</sup>

<sup>1</sup> *Ante*, § 3967, *et seq.*

<sup>2</sup> Able writers have differed on the question whether exemplary damages may be given in any case. Professor Greenleaf and Mr. Sedgwick have discussed it at length, and subsequent annotators of their respective works have continued the discussion so ably carried on by these great authors. Each cites a large number of authorities to sustain his position, and each apparently succeeds, to his own satisfaction, in proving that his views are correct. The position held by Professor Greenleaf, as stated in his great work on Evidence (2 Greenl. Ev. (13th ed.), § 253, — see note 2), is as follows: "Damages are given as a compensation,

recompense, or satisfaction to the plaintiff for an injury actually received by him from the defendant. *They should be precisely commensurate with the injury, neither more nor less, and this whether it be to his person or estate.*" But Mr. Sedgwick, in his authoritative treatise on the Law of Damages (Sedgw. Dam. (6th ed.), p. 38—see also chapter 18, page 466, note 1), says: "Where either of these elements [of fraud, malice, gross negligence, or oppression] mingle in the controversy, the law, instead of adhering to the system or even the language of compensation, adopts a wholly different rule. It permits the jury to give what it terms punitive, vindictive, or exem-

§ 6386. **Further Comments.**—But any species of logic that would abolish the rule of exemplary damages as against natural principals or masters, for the malicious torts of their agents or servants, and hence as against corporations in all cases except for acts authorized by the stockholders in their constituent capacity,—would equally abolish the entire doctrine of *respondeat superior*, except in the limited class of cases where the wrongful act has been previously authorized or subsequently ratified. The one has just as much logic to support it as the other. No lawyer or judge can give a *logical* reason why an individual principal or master, who uses due diligence in selecting a competent and proper agent or servant and in instructing him and overlooking his conduct, should be answerable in damages for a negligent or other wrongful injury done by that agent or servant. In such a case the principal or master is, in a moral sense, absolutely

ply damages; in other words, blends together the interest of society and of the aggrieved individual, and gives damages *not only to recompense the sufferer, but to punish the offender.*" Theron Metcalf, then reporter of the State of Massachusetts, and since judge of the Supreme Judicial Court of that State (3 Am. Jur. 287-313), and Chancellor Kent (2 Kent's Com. (12th ed.), pt. 4, § 24, p. 15, note a), take opposite sides on this question, and numerous judges and text-writers have noticed the controversy. See *Fay v. Parker*, 53 N. H. 342, where the question is considered at length, and numerous authorities on the subject are reviewed. The question, however, may be considered as settled, the current of authority at the present time being in accord with the principle stated in the text. "It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindic-

tive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages inflicted by way of penalty or punishment given to the party injured." *Grier, J., in Day v. Woodworth*, 13 How. (U. S.) 363, 371. See also *Philadelphia &c. R. Co. v. Quigley*, 21 How. (U. S.) 202; *Milwaukee &c. R. Co. v. Arms*, 91 U. S. 489; *Memphis &c. R. Co. v. Whitfield*, 44 Miss. 466; s. c. 7 Am. Rep. 699; *Hopkins v. Atlantic &c. R. Co.*, 36 N. H. 9; s. c. 72 Am. Dec. 287.

innocent; and yet the law identifies him with his agent or servant, and looks no further than to see whether the agent or servant, at the time of doing the negligent or wrongful act, was acting within the general scope of his employment. And yet the doctrine of *respondeat superior*, even in such applications of it, comports with the sense of justice of lawyers, judges, jurors, and mankind in general. The same may be said with regard to the doctrine of exemplary damages when applied to individuals, and more especially when applied to corporations. When applied to corporations and left to the sense of justice of jurors with a reasonable superintendence on the part of judges, it is, though often misapplied, in general the defense of weak and scattered individuals against aggregate money and power. To remit the redress of injuries, for which exemplary damages ought to be given, exclusively to the criminal arm of the government, would be to allow the most flagrant oppressions to go unredressed in most cases. The corruption of a single prosecuting attorney,—and common experience indicates to what extent that has gone,—might give a wealthy corporation, managed by unscrupulous men, a practical exemption from criminal responsibility for their wrongs. But it is idle to theorize further upon such a question. If the rule of exemplary damages as against corporations were abolished by judicial decisions to-day, it would be reinstated by most of the State legislatures to-morrow.

**§ 6387. View that Exemplary Damages may be Awarded against Corporations where They would be Awarded against an Individual Principal for the Tort of his Agent.**—There are cases which hold that a principal is not liable to pay exemplary damages for the fault of his agent;<sup>1</sup> but it is everywhere conceded that a principal may make himself liable by *authorizing or ratifying* the act.<sup>2</sup> Some of the decisions,

<sup>1</sup> *Wardrobe v. California Stage Co.*, 7 Cal. 118; *s. c.* 68 Am. Dec. 231; *Mendelsohn v. Anaheim Lighter Co.*, 40 Cal. 657; *Turner v. North Beach*

*R. Co.*, 34 Cal. 594; *Hill v. New Orleans &c. R. Co.*, 11 La. An. 292.

<sup>2</sup> *Lake Shore &c. R. Co. v. Prentice*, 147 U. S. 101; *Rouse v. Metro-*

assimilating the liability of a corporation for such damages, to that of a natural person where a tort has been committed by his agent or servant, hold that a corporation is not liable to pay such damages unless it has *previously authorized*, or *subsequently ratified*, the wrongful act.<sup>1</sup> This limitation of the law of exemplary damages proceeds upon the theory that such damages can only be given where the *corporation itself has been remiss, and that the governing body is the corporation*. The Supreme Court of Texas have expressed it in the following language, in its opinion written by Mr. Justice Gould: "In fact, however, the actual damages to which the company must respond, extending as it does to injuries to the feelings, and danger of personal suffering, seems to give to juries sufficient scope, without allowing exemplary damages, except in cases where the corporation has itself been remiss. If the malicious act of its agent is ratified or adopted; if there is carelessness in the selection of employés or in the establishment of appropriate regulations; if, in short, the corporation, or their

politan Street R. Co., 41 Mo. App. 298; Milwaukee &c. R. Co. v. Finney, 10 Wis. 388; Craker v. Chicago &c. R. Co., 36 Wis. 657; s. c. 17 Am. Rep. 504; Malecek v. Tower Grove &c. R. Co., 57 Mo. 17; Doss v. Missouri &c. R. Co., 59 Mo. 27; s. c. 21 Am. Rep. 371; Traverse v. Kansas Pac. R. Co., 63 Mo. 421; Bass v. Chicago &c. R. Co., 42 Wis. 654; s. c. 24 Am. Rep. 437; Nashville &c. R. Co. v. Starnes, 9 Heisk. 52; s. c. 24 Am. Rep. 296; Illinois &c. R. Co. v. Hammer, 72 Ill. 347.

<sup>1</sup> Galveston &c. R. Co. v. Donahoe, 56 Tex. 162; Gulf &c. R. Co. v. Moore, 69 Tex. 157; International &c. R. Co. v. Garcia, 70 Tex. 207; s. c. 7 S. W. Rep. 802; Sullivan v. Oregon R. &c. Co., 12 Or. 392; s. c. 53 Am. Rep. 364, 373; Turner v. North Beach &c. R. Co., 34 Cal. 594; Craker v. Chicago &c. R. Co., 36 Wis. 657; s. c. 17 Am. Rep. 504; Hinckley v. Chicago &c. R.

Co., 38 Wis. 194; Pleasants v. North Beach &c. R. Co., 34 Cal. 586; Hagan v. Providence &c. R. Co., 3 R. I. 88; s. c. 62 Am. Dec. 377; Lake Shore &c. R. Co. v. Prentice, 147 U. S. 101; Rouse v. Metropolitan Street R. Co., 41 Mo. App. 298 (McGill, J., dissenting). In this last case a majority of the court formulate their view in the proposition that "there must be *undue want of care* in the selection of the servant, or previous authorization, or subsequent ratification." 41 Mo. App. 316. But this shows the want of a correct understanding of the subject, because exemplary damages are never given on the ground of negligence or want of care, especially in such a general matter as the selection of servants, unless the negligence is so gross as to indicate a reckless disregard of the public rights and safety. *Ante*, § 6378.

officers by whom it is controlled and represented, are guilty of some 'fraud, malice, gross negligence, or oppression,'—the settled rules of law will hold it liable to exemplary damages, but, in our opinion, not otherwise."<sup>1</sup>

§ 6388. View that Exemplary Damages may be Awarded against Corporations where They would be Awarded against an Individual if Acting for Himself. — The other and more advanced view, and that taken by a great majority of the American State courts, is that a corporation is liable for exemplary damages for such acts, done by its agents or servants acting *within the scope of their employment*, as would, if done by an individual *acting for himself*, render him liable for such damages, that is to say, although the *particular act* was neither *authorized* nor *ratified*.<sup>2</sup> The rule has been said to be that if

<sup>1</sup> Hays v. Houston &c. R. Co., 46 Tex. 272, 284. Substantially the same rule was thus expressed by Mr. Chief Justice Church, in giving the opinion of the Court of Appeals of New York in Cleghorn v. New York &c. R. Co., 56 N. Y. 44; s. c. 15 Am. Rep. 375; which language was quoted with approval in Sullivan v. Oregon R. &c. Co., 12 Or. 392; s. c. 53 Am. Rep. 364, 373. Substantially the same theory was expressed by Brayton, J., in Hagan v. Providence &c. R. Co., 3 R. I. 88, 91; s. c. 62 Am. Dec. 377.

<sup>2</sup> Atlantic &c. R. Co. v. Dunn, 19 Ohio St. 162; s. c. 22 Am. Rep. 382; Pittsburg &c. R. Co. v. Slusser, 19 Ohio St. 157; Louisville &c. R. Co. v. Guinan, 11 Lea (Tenn.), 98; s. c. 47 Am. Rep. 279 (*semble*); Alabama &c. R. Co. v. Frazier, 93 Ala. 45; s. c. 9 South. Rep. 303; Hart v. Railroad Co., 33 S. C. 427; s. c. 12 S. E. Rep. 9; 10 L. R. A. 794; Purcell v. Richmond &c. R. Co., 108 N. C. 404; s. c. 12 S. E. Rep. 954; 12 L. R. A. 113; 10 Rail. & Corp. L. J. 35; Alabama &c. R. Co. v. Sellers, 93 Ala. 9; s. c. 9 South. Rep. 375; 10 Rail. & Corp. L. J. 224; Fell v. North-

ern Pac. R. Co., 44 Fed. Rep. 248 (overruled, *post*, § 6389); Galina v. Hot Springs Railroad, 13 Fed. Rep. 116 (overruled, *post*, § ); Goddard v. Grand Trunk R. Co., 57 Me. 202; s. c. 2 Am. Rep. 39; Perkins v. Missouri R. Co., 55 Mo. 201; Doss v. Missouri &c. R. Co., 59 Mo. 27; s. c. 21 Am. Rep. 271 (*semble*); Palmer v. Railroad, 3 S. C. 580; s. c. 16 Am. Rep. 750; Hanson v. European &c. R. Co., 62 Me. 84; s. c. 16 Am. Rep. 404; New Orleans &c. R. Co. v. Burke, 53 Miss. 200; s. c. 24 Am. Rep. 689 (*semble*). In New Hampshire it is said by Perley, C. J.: "If a corporation like this railroad is guilty of an act or default, such as, in the case of an individual, would subject him to exemplary damages, we think the same rule must be applied to the corporation." Hopkinson v. Atlantic &c. R. Co., 36 N. H. 9, 17; s. c. 72 Am. Dec. 287. In the Supreme Court of the United States, Mr. Justice Campbell in giving the opinion of the court, said: "The result of the cases is, that for acts done by the agents of a corporation, either *in contractu* or *in de-*

the wrongful act of the agent is perpetrated while ostensibly discharging duties within the scope of the corporate purposes, the corporation may be liable to exemplary damages; and that a person openly and notoriously exercising the functions of a particular agency of a corporation will be presumed to have sufficient authority from the corporation so to act, for the purposes of this rule.<sup>1</sup> Applying this rule to railways, we find a case where exemplary damages were awarded because the conductor of a passenger train refused to move the train back to a station past which it had negligently run, and at which it was his duty to stop, — willfully compelling a female passenger having a ticket to such station to alight in a driving rain several hundred yards from any shelter, although so incumbered with a child and with her baggage as to be unable to protect herself from exposure;<sup>2</sup> and also a case where such damages were awarded because the servants of such a company in charge of its passenger train ran by a station without stopping, at which it was advertised to stop, and at which the plaintiff had purchased a ticket to go on that train.<sup>3</sup>

**§ 6389. The Federal Doctrine on This Question.**—The Federal doctrine upon this question, as settled by a recent decision of the Supreme Court of the United States, is: 1. That where a court of the United States has jurisdiction of an action for damages against a corporation (generally on the ground of diverse citizenship), the question whether exemplary damages will be given or denied is a question of what is called “general jurisprudence,” in contradistinction to questions of “local law”; and that, consequently, the Federal judiciary are at liberty to adopt their own rule of

*licto*, in the course of its business and of their employment, the corporation is responsible as an individual is responsible under similar circumstances.” Philadelphia &c. R. Co. v. Quigley, 21 How. (U. S.) 202.

<sup>1</sup> Singer Man. Co. v. Holdfodt, 86 Ill. 455; s. c. 29 Am. Rep. 43.

<sup>2</sup> Alabama &c. R. Co. v. Sellers, 93 Ala. 9; s. c. 30 Am. St. Rep. 17; 9 South. Rep. 375; 10 Rail. & Corp. L. J. 224.

<sup>3</sup> Purcell v. Richmond &c. R. Co., 108 N. C. 414; s. c. 12 L. R. A. 113; 10 Rail. & Corp. L. J. 35; 12 S. E. Rep. 954.

damages without regard to the rule which is established by the decisions of the highest court of the State within which the act creating the liability arose, and within which the cause was tried. 2. That a corporation is not liable to exemplary damages, except where a natural person would be liable to such damages for a similar act done by his agent or servant. 3. And that a natural person is not generally liable for such damages except where he has *commanded* the doing of the oppressive act or subsequently *ratified* it. Applying this doctrine to the case in judgment, the court held that a railroad corporation is not liable to exemplary damages for an illegal, wanton, and oppressive arrest of a passenger by a conductor of one of its trains, which action was in no way authorized nor ratified *by the corporation*.<sup>1</sup> What the court means by its being ratified *by the corporation* is not clear. The opinion, which is written by Mr. Justice Gray, concedes, what the court has previously held,<sup>2</sup> that corporations may be liable to exemplary damages, but qualifies the concession with the proviso that "the criminal intent necessary to warrant the imposition of such damages is brought home *to the corporation*." The court does not define what body or constituency it means by "the corporation." It probably means the board of directors. But as they are merely the *agents* of the ultimate constituent body, the shareholders, any theory that will exonerate the corporation, by reason of an absence of criminal intent in the directors, will exonerate it where there is such a criminal intent; for there is just as much reason in imputing to the directors the criminal intent of the subordinate agents whom they employ, as there would be in imputing to the stockholders the criminal intent of the directors whom they have elected. The lines of reasoning of this and other like decisions will overthrow the doctrine of exemplary damages entirely when applied to corporations,

<sup>1</sup> Lake Shore &c. R. Co. v. Prentice, 147 U. S. 101.

<sup>2</sup> Philadelphia &c. R. Co. v. Quigley, 21 How. (U. S.) 202; Milwaukee

&c. R. Co. v. Arms, 91 U. S. 489; Denver &c. Railway v. Harris, 122 U. S. 597.



except when it can be proved that the criminal act was authorized or ratified by the ultimate constituency, the stockholders; and even then it would be difficult to discover any theory of justice upon which the minority of the stockholders are to be fined and their dividends confiscated because of the criminal act or intent of a majority of them. The true theory is, that the rule of exemplary damages is a rule, not of logic, but of public safety; that the public know the corporation only through its ministerial agents and servants; that the corporation touches the public only by the hands of these agents and servants; and that, consequently, so far as the public rights are concerned, they are to be regarded as the corporation,—precisely as the doctrine of *respondeat superior* identifies the principal and his agent for the purpose of protecting third persons.

§ 6390. **Such Damages Given against Carriers for the Wanton Expulsion of Passengers.** — The rule that exemplary damages will be given against a corporation in all cases where they would be given against an individual if acting for himself, and that a previous authorization or subsequent ratification by the governing board is not necessary to justify the giving of such damages,<sup>1</sup> is illustrated by a numerous class of cases, which hold that such damages may be given against incorporated carriers of passengers, where *passengers have been expelled* by their agents or servants in charge of their vehicles of transportation, under circumstances which may be characterized as *willful, malicious, wanton, or oppressive*.<sup>2</sup> It has been held that such damages may be properly given against a street railway company, whose servants have ejected a passenger from its car for refusing to comply with an illegal exaction of fare;<sup>3</sup> where the employés of a steam railway company, in removing a passenger from its train for his refusal to pay more than the maximum fare prescribed by a statute, committed a wanton and aggravated assault upon him, which

<sup>1</sup> *Ante*, § 6388.

<sup>2</sup> *Ante*, § 6307.

<sup>3</sup> *Baltimore &c. Turnp. Road v. Boone*, 45 Md. 344.

was either authorized or approved by the company;<sup>1</sup> and for expelling a passenger from the defendant's railway carriage with *unnecessary and reckless violence* and indignity, the defendant's servants acting in a wanton, high-handed, and outrageous manner, — even though the plaintiff was liable to expulsion;<sup>2</sup> but not where a passenger took passage upon its cars in order to test a question of fares, and expecting to be ejected, and to make money out of the transaction through an action against the company. A person so acting brings himself within the maxim, *volenti non fit injuria*;<sup>3</sup> nor where the passenger, having failed to procure a ticket in consequence of the absence of the ticket agent, was put off at the next station, without unnecessary violence in consequence of his refusal to pay the extra fare demanded by a rule of the company.<sup>4</sup> In the view of some of the courts, the mere fact that a passenger is unlawfully removed or expelled from a railway train does not make a case for exemplary damages; but, in order to the recovery of such damages, the expulsion must have been made with undue force, unnecessary rudeness, circumstances of insult, or circumstances exhibiting the presence of malice and willful wrong.<sup>5</sup> It follows that where the passenger has been ejected without the presence of such aggravating circumstances, by a mere *mistake* on the part of the conductor, the case will not be one for exemplary damages,<sup>6</sup> especially where the passenger takes no pains to relieve the mind of the conductor of his mistake.<sup>7</sup>

<sup>1</sup> *Hinckley v. Chicago &c. R. Co.*, 38 Wis. 194.

<sup>2</sup> *Philadelphia &c. R. Co. v. Larkin*, 47 Md. 155; *s. c.* 28 Am. Rep. 442. Compare *Atlantic &c. R. Co. v. Dunn*, 19 Ohio St. 162; *s. c.* 2 Am. Rep. 382; *Palmer v. Railroad*, 3 S. C. 580; *s. c.* 16 Am. Rep. 750; *Cincinnati &c. R. Co. v. Cole*, 29 Ohio St. 126; *s. c.* 23 Am. Rep. 729.

<sup>3</sup> *Cincinnati &c. R. Co. v. Cole*, 29 Ohio St. 126; *s. c.* 23 Am. Rep. 729.

<sup>4</sup> *Finch v. Northern P. R. Co.*, 47 Minn. 36; *s. c.* 49 N. W. Rep. 329.

<sup>5</sup> *Tomlinson v. Wilmington &c. R. Co.*, 107 N. C. 327; *s. c.* 12 S. E. Rep. 138; *Rose v. Wilmington &c. R. Co.*, 106 N. C. 168, 170; *Knowles v. Norfolk Southern R. Co.*, 102 N. C. 59, 66; *Holmes v. Carolina Cent. R. Co.*, 94 N. C. 318.

<sup>6</sup> *Hoffman v. Northern Pac. R. Co.*, 45 Minn. 53; *s. c.* 47 N. W. Rep. 312.

<sup>7</sup> *Georgia R. &c. Co. v. Eskew*, 86 Ga. 641; *s. c.* 22 Am. St. Rep. 490; 12 S. E. Rep. 1061. In another case, the plaintiff, a passenger in a railway car, gave up his ticket to a brakeman,

§ 6391. **Cases not within the Principle.**—In still another case, a passenger had purchased a ticket for a berth in a sleeping-car. He lost it, and when it was demanded by the conductor, being unable to produce it, he was expelled from the car, but *without violence*, and was compelled to ride in a common car. It was held that this was not a case for exemplary damages, and that a verdict for \$3,000 ought to be set aside as excessive.<sup>1</sup> Under any theory of this subject there is an obvious propriety in the conclusion that a railroad company is not liable in exemplary damages, for the act of a conductor who unlawfully ejects a passenger from its cars unless plaintiff would have been entitled to recover such damages, had the action been against the conductor.<sup>2</sup>

§ 6392. **Cases where Such Damages have been Awarded on the Principle of Direct Authorization or Subsequent Ratification.**—A railroad company collected an armed force of several hundred men *under command of its vice-president and assistant general manager*, and attacked, with deadly weapons, the agents and employes of another railroad company, and expelled them from the railroad of the other company, and forcibly took possession of it, after which the aggressor company continued to use and operate it

who was authorized to demand and receive it. Shortly after, the brakeman approached the plaintiff, denied that he had received his ticket, and assaulted and grossly insulted him. It was held that the defendants were liable; that it was a proper case for exemplary damages; and that the defendants, having retained the brakeman in their employ after notice of his conduct, a verdict for \$4,850 would not be set aside as excessive. *Goddard v. Grand Trunk R. Co.*, 57 Me. 202; *s. c.* 2 Am. Rep. 39. See also *Hanson v. European & C. R. Co.*, 62 Me. 84; *s. c.* 16 Am. Rep. 404.

<sup>1</sup> *Pullman Palace Car Co. v. Reed*, 75 Ill. 125; *s. c.* 20 Am. Rep. 232. Compare *Craker v. Chicago & C. R. Co.*, 36 Wis. 657; *s. c.* 17 Am. Rep. 504,—where a railway company was mulcted in \$1,000, as *compensatory*

damages for the pleasure accruing to its conductor in *kissing* a female passenger. For another case in which, under the circumstances, a verdict for \$1,500 was held excessive,—see *Chicago & C. R. Co. v. Griffin*, 68 Ill. 499.

<sup>2</sup> *Townsend v. New York Cent. & C. R. Co.*, 56 N. Y. 295; *s. c.* 15 Am. Rep. 419. In *Pleasants v. North Beach & C. R. Co.*, 34 Cal. 586, a verdict of \$500 was set aside, where the wrong consisted in refusing to allow a *colored person* to ride in a street car on account of his color,—the court holding it a case for nominal damages merely. To the same effect, see *Turner v. North Beach & C. R. Co.*, 34 Cal. 594. Opposed to this is *Palmer v. Railroad*, 3 S. C. 580; *s. c.* 16 Am. Rep. 750, where the opinion of the court was written by a negro.

as its own. In the skirmish which took place, one of the employés of the defending company was wounded. In an action against the attacking company, it was held to be a case for exemplary damages, on the ground that "the corporation, *by its controlling officers*, wantonly disturbed the peace of the community, and, by the use of violent means, endangered the lives of citizens, in order to maintain rights, for the vindication of which, if they existed, an appeal should have been made to the judicial tribunals of the country."<sup>1</sup> The case might also have been put upon the ground of a subsequent *ratification*; for, by *keeping the fruits* of the misconduct of its managing officers and servants, the corporation must be presumed to have ratified the means adopted by them to acquire the possession. Slighter circumstances have been held sufficient to authorize the conclusion of a ratification so as to justify exemplary damages, under the rule that a previous authorization or subsequent ratification is necessary. Thus, where the employé of a railway company has committed an unjustifiable assault upon a passenger and the company, with knowledge of the fact, *retains him in service*, and especially where it promotes him, there is judicial opinion to the effect that this is such a ratification or adoption by the company of the wrongful act of the servant as will warrant the imposition of punitive damages.<sup>2</sup>

§ 6393. Statutes Giving Such Damages. — Statutes and constitutional ordinances have recently been enacted in some States, giving exemplary damages in terms.<sup>3</sup> Such statutes

<sup>1</sup> Denver & C. R. Co. v. Harris, 122 U. S. 597.

<sup>2</sup> Bass v. Chicago & C. R. Co., 42 Wis. 654; s. c. 24 Am. Rep. 437. See, as to the effect of *retaining in service* the employé committing the wrong, Goddard v. Grand Trunk R. Co., 57 Me. 202; s. c. 2 Am. Rep. 39.

<sup>3</sup> The constitution of Texas contains the following provision: "Every person, corporation, or company, that may commit a homicide through willful act, or omission, or gross neglect, shall be responsible, in exemplary damages, to the surviving husband, widow, heirs of his or her body, or

such of them as there may be, without regard to any criminal proceeding that may or may not be had in relation to the homicide." Tex. Const. 1876, art 16, § 26. So, there is a statute in Kentucky enacting that, "if the life of any person or persons is lost or destroyed by the willful neglect of another person or persons, company or companies, corporation or corporations, their agents or servants, then the personal representative of the deceased shall have the right to sue such person or persons, company or companies, corporation or corporations, and recover punitive

are *not unconstitutional*. They do not deprive a railroad company of its property without due *process of law*, or deny to it the equal protection of the laws, within the meaning of the fourteenth amendment to the constitution of the United States. On the contrary, it is laid down that the legislature of a State may fix the amount of damages, beyond compensation, to be awarded to a party injured by the gross negligence of a railroad company in failing to provide suitable fences and guards of its road, or may prescribe the limits within which the jury, in assessing damages for such default, may exercise their discretion. The additional damages are by way of *punishment* to the company for its negligence; and it is not a valid objection that the sufferer instead of the State receives them; since the modes in which fines and penalties shall be enforced, whether at the suit of a private party or of the public, and what disposition shall be made of the amounts collected, are matters of legislative discretion.<sup>1</sup>

§ 6394. Such Damages Given in the Case of Malicious Libel Published by Corporations. — The principle has been recognized and acted upon that exemplary damages may be given against corporations publishing *malicious libels*.<sup>2</sup> It has been held, by the Superior Court of Cincinnati, that where a newspaper corporation employs a reporter to write articles containing statements which, if untrue, are *libelous on their face*, and publishes them, the corporation may be charged in exemplary damages for the malice or wanton recklessness of its reporter.<sup>3</sup> But in a leading case, affirming the liability of a corporation to pay damages for publishing a malicious libel, it was held that, to justify an award of *exemplary damages*, something more should be proved than that species of malice which consists merely in the doing of an unlawful or injurious act,

damages for the loss or destruction of the life aforesaid." See *Chiles v. Drake*, 2 Met. (Ky.) 146; *s. c.* 74 Am. Dec. 406, 409.

<sup>1</sup> *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512.

<sup>2</sup> As to the liability of a corporation for publishing a malicious libel, see *ante*, § 6310.

<sup>3</sup> *Commercial Gazette Co. v. Grooms*, 21 Week. L. Bul. 292.

—in other words, that something more should be proved than the state of facts upon which the law *implies malice* in such cases. But it was held that the act complained of must be conceived in the spirit of mischief or of criminal indifference to civil obligations; and, there being no evidence upon which the jury could properly come to such a conclusion, the judgment was reversed, because the court, in its instructions, allowed the jury to give exemplary damages.<sup>1</sup>

§ 6395. **Some Illustrative Cases where Such Damages have been Affirmed.**—The engineer of a railway company, *wantonly and maliciously, sounded the whistle* of the locomotive so as to frighten the horses of the plaintiff, whereby he was injured. It was held that the railway company was liable for the resulting damages, and a judgment for \$1,000 was affirmed.<sup>2</sup> A foreign corporation, by its agent in Illinois, *sold a sewing-machine to be paid for in monthly installments*, and the lease was delivered and accepted, authorizing the seller, without process, to enter the premises of the purchaser, and take the machine for the non-payment of any installment. The purchaser made certain payments to the same agent. Nevertheless, another agent of the defendant twice thereafter entered the plaintiff's house and threatened to remove his machine, which threats were reported at the company's office, with an exhibition of the plaintiff's receipts showing that his payments were duly made. Finally, other of the company's agents entered the plaintiff's house, in his absence, and forcibly and violently, and against the remonstrances of the plaintiff's wife, removed the machine and kept it one day, and then returned it. The taking was claimed to be on the belief that an installment was overdue and unpaid, but the first agent had been notified that it was paid. This was held a proper case for exemplary damages.<sup>3</sup>

<sup>1</sup> Philadelphia &c. R. Co. v. Quigley, 21 How. (U. S.) 202, 214.

<sup>2</sup> Chicago &c. R. Co. v. Dickson, 63 Ill. 151; s. c. 14 Am. Rep. 114.

<sup>3</sup> Singer Man. Co. v. Holdfodt, 86 Ill. 455; s. c. 29 Am. Rep. 43.

## CHAPTER CXLII.

### UNLAWFUL TRUSTS FOR THE CONTROL OF CORPORATIONS AND THE PREVENTION OF COMPETITION AMONG THEM.

SECTION	SECTION
6399. Power of corporations to make contracts diminishing competition.	6407. Such combinations void at common law as being in restraint of trade.
6400. General statement in respect of the formation and growth of "trusts" for the prevention of competition among corporations.	6408. No recovery upon contracts in furtherance of such combinations.
6401. All such combinations illegal.	6409. Whether the draughtsman of the trust agreement can recover compensation for his service.
6402. Validity of statutes prohibiting such combinations.	6410. Right of members of such combinations to rescind and withdraw.
6403. Such combinations void, as unlawful attempts to create partnerships among corporations.	6411. Corporations may be dissolved for entering into such combinations.
6404. Invalidity of agreements by which stockholders surrender their voting power.	6412. Although the combination takes the form of a combination among the stockholders merely.
6405. Illegality of corporations organized to purchase the shares of other corporations for the purpose of controlling their management.	6413. Power of the "trustees" to sell the shares deposited with them.
6406. Invalidity of corporations organized for the mere purpose of stifling competition, and engrossing a particular manufacture.	6414. <i>Status</i> of "trust certificates."
	6415. Relation of manufacturing "trusts" to interstate commerce.

§ 6399. **Power of Corporations to Make Contracts Diminishing Competition.** — Corporations competing with each other in business have undoubtedly, as a mere implication of law, and without an affirmative expression thereto in their charters or governing statutes, the same power to enter into contracts or arrangements with each other to prevent ruinous

or injurious competition, which natural persons have,<sup>1</sup>—subject, of course, to the principle of the common law which avoids such contracts when in restraint of trade, and when tending to produce monopolies of the necessities of life,—a subject about to be considered.

**§ 6400. General Statement in Respect of the Formation and Growth of "Trusts" for the Prevention of Competition among Corporations.**—Within a recent period a new phase of American industrial life has gradually developed, in the form of combinations known as "trusts," having for their purpose the preventing of competition among corporations, by placing all corporations engaged in a given manufacture or trade under the control of a central management having power to regulate the aggregate output of manufactured articles, by prescribing the amount to be manufactured by the different members of the combination, and to regulate the prices at which such articles are to be sold. These combinations generally take one of five forms, and in some of them the five are more or less mingled: 1. The transfer, by the stockholders of the different corporations entering into the combination, to a central board of "trustees," of all their shares, together with a power of attorney to such trustees, to vote such shares at corporate elections of the respective corporations. By this means, the absolute control of each corporation is devolved upon a central committee, whose members may or may not be stockholders in the particular corporation. They are clothed with power to elect to the board of directors of each corporation such persons as may be relied upon to obey their orders and carry out the scheme; and the power of election necessarily carries with it the power of deposition. In exchange for the shares of stock thus surrendered by the members of the different corporations, a new species of security, hereafter described, is issued to them, called a "trust certificate." They thus become the holders of

<sup>1</sup> *Ellerman v. Chicago Junction R. &c. Co.*, 49 N. J. Eq. 217; s. c. 23 Atl. Rep. 287.



“trust certificates” in their individual character, and, as such, members of the general trust thus created, and dividends are declared and paid to them in respect of their several holdings of trust certificates, in like manner as dividends are declared and paid to the stockholders of corporations. The combination, while called a “trust,” thus becomes in effect a vast corporation created outside of and unknown to the laws. 2. Another, and perhaps a simpler scheme, is for one of several corporations, engaged in competition with each other in the same business, to purchase the shares of the other corporations from their holders, and to issue its own shares in exchange for them. One corporation thus, in its corporate character, assumes to be the owner, so to speak, of a number of other corporations, with power to wield their franchises and dispose of their properties, through the simple office of voting their shares at their meetings and putting its own dummies in their board of directors. 3. A third, and more general class, into which all other schemes may be gathered, consist of various arrangements in the nature of a partnership among the several competing corporations. These arrangements necessarily involve the control of all the corporations and the management of their properties by a central board of management. 4. A fourth is an agreement under which the competing corporations, without entering into an arrangement in the nature of a partnership, or establishing a central board of control, agree among themselves that each is to take a certain course of action, the result of which will be to diminish or prevent competition among them and to maintain certain prices for the commodities which they manufacture and sell. 5. A fifth is a voluntary dissolution of all the competing corporations, and the formation of a single corporation, under the statutes of some State, whose laws are sufficiently liberal to enable it to be done,—the new corporation becoming the purchaser of all the properties of the antecedent corporations, and the shareholders of such corporations receiving shares in the new corporation upon a basis agreed upon in the scheme of reincorporation.

§ 6401. All Such Combinations Illegal.—All of these schemes, except the last two, are illegal. 1. In so far as they consist of conspiracies to engross the necessities of life, they are illegal and criminal under the principles of the common law.<sup>1</sup> 2. They are illegal as contracts in general restraint of trade.<sup>2</sup> 3. They are unlawful in the sense of being *ultra vires*, that is to say, in the sense of being beyond the powers of each and every corporation entering into them; for whatever is *ultra vires* a corporation is unlawful, though not expressly prohibited by statute, for the reason that corporations are, under the principles of the common law, prohibited from exercising powers which the legislature has not granted to them in express terms, or by reasonable implication.<sup>3</sup> In the case of corporations formed to render service to the public distributively, such as railroad companies, gaslight companies, water-supply companies, etc., they are unlawful, in so far as they involve attempts on the part of the corporations entering into them to *abnegate their public duties* and devolve them upon other persons or corporations.<sup>4</sup> 5. They are also, in many cases, prohibited by constitutional and statutory provisions.<sup>5</sup>

<sup>1</sup> 3 Inst. 195, 196; Bac. Abr., tit. *Forestalling* (A); 1 Hawk. P. C., ch. 80, § 3; 1 Russ. Cr. 252. Says Blackstone: "Combinations also among victuallers or artificers, to raise the price of provisions, or any commodities, or rate of labor, are in many cases severely punished by particular statutes; and in general by Statutes 2 & 3 Edward VI., ch. 15, with the forfeiture of 10 pounds, or twenty days' imprisonment, with an allowance of only bread and water, for the first offense; 20 pounds, or the pillory, for the second; and for the third, 40 pounds, or else the *pillory, loss of one ear, and perpetual infamy*." In the same manner, by a constitution of the Emperor Zeno (Cod. 4591), all monopolies and combinations to keep

up the price of merchandise, provisions, or workmanship, were prohibited, upon pain of forfeiture of goods and perpetual banishment. 21 Am. Law Rev. 977.

<sup>2</sup> *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396.

<sup>3</sup> *State v. Nebraska Distilling Co.*, 29 Neb. 700, 714; *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 292; s. c. 17 Am. St. Rep. 319; *ante*, §§ 5638, 5639, 5972.

<sup>4</sup> *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 411; *ante*, §§ 5880, 5998, 6137.

<sup>5</sup> Such a provision is found in the constitution of the new State of Idaho, as follows: "That no incorporated company, or any association of persons or stock company, in the State

§ 6402. **Validity of Statutes Prohibiting Such Combinations.** — If the State has, in a special act, created a corporation, or in a constitutional provision, or in a general statute, existing at the time of the creation of the corporation, reserved to its legislature the right to alter, amend, or repeal an act of incorporation,<sup>1</sup> this right may be exercised by passing such a statute as the following: "That the said company be, and hereby is, prohibited from entering into any consolidation, combinations, or contract with any other gas company whatever; and any attempt to do so, or to make such combinations or contracts as herein prohibited, shall be utterly null and void."<sup>2</sup> The title of the so-called "anti-trust law" of Kansas<sup>3</sup> was held sufficiently comprehensive to embrace a clause prohibiting combinations "to control the cost or rate of insurance," — the language of the title being as follows: "An act to declare unlawful trusts and combinations in restraint of trade and products, and to provide penalties therefor."<sup>4</sup> A statute of Missouri, almost idiotic in its underlying conceptions,<sup>5</sup> roughly speaking, prevented corporations from entering into combinations and trust; provided that for any violation of the statute by any corporation, its corporate existence *ipso facto* should cease and determine; authorized the Secretary of State to address an interrogatory to the president, secretary, or treasurer of any corporation, to be answered by him under

of Idaho, shall, directly or indirectly, combine or make any contract with any other incorporated company, foreign or domestic, through their stockholders, or the trustees or assignees of such stockholders, or in any manner whatsoever, for the purpose of fixing the price or regulating the production of any article of commerce or of produce of the soil, or of consumption by people, and that the legislature be required to pass laws for the enforcement thereof, by adequate penalties, to the extent, if necessary for that purpose, of the forfeiture of their property and franchise." Const. Idaho 1889, art. XI, § 18. The most

conspicuous denunciatory statute is probably the so-called "Sherman Anti-trust Law."

<sup>1</sup> See, on this subject, *ante*, § 5412, *et seq.*

<sup>2</sup> *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396.

<sup>3</sup> Kan. Laws 1889, ch. 257.

<sup>4</sup> *Re Pinkney*, 47 Kan. 89; *s. c.* 27 Pac. Rep. 179. As to the constitutionality of statutes relating to corporations under the constitutional provision that a statute shall contain but one subject which shall be expressed or indicated in its title, — see *ante*, § 607, *et seq.*

<sup>5</sup> Mo. Laws 1889, p. 97.

oath, as to whether the corporation had violated the provisions of the act; and empowered him, in case of refusal of a corporation so to answer by its officers, to revoke its charter. As this statute denounced a severe penalty against any officer of a corporation guilty of violating the act, it was held that the act in so far as it sought to compel a disclosure from the officers of the corporation, as to whether the act had been violated, was within the prohibition of the constitution of the State,<sup>1</sup> "that no person shall be compelled to testify against himself in a criminal cause."<sup>2</sup>

§ 6403. **Such Combinations Void as Unlawful Attempts to Create Partnerships among Corporations.**—A combination by which (omitting details and particulars) the shareholders of a number of corporations engaged in the same industry transfer all their shares to a central board of trustees, who themselves are not incorporated, with power to vote their shares at the meetings of their respective corporations, and in that way to fill at their pleasure, and control the official boards of each corporation, and through them to control the business of each corporation, upon a scheme by which the output of the aggregate corporations is regulated, combinations of labor resisted, prices of the manufactured product advanced, and competition successfully destroyed,—has been held unlawful, as being an attempt on the part of the corporations to combine into a *partnership* without legislative authority.<sup>3</sup> In

<sup>1</sup> Const. Mo., art. 2, § 23.

<sup>2</sup> *State v. Simmons Hardware Co.*, 109 Mo. 118; *s. c.* 18 S. W. Rep. 1125; 15 L. R. A. 676; 36 Am. & Eng. Corp. Cas. 330.

<sup>3</sup> *People v. North River Sugar Refining Co.*, 121 N. Y. 582; *s. c.* 18 Am. St. Rep. 843; 24 N. E. Rep. 834; 31 N. Y. St. Rep. 781; 25 Abb. N. Cas. (N. Y.) 1; 9 L. R. A. 33; 8 Rail. & Corp. L. J. 22; 42 Alb. L. J. 125; affirming *s. c.* 54 Hun (N. Y.), 354; 27 N. Y. St. Rep. 282; 6 Rail. & Corp. L. J. 442; 7 N. Y. Supp. 406; 5

L. R. A. 386; affirming in turn *s. c.* 19 N. Y. St. Rep. 853; 22 Abb. N. Cas. (N. Y.) 164; 2 L. R. A. 33. In the courts below it was held that such a combination was unlawful as being in *general restraint of trade*, by its tending to create a dangerous monopoly; and this is so held by other courts upon the clearest grounds. But the New York Court of Appeals, probably in deference to the views of some of the judges, and for the purpose of securing unanimity both in its conclusions and in its

another such case the contracting corporations, which were engaged in manufacturing cotton-seed oil, agreed to select a committee composed of representatives from each corporation, and to turn over to this committee the manufacturing plant and machinery of each corporation, to be managed and operated by this committee, through officers, agents, and employés, selected by them, for the common benefit, the profits and losses of such operation to be shared in certain agreed proportions. This arrangement was to last one year; but, with the consent of all, it might be renewed for two additional years, and it was so renewed at the end of the first year. The facts clearly established that the possession of the several mills was turned over to this executive committee, and that they were operated by these managers thenceforward under the name of the "Independent Cotton Seed Association." While the agreement was in force, one of the members of the combination got tired of the arrangement and desired to withdraw from it, but was refused the possession of its mill by the managing committee. Thereupon it brought an action for *unlawful detainer* to recover the same, and succeeded both in the trial court and in the Supreme Court, on the ground that the combination exhibited by the evidence was a corporation, that it is contrary to the law of Tennessee for manufacturing corporations to enter into *partnerships* with each other, and that the contract had not been *executed* in such a sense as precluded the plaintiff from withdrawing from participation in its further execution.<sup>1</sup>

reasons, declined to place its decision upon that ground; or to enter into the problems of political economy thereby involved, until some emergency should arise compelling their consideration. Finch, J., who gave the opinion of the court concluded by saying: "Without either approval or disapproval of the views expressed upon that branch of the case by the courts below, we are enabled to decide that in this State there can be no partnerships of separate and independent corpora-

tions, whether directly or indirectly, through the medium of a 'trust'; no substantial consolidations which avoid and disregard the statutory permissions and restraints, but that manufacturing corporations must be and remain several as they were created, or one under the statute." *People v. North River Sugar Refining Co., supra.*

<sup>1</sup> *Mallory v. Hanauer Oil Works*, 86 Tenn. 598; s. c. 8 S. W. Rep. 396.

§ 6404. **Invalidity of Agreements by Which Stockholders Surrender their Voting Power.**—Stockholders in general *vote by proxy*, though there is no such right at common law;<sup>1</sup> and an arrangement by which they place their stock in the hands of a depositary with instructions to vote it as directed by a committee appointed by themselves, and subject to their control, is merely a convenient arrangement for voting their stock by proxy, and is not invalid.<sup>2</sup> Such an arrangement differs widely from an agreement whereby all the shareholders in a number of corporations place their shares in the hands of the same trustees, and invest them with power of voting, in respect of them, at elections of their respective corporations, as the inclinations or interests of such trustees may dictate, irrespective of the wishes or directions of the owners. An arrangement of the latter kind is void, as against the policy of statutes governing the formation and management of corporations, and inconsistent with the purpose of the creation of corporations.<sup>3</sup> The *purposes* for which such transfers are made and proxies given determine the validity or invalidity of the act. Where certain persons holding shares in a corporation as executors and trustees; enter into a contract with other shareholders, in pursuance of which the former execute a proxy, irrevocable for five years, to the latter, to vote at all stockholders' meetings, in respect of the shares, upon consideration of an agreement to employ one of the former continuously as manager of the corporation at a stated salary,—the former may have relief against the voting of such shares by the latter, by an injunction, although they were *in pari delicto*; because the agreement is void as against public policy, and also as a breach of their trust as executors and trustees; and it is their duty to recede from it at any time, and where they merely seek to rescind and undo their wrongful act, the court will aid them.<sup>4</sup> So, where the object of

<sup>1</sup> *Ante*, 736, *et seq.*

49 Ohio St. 137; s. c. 34 Am. St. Rep.

<sup>2</sup> *Railway Co. v. State*, 49 Ohio St. 668; s. c. 32 N. E. Rep. 933.

541.

<sup>4</sup> *Cone v. Russell*, 48 N. J. Eq. 208;

<sup>3</sup> *Ibid.*; *Gould v. Head*, 38 Fed. Rep. 886; *State v. Standard Oil Co.*,

s. c. 21 Atl. Rep. 847; 9 Rail. & Corp. L. J. 513.

such a proxy is to vest all the shares of a number of competing corporations in the hands of a central board of control, with the view of stifling competition and enhancing the prices of the product of such corporations, there is an added reason for holding the granting of such voting proxies to be void as against public policy.<sup>1</sup>

**§ 6405. Illegality of Corporations Organized to Purchase the Shares of Other Corporations for the Purpose of Controlling their Management.** — One corporation has no power, in the absence of an express grant, to purchase the shares of another corporation for the purpose of owning, possessing, and controlling its property, and business; though a limited power has been conceded to corporations, and especially banking and other financial corporations, — of dealing with the shares of other corporations, as mere securities or instruments of commerce, by taking them in pledge for the security of advances or other debts, — but generally with the restriction that when they so acquire them they hold them only as the owners of paper securities, and not as stockholders or corporators in the corporation whose shares they are; and consequently they do not acquire the right to vote in respect of such shares at corporate elections.<sup>2</sup> In the absence of an

<sup>1</sup> *State v. Standard Oil Co.*, 49 Ohio St. 137; *s. c.* 34 Am. St. Rep. 541. This doctrine was applied by Robinson, J., of the Superior Court of Connecticut, in a case where a syndicate had purchased a majority of the capital stock of a railroad company, which was placed in a voting trust, to continue for five years or until a consolidation was effected with some other railroad company, when it should be dissolved by agreement. *Shepaug Voting Trust Cases*, 60 Conn. 553; *s. c.* (under other names) 24 Atl. Rep. 32; 9 Rail. & Corp. L. J. 203. It was also held that such a voting power could only be given for one year, under the terms of Gen. Stats. Conn., § 1927. *Ibid.* The

court also held, upon applicatory facts, that, although there may be nothing illegal *per se* in the pooling of stock to carry out a scheme of extension, it is otherwise when, underlying it, there is between the members of a syndicate of directors in control of the corporation, or a majority thereof, a secret agreement which enters into it, by which they are to take to themselves the profits. *Ibid.*

<sup>2</sup> *Ante*, § 3873. That a corporation cannot vote upon the stock of another corporation without express statutory authority, even if it has acquired the shares lawfully in payment of, or as security for, a debt, — see *Woods v. Memphis & c. R. Co.*, 5 Rail. & Corp. L. J. 372.

enabling statute, authorizing the formation of a corporation with such powers, it cannot acquire them by merely assuming them in its articles of association. Without such an express grant of power, a corporation, created to perform certain public duties, such as manufacturing and vending illuminating gas to a city and its inhabitants, has no power to purchase and hold or sell the shares of stock in other like corporations, for the purpose of absorbing or controlling their business and preventing competition therein; and a corporation formed under articles of association which assume such power, without an express grant of the legislature, is unlawful and void, and will be *dissolved* in a proceeding by *quo warranto*.<sup>1</sup> It should be added that while the stockholders of a corporation have a standing in court, under certain conditions, to enjoin the directors of the corporation from committing *ultra vires* acts in breach of their trust,<sup>2</sup> — yet this is so only where such acts are injurious to the rights of the stockholders. Mere injury to the public has been held insufficient to entitle them to intervention, — as for the purpose of putting a stop to the execution of a contract of their corporation to buy off the

<sup>1</sup> *People v. Chicago Gas Trust Co.*, 130 Ill. 268; *s. c.* 17 Am. St. Rep. 319; 22 N. E. Rep. 798; 8 L. R. A. 497; reversing *s. c.* 9 Rail. & Corp. L. J. 536. In this case a contract between several gaslight companies in the city of Chicago, intended to stifle competition, having been held void (*Chicago Gaslight Co. v. People's Gaslight Co.*, 121 Ill. 530), an attempt was made to defeat the effect of this decision by organizing a corporation called the "Chicago Gas Trust Company," with power, as stated in its articles of association, among other things, "to purchase and hold, or sell the capital stock, or purchase, or lease, or operate the property, plant, goodwill, rights, and franchises of any gas works or gas company or companies, or any electric company or companies, in Chicago or elsewhere." The corpo-

ration sought to exercise these powers only, and did not attempt to manufacture and vend illuminating gas. For this purpose it bought a majority of the shares of all the stock of all the gas companies in Chicago, four in number, in order to control their business, and the management of their property through such directors as it might elect, and thus destroy competition and create a monopoly in the business of manufacturing and supplying illuminating gas to the city and its inhabitants, — there being no statute authorizing a gaslight or other corporation to take to itself such powers. It was held that the corporation so organized was illegal, and (in effect) that it was subject to be dissolved in a *quo warranto* proceeding by the State.

<sup>2</sup> *Ante*, § 4518, *et seq.*



competition of a rival company.<sup>1</sup> The constitution of the State of Georgia contains the provision that "the general assembly of this state shall have no power to authorize any corporation to buy shares or stock in any other corporation in this State or elsewhere, or to make any contract or agreement whatever with any such corporation, which may have the effect, or be intended to have the effect, to defeat or lessen competition in their respective businesses, or to encourage monopoly; and all such agreements and contracts shall be illegal and void."<sup>2</sup> It has been held that, with this constitutional provision in force, a purchase, by a railway company in Georgia, of a contract to construct the line of a competitive company, and of the securities of such competitive company, with a view of preventing the construction of such competing line, is illegal and void, although accomplished indirectly, and constitutes all concerned in such illegal transaction, *trustees* as to assets resulting therefrom, for the benefit of persons whose rights have been invaded.<sup>3</sup>

**§ 6406. Invalidity of Corporations Organized for the Mere Purpose of Stifling Competition and Engrossing a Particular Manufacture.** — It will be remembered that when the so-called New York Sugar Trust was destroyed by the dissolution of one of its members, the North River Sugar Refining Company, by a judgment of the Supreme Court of New York, which was finally affirmed by the Court of Appeals of that State,<sup>4</sup> the combination was reorganized by becoming incorporated under the laws of New Jersey, under conditions which the writer is not able to state. The legality of such corporations may be challenged by the State in every case where they cannot find an express grant of power to become incorporated for such a purpose. We have already seen<sup>5</sup> that this was held in a case where a so-called gas trust company was organized under a general enabling statute for the mere purpose of con-

<sup>1</sup> *Leslie v. Lorillard*, 110 N. Y. 519; s. c. 18 N. E. Rep. 363; 1 L. R. A. 456; 18 N. Y. St. Rep. 520.

<sup>2</sup> Const. Ga., art. 4, § 2, par. 4.

<sup>3</sup> *Langdon v. Branch*, 37 Fed. Rep. 449; s. c. 2 L. R. A. 120.

<sup>4</sup> *Ante*, § 6403.

<sup>5</sup> *Ante*, § 6405.

trolling other gaslight companies by purchasing their shares and exercising the voting power of their stockholders.<sup>1</sup> Upon the same principle it has been held by one of the departments of the Supreme Court of New York, that where the various manufacturers of an implement necessary to agriculture enter into a combination which absolutely controls the production, regulates the prices, and stifles competition in respect of such manufacture, the form of the transaction being the creation of a corporation, and the sale to it by the various manufacturers of their business and patents,—the combination is not protected by the law, because organized as a corporation under a State statute.<sup>2</sup>

§ 6407. **Such Combinations Void at Common Law as being in Restraint of Trade.**—Combinations of the kind described in a preceding section,<sup>3</sup> by which all the shareholders of all the corporations engaged in a given manufacture transfer their shares to a body of so-called “trustees,” so that, through the power of voting them at elections in the respective corporations, these trustees control the corporations and their business, under a scheme by which production is to be diminished, prices enhanced, all manufactured productions of a given kind engrossed, and competition stifled,—are held to be against public policy, under the principles of the common law, as being *in general restraint of trade*, and as such unlawful, and *ultra vires* because unlawful.<sup>4</sup>

<sup>1</sup> *People v. Chicago Gas Trust Co.*, 130 Ill. 268; *s. c.* 17 Am. St. Rep. 319.

<sup>2</sup> *Starit v. National Harrow Co.*, 18 N. Y. Supp. 224.

<sup>3</sup> *Ante*, § 6400.

<sup>4</sup> *State v. Nebraska Distilling Co.*, 29 Neb. 700; *s. c.* 46 N. W. Rep. 155; 8 Rail. & Corp. L. J. 323; *State v. Standard Oil Co.*, 49 Ohio St. 137; *s. c.* 34 Am. St. Rep. 541; 30 N. E. Rep. 279; *American Preservers' Trust Co. v. Taylor Man. Co.*, 46 Fed. Rep. 152. Much of the learning in support of the proposition of the text will be

found in the strong dissenting opinion of Mr. Justice Harlan in *United States v. E. C. Knight Co.* (Sugar Trust Case), U. S. The following paragraph from the official syllabus of one of the above cases is perhaps a good expression of what the judges intended to hold in all of them: “An agreement by which all, or a majority of the stockholders of a corporation, transfer their stocks to certain trustees, in consideration of the agreement of the stockholders of other companies and of the members of

§ 6408. **No Recovery upon Contracts in Furtherance of Such Combinations.**—No recovery can be had upon a contract knowingly entered into by a person for the purpose of bringing about such an unlawful combination. The governing principle is that where a contract is void as against public policy, a court will neither enforce it while executory, nor relieve a party from loss by having performed it in part, but will leave the parties where they have placed themselves.<sup>1</sup> On like grounds it has been held that an agreement intended to aid in the formation of a corporation, created under the laws of Connecticut, to secure a monopoly of the entire business of manufacturing and selling friction matches throughout the United States, by which agreement and in consideration of indorsements and other financial aid rendered to an intending shareholder to enable him to raise funds to join the enterprise, the indorsers are to have a share of the net earnings of its stock, is void on grounds of public policy.<sup>2</sup>

limited partnerships, engaged in the same business, to do likewise; and by which all are to receive, in lieu of their stocks and interests so transferred, trust certificates, to be issued by the trustees, equal at par to the par value of their stocks and interests; and by which the trustees are empowered, as apparent owners of the stock, to elect directors of the several companies, and thereby control their affairs in the interests of the trust so created; and are to receive all dividends made by the several companies and limited partnerships, from which, as a common fund, dividends are to be made by the trustees to the holders of the trust certificates,—tends to the creation of a monopoly to control production as well as prices, and is against public policy.” *State v. Standard Oil Co.*, 49 Ohio St. 137; *s. c.* 34 Am. St. Rep. 541; 30 N. E. Rep. 279. Such also was the ground on which the judges of the courts below put

their decision in favor of dissolving the North River Sugar Refining Company, which had entered into such a trust, though, as already observed (*ante*, § 6403), the Court of Appeals put its decision upon the mere ground that manufacturing corporations cannot, in that State, enter into *partnerships* with each other: *People v. North River Sugar Refining Co.*, 3 N. Y. St. Rep. 401; *s. c.* 22 Abb. N. Cas. (N. Y.) 164; 16 Civil Proc. R. 1.

<sup>1</sup> *Richardson v. Buhl*, 77 Mich. 632; *s. c.* 43 N. W. Rep. 1102; 7 Rail. & Corp. L. J. 89; 27 Am. & Eng. Rail. Cas. 256; 6 L. R. A. 457.

<sup>2</sup> *Richardson v. Buhl*, 77 Mich. 632; *s. c.* 43 N. W. Rep. 1102; 6 L. R. A. 457; 27 Am. & Eng. Rail. Cas. 256; 7 Rail. & Corp. L. J. 89. The statement of facts is complicated, and the value of the decisions is diminished by the fact that some of the judges placed their concurrence on different grounds.

§ 6409. **Whether the Draughtsman of the Trust Agreement can Recover Compensation for his Service.**—This question is answered by the Supreme Court of the United States in the following two propositions: 1. Where a contract, void on account of the illegal intent of the principal parties to it, has been negotiated by a person ignorant of such intent, and innocent of any violation of law, he may have a meritorious ground for recovery of compensation for his service and advances. 2. But where such agent “is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and cannot recover for services rendered, or losses incurred by himself, on behalf of either in forwarding the transaction.<sup>1</sup>

§ 6410. **Right of Members of Such Combinations to Rescind and Withdraw.**—Such combinations being *ultra vires*, not merely in the sense of being in excess of granted powers, but also in the sense of being contrary to public policy, a continuing wrong-doing, — there is accordingly a continuing duty on the part of every member to withdraw therefrom; and any corporation which has entered into such a combination may exercise this privilege at any time, and is not restrained from doing so on the theory of the contract being *executed*.<sup>2</sup> The governing principle is the same which has been frequently applied where railway, and other like companies, have endeavored, by contracts with each other, to *devolve the public duties* of one corporation upon the other, — in which case there is a continuing duty of disaffirmance on the part of either; so that it is at liberty to withdraw, and having done so, it is not liable to an action for anything agreed to be done in future,

<sup>1</sup> *Irwin v. Williar*, 110 U. S. 499, 510; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 405. In the latter case one who had acted as an agent in procuring a contract between two gaslight companies in the City of Baltimore, such as was declared to be

utterly null and void by a statute of the State, was denied the right to maintain an action for compensation for his service.

<sup>2</sup> *Mallory v. Hanauer Oil Works*, 86 Tenn. 598; *s. c.* 8 S. W. Rep. 396.

as for the payment of rents under the contract, or a valuation of the loss resulting from its disaffirmance, or otherwise.<sup>1</sup>

§ 6411. **Corporations may be Dissolved for Entering into Such Combinations.**—The offense of entering into such combinations as those described in this chapter furnishes a good ground for dissolving the corporation, in a proceeding in the nature of *quo warranto* by the State.<sup>2</sup> If the corporation has been primarily formed for the purpose of absorbing other corporations, by purchasing and controlling their shares, it is subject to dissolution as an unlawful corporation.<sup>3</sup> In such a case if the court does not feel disposed to concede to the State the severe punishment of dissolving the corporation, it may limit itself to ousting it, in a *quo warranto* proceeding, of the right to make the contract by which the illegal corporation is formed, and of the power to perform it.<sup>4</sup>

§ 6412. **Although the Combination Takes the Form of a Combination among the Stockholders Merely.**—In the largest and best sense a corporation is an aggregate body of men, considered as a unit when acting within certain limits, for certain purposes, and in a prescribed method of action. In ordinary business matters, this method of action is the action of the directors, sitting as a board or body, and carried out through the agency of certain ministerial officers and subor-

<sup>1</sup> *Thomas v. Railroad Co.*, 101 U. S. 71; *Oregon Rail. & Nav. Co. v. Oregonian R. Co.*, 130 U. S. 1; *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 24. Compare *ante*, § 5999, *et seq.*

<sup>2</sup> *People v. North River Sugar Refining Co.*, 121 N. Y. 582; *s. c.* 18 Am. St. Rep. 843; 24 N. E. Rep. 834; 31 N. Y. St. Rep. 781; 25 Abb. N. Cas. (N. Y.) 1; 9 L. R. A. 33; 8 Rail. & Corp. L. J. 22; 42 Alb. L. J. 125; affirming *s. c.* 54 Hun (N. Y.), 354; 27 N. Y. St. Rep. 282; 6 Rail. & Corp. L. J. 442; 7 N. Y. Supp. 456; 5 L. R. A.

386; affirming in turn *s. c.* 19 N. Y. St. Rep. 853; 22 Abb. N. Cas. (N. Y.) 164; 2 L. R. A. 33.

<sup>3</sup> *People v. Chicago Gas Trust Co.*, 130 Ill. 268; *s. c.* 17 Am. St. Rep. 319.

<sup>4</sup> Such was the judgment of the court in *State v. Standard Oil Co.*, 49 Ohio St. 137, 189; *s. c.* 34 Am. St. Rep. 541. It cannot, however, escape attention that this is turning a proceeding by information, in the nature of *quo warranto*, into a sort of injunction restraining a corporation from making and executing an illegal contract.

dinate agents.<sup>1</sup> But in *constituent matters*,—those affecting the organization of the corporation itself, and producing changes therein, the only admissible action is that of the aggregate body of shareholders, or members, at meetings duly notified;<sup>2</sup> though, as already seen,<sup>3</sup> both constituent and business acts done by the directors, officers, or agents, without the proper precedent authorization, or without the proper formality, become valid by the act or neglect of the stockholders, in acquiescing with knowledge or the means of knowledge. In the primary and largest sense, corporate action, then, consists of the action of the constituent body. Where this action refers exclusively to the *status*, control, and management of the corporation, it is none the less corporate action because it may take the form of action on the part of the individual shareholders. When, therefore, the State proceeds to dissolve a corporation for the offense of entering into a trust, under such a scheme as that which takes place where all its members, under a concerted arrangement, transfer their shares to a board of trustees, in return for so-called “trust certificates,” issued to such members, to whom the members of other like corporations also transfer their shares for the purpose of vesting in such trustees the absolute power of electing the directors of the corporation, and thereby controlling its action, so that it shall not be brought into competition with the other corporations taking like action, it cannot be urged in defense that the action is not corporate action,—but the action of the individual shareholders, and hence that the corporate entity has committed no offense.<sup>4</sup>

<sup>1</sup> *Ante*, §§ 3974, 3975.

<sup>2</sup> *Ante*, § 3979.

<sup>3</sup> *Ante*, § 5314.

<sup>4</sup> *People v. North River Sugar Refining Co.*, 121 N. Y. 582; *s. c.* 18 Am. St. Rep. 843; 24 N. E. Rep. 834; 31 N. Y. St. Rep. 781; 25 Abb. N. Cas. (N. Y.) 1; 9 L. R. A. 33; 8 Rail. & Corp. L. J. 22; 42 Alb. L. J. 125; affirming *s. c.* 54 Hun (N. Y.), 354; 27 N. Y. St. Rep. 282; 6 Rail. & Corp.

L. J. 442; 7 N. Y. Supp. 406; 5 L. R. A. 386; affirming in turn *s. c.* 19 N. Y. St. Rep. 853; 22 Abb. N. Cas. (N. Y.) 164; 2 L. R. A. 33; *State v. Standard Oil Co.*, 49 Ohio St. 137; *s. c.* 34 Am. St. Rep. 541; 30 N. E. Rep. 279; 15 L. R. A. 145; 11 Rail. & Corp. L. J. 229. The official syllabus of the Ohio case states the doctrine thus: “Where all, or a majority of the stockholders composing a corporation, do an act

§ 6413. Power of the "Trustees" to Sell the Shares Deposited with Them.—The serious nature of the step which is taken by the shareholders of a corporation, when, for the purpose of forming such a "trust" as those under consideration, they deposit their shares with a board of trustees, will be understood, when it is suggested that the gravest questions are liable to arise with reference to the power of the trustees to deal with the shares, and as to what remedies the policy of the law will concede to the shareholders in case the trustees convert them, or otherwise deal with them unlawfully. The writer is clear of all doubt that if, in such a case, the judges carry out the principles of the common law, it will be found that the shareholders have placed their property beyond the protection of the laws, except that the law will aid them in withdrawing from the unlawful compact, and in getting back what they have parted with on entering into it.<sup>1</sup> But even this may be doubtful. The arrangement being a conspiracy against commerce, a gross abuse of the franchises conferred upon the shareholders in giving them a corporate existence with the power to transfer their holdings in the corporation, and an offense against public right, denounced in many cases by criminal statutes, — it may be doubtful whether the State will even extend its aid so far as to enable one of the co-conspirators, in withdrawing from the conspiracy, to get out of it what he put into it. If the so-called "trustees," in breach of their trust, pledge or sell the shares deposited with them, what remedy can the shareholder demand of a court of justice that will not involve putting the

which is designed to affect the property and business of the company, and which, through the control their numbers give them over the selection and conduct of the corporate agencies, does affect the property and business of the company, in the same manner as if it had been a formal resolution of its board of directors; and the act so done is *ultra vires* of the corporation and against public policy, and was done

in their individual capacities for the purpose of concealing their real purpose and object, the act should be regarded as the act of the corporation; and, to prevent the abuse of corporate power, may be challenged as such by the State in a proceeding in *quo warranto*." State v. Standard Oil Co., *supra*.

<sup>1</sup> See for analogy Mallory v. Ha-nauer Oil Works, 86 Tenn. 599.

court in the predicament of aiding him to enforce and carry out the unlawful agreement according to its terms? These thoughts are suggested by two Federal cases, or possibly by the same Federal case heard before successive judges, where the question arose whether the trustees of the American Cattle Trust, a voluntary organization, existing in the State of New York, concocted to control corporations engaged in the live-stock business, having obtained the stock of a corporation organized in the Territory of New Mexico, called the "Phoenix Farm and Ranch Company," in the manner above described, — had power to sell or otherwise alienate it. One judge held that it had,<sup>1</sup> and the other that it had not.<sup>2</sup> The writer believes that neither judge should have held anything at all, except that courts of justice do not sit to decide the rights of parties to such unlawful agreements, any more than they will sit for the purpose of deciding how a gang of highwaymen shall divide their plunder. But it should be added that, assuming that a court of justice will so far degrade itself and depart from its true functions as to become the interpreter of such an unlawful agreement, its function is limited to mere *interpretation*, that is, to the mere office of finding out what the conspirators intended, from the language of the instrument creating the conspiracy.<sup>3</sup>

§ 6414. Status of "Trust Certificates." — Under the combinations already described, it is usual for the central board to issue to the various shareholders of the corporations entering into the combination, in exchange for their shares which are surrendered to the so-called "trustees," an instrument very much like an ordinary share certificate, called a "*trust certificate*." It is understood to be transferable on the books of the "trust," as though it were a corporation, or a joint-stock

<sup>1</sup> Gould v. Head, 38 Fed. Rep. 886.

<sup>2</sup> Gould v. Head, 41 Fed. Rep. 240.

<sup>3</sup> That was what the learned judges attempted to do in the two cases above cited. Judge Hallett thought that to allow the trustees power to alienate

the shares was contrary to the purposes of the trust; but Judge Phillips could not come to that conclusion, in the face of express language in the instrument of trust conveying the power of alienation.



company, and the holder is entitled to dividends as a shareholder in a corporation would be; though no case has come under the notice of the writer where he would be liable to an assessment in case the funds of the "trust" should fail to meet its business emergencies. The writer believes that the true theory of the law, in dealing with these trust certificates, is not to regard them as lawful instruments of commerce, but to treat them as something in the nature of counterfeit money, as securities which have been issued in violation of law, and in contravention of public right. So treating them, the utmost that a court of justice would do in favor of their holder would be to allow him to use them as evidence of his interest as a shareholder of the corporation whose shares he surrendered in exchange for them; or possibly to make them the basis of aiding him where he acquired them in an effort to secure an antecedent indebtedness, though not where he purchased them in the market for a new consideration. If we may trust the soundness of the conclusion of Judge Robinson, of the Superior Court of Connecticut, we may conclude that, although these securities are issued in violation of the duties of the directors of a railroad company, and against the policy of the law, yet the law so far protects them as to regard them as *quasi-negotiable*. So that, although they were issued in pursuance of an unlawful agreement, yet one who advances money on the pledge of them, and acquires them through their sale as a pledge, has a standing in court to use them as a basis of *withdrawing from the so-called "trust,"* and demanding the original corporate shares which were issued in exchange for them.<sup>1</sup> There is also a judicial holding to the effect that a preliminary injunction will be granted in favor of a holder of a certificate in a "trust" which has been declared illegal,<sup>2</sup> to restrain any reorganization of the "trust" until the certificate holders are placed on an equality, so far as to be let into the secrets of the new scheme and the financial con-

<sup>1</sup> Shepaugh Voting Trust Cases, 60 Conn. 553, suppl.; reported under other names in 24 Atl. Rep. 32.

Trust: See *People v. North River Sugar Refining Co.*, 121 N. Y. 582; s. c. 18 Am. St. Rep. 843.

<sup>2</sup> In this case the New York Sugar

ditions underlying it.<sup>1</sup> It is impossible to understand how, after the judicial and legislative condemnation which these so-called "trusts" have everywhere received, honest and self-respecting judges can degrade their courts to the office of declaring the rights of the parties to such arrangements, and of assisting them in or out of the predicament where their unlawful conduct has placed them. The public will never successfully grapple with these combinations, as long as courts of justice extend to them and to their certificate-holders any legal recognition beyond that of criminals at their bar; and in the struggle against them, the people may find it necessary to get rid of the judges who thus lend themselves and their courts to their purposes. Circumstances may, of course, arise where, for the purpose of protecting the rights of third persons, a corporation which has entered into such an illegal combination will be estopped to set up its illegality, and where, after its insolvency, its receiver will also be estopped.<sup>2</sup>

§ 6415. **Relation of Manufacturing Trusts to Interstate Commerce.**—Since the preceding sections were written the Supreme Court of the United States have held that the act of Congress "to Protect Trade and Commerce against Unlawful Restraints and Monopolies," known as the "Sherman Antitrust Act,"<sup>3</sup> does not extend so far as to reach a combination formed by one manufacturing corporation buying up all the shares of all other competing corporations, so as, by controlling the manufacture and output of the commodity which all these corporations are engaged in manufacturing, to engross and control the markets in respect of that commodity throughout the United States. The court proceed upon the ground that the *primary* object of the combination is *manufacturing*, which is a matter of local and domestic concern, subject only to the police regulations of the State in which the manufacturing takes place, and which touches interstate commerce

<sup>1</sup> *Cameron v. Havemeyer*, 25 Abb. N. Cas. (N. Y.) 438; *s. c.* 12 N. Y. Supp. 126.

<sup>2</sup> *Pittsburgh Carbon Co. v. Mc-*

*Millin*, 6 N. Y. St. Rep. 433; *s. c.* 53 Hun (N. Y.), 67.

<sup>3</sup> 26 U. S. Stat., p. 209, ch. 647.

only *secondarily* and incidentally; and the intimations of the opinion are plain to the effect that if the statute had been so drawn as to include such combinations in terms, it would have been unconstitutional.<sup>1</sup> Mr. Justice Harlan alone dissented, and his dissenting opinion makes it clear of all doubt—if indeed there could have been any doubt upon such a question—that the entire object, end, and purpose of the combination was a conspiracy against interstate commerce throughout the whole Union, and that the control of local manufacturing was merely a means to the end. The opinion of the court, written by Mr. Chief Justice Fuller, is weak, scattering, vague, and inconclusive; the dissenting opinion of Mr. Justice Harlan is strong, clear, pointed, well-sustained, and convincing. The decision is one of the most unfortunate ever rendered by that court. The Original Sugar Trust was broken up by the dissolution, under a judgment of the Supreme Court of New York, affirmed by the Court of Appeals of that State, of one of its members, the North River Sugar Refining Company.<sup>2</sup> No sooner had that decision been affirmed than the dissolved corporation and its copartners organized a new “trust,” in the form of a corporation organized under the laws of New Jersey. They next procured authority to increase their capital stock to an extent sufficient to enable them to buy up all the shares of all other competing sugar refining companies in the United States; and they actually succeeded in buying up all the shares of such competing companies, save one, and in bringing under their control the manufacture of ninety per cent of all the sugar manufactured in the United States. By this means, as the facts agreed upon, and which form the basis of the judgment of the court, clearly show, this New Jersey corporation, situated in a State which does not probably consume five per cent of the sugar consumed in the United States, succeeded in seizing every market in the United States by the throat, in respect of that article, and controlling it absolutely,

<sup>1</sup> United States v. E. O. Knight Fed. Rep. 934, which in turn affirmed Co., 156 U. S. 1; affirming s. c. 60 s. c. 60 Fed. Rep. 306.

<sup>2</sup> *Ante*, § 6411.

— the small competition of the single company which they failed to control not being enough to prevent that result. And it is said by the court that this combination does not directly touch interstate commerce, but that it is only a matter of domestic concern; and it is intimated that if the statute did directly apply to it, the statute would be beyond the power of Congress. Thus, a combination creating a monopoly and undoubtedly in general restraint of trade, eluded the power of the greatest State in the Union to suppress it, by the mere act of crossing the State boundary into another State; and it has in turn, by the aid of this decision, eluded the power of the United States. It thus stands, through the aid of this regrettable decision, above all governmental power.

## CHAPTER CXLIII.

### INDICTMENT OF CORPORATIONS.\*

#### SECTION

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- 6431. For usury.
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- 6440. Entering the plea of not guilty.
- 6441. Proof of the fact of incorporation under an indictment.
- 6442. Defenses to indictments.
- 6443. The judgment or sentence.
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§ 6418. Corporations Indictable under Ancient Law.—The law on the subject of the criminal liability of corporations has had a growth and development analogous to that relating to the civil liability of corporations for torts. Decisions and *dicta* are not wanting in the ancient, and even in the modern books of our law, which deny, in the broadest terms, that a corporation can be indicted or criminally impleaded. Lord Holt is reported to have said that "a corpora-

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\*The author acknowledges his indebtedness to an article in the *Criminal Law Magazine*, for May, 1885, by Adelbert Hamilton, Esq., of the Chicago Bar, on the subject of the "Indictment of Corporations," for valuable materials and suggestions, aiding him in the preparation of this chapter.

tion is not indictable, but the particular members of it are,"<sup>1</sup> and the Superior Court of Virginia declared, in the year 1823, in general terms, that a corporation cannot be impleaded *criminaliter* by its artificial name.<sup>2</sup> But, apart from the notorious inaccuracy of the so-called Modern Reports, and the suspicion which always attaches to the anonymous cases reported in that series,<sup>3</sup> it has been pointed out<sup>4</sup> that, in the time of Lord Holt, there were many instances of indictments against *counties*, which were *quasi*-corporations, for their neglect to keep their roads and bridges in repair.<sup>5</sup> It has often been urged in behalf of corporations, that it is unnecessary to hold them liable criminally for acts of malfeasance, since their officers who do the act may be so prosecuted. "Of this," said Lord Denman, C. J., "there is no doubt. But the public knows nothing of the former, and the latter, if they can be identified, are commonly persons of the lowest rank, wholly incompetent to make any reparation for the injury. There can be no effectual means for deterring from an oppressive exercise of power for the purpose of gain, except the remedy by an indictment against those who truly commit it,—that is, the corporation acting by its majority; and there is no principle which

<sup>1</sup> Anon., 12 Mod. 559.

<sup>2</sup> Com. v. Swift &c. Turnp. Co., 2 Va. Cas. 362.

<sup>3</sup> Lord Holt himself complained of his reporters, who seem to have been mere private note-takers in the court, and not officially appointed,—“that the stuff which they published would make posterity think ill of his understanding, and that of his brethren on the bench.” But the fame of Lord Holt, as a master of the common law, is too well established to be shaken even by the travesties of his decisions which appear in the Modern Reports.

<sup>4</sup> By Chief Justice Green, of New Jersey, in his learned opinion in State v. Morris &c. R. Co., 23 N. J. L. 360, 364.

<sup>5</sup> Reg. v. Wilts, 1 Salk. 359; Reg.

v. Cluworth, 1 Salk. 359; s. c. 6 Mod. 163; Holt, 239; Reg. v. Saintiff, 6 Mod. 255. In this last case Lord Holt himself presided, and held that if a common footway be in decay, an indictment will lie for it of necessity, because an action will not lie without special damage. That an indictment was the settled method of *compelling counties and municipal corporations to keep their highways in repair*, is shown by the following cases: Case of Langforth Bridge, Cro. Car. 365; Rex v. West Riding of Yorkshire, 2 W. Black. 685; Rex v. Great Broughton, 5 Burr. 2700; Rex v. Clifton, 5 T. R. 498; Rex v. Liverpool, 3 East, 86; Rex v. Stratford-upon-Avon, 14 East, 348.

places them beyond the reach of the law for such proceedings.”<sup>1</sup> We may conclude that it is a settled principle of modern jurisprudence that an indictment will lie against a corporation aggregate, though not for every species of crime or misdemeanor.<sup>2</sup>

§ 6419. For What Offenses Corporations not Indictable. — Having concluded, upon judicial authority, that corporations are indictable, the next inquiry will be for what offenses are they indictable; and this inquiry can be best answered by discovering for what offenses they are *not* indictable, and excluding that class of offenses from consideration. The ancient theory unquestionably was that a corporation aggregate was indictable only for acts of *non-feasance*, that is, for the *failure to perform some public duty*, such as keeping a highway in repair. The theory was that it was not indictable for acts of *misfeasance*, because it had no power, under its charter, to commit such acts, but that, when those who professed to act in its behalf committed acts of misfeasance, they were acting *ultra vires*, and their acts were personal acts, and not the acts of the corporation. The rule was strictly analogous to the ancient doctrine that *evil intent or motive* cannot be imputed to a corporation, and that a corporation cannot be made liable, in a civil action, for a *trespass* or other *malicious injury* unless committed by deed.<sup>3</sup> This idea that a corporation cannot be punished criminally for a malfeasance has inhered to some extent in modern decisions;<sup>4</sup> but it is now thoroughly settled, both in England and America, that a corporation may be prosecuted by indictment *for a misfeasance as well as for a non-feasance*.<sup>5</sup>

<sup>1</sup> Reg. v. Great North of England R. Co., 9 Ad. & El. (N. S.) 315, 327.

<sup>2</sup> Reg. v. Birmingham &c. R. Co., 3 Ad. & El. (N. S.) 223; s. c. 9 Car. & P. 469 etc. (where the subject underwent full examination); State v. Morris &c. R. Co., 23 N. J. L. 360 (where the subject was likewise fully examined on the English precedents).

<sup>3</sup> Ante, § 6302.

<sup>4</sup> State v. Great Works Milling &c. Co., 20 Me. 41; s. c. 37 Am. Dec. 38; State v. Ohio &c. R. Co., 23 Ind. 362.

<sup>5</sup> Reg. v. Great North of England R. Co., 9 Ad. & El. (N. S.) 315; Com. v. New Bedford Bridge, 2 Gray (Mass.), 339; State v. Vermont &c. R. Co., 27 Vt. 103; State v. Morris &c. R. Co., 23 N. J. L. 360; Com. v. Pulaski County Agric. &c. Asso., 92 Ky. 197;

**§ 6420. Not Indictable for Treason, Felony, Breaches of the Peace, etc.**—Nevertheless, it would be regarded as a startling proposition that a corporation aggregate can be prosecuted criminally for every species of crime or misdemeanor. The impossibility of visiting upon such a body the punishment of *imprisonment*, which is the usual sanction attached, by the principles of the common law and by penal statutes, to the commission of crimes and misdemeanors, such as treason, felony, and breaches of the peace,—carries with it the conclusion that a corporation aggregate cannot be deemed to have the capacity to commit such offenses, and cannot be prosecuted criminally therefor. “Some *dicta*,” said Lord Denman, C. J., “occur in old cases: ‘A corporation cannot be guilty of treason or felony.’ It might be added ‘of perjury, or offenses against the person.’ . . . But nobody has sought to fix them with acts of immorality. These plainly derive their character from the corrupted mind of the person com-

*s. c.* 17 S. W. Rep. 442; *State v. Portland*, 74 Me. 268; *s. c.* 43 Am. Rep. 586; overruling *State v. Great Works Milling & Co.*, 20 Me. 41; *s. c.* 37 Am. Dec. 38; *People v. Albany*, 11 Wend. (N. Y.) 539; *s. c.* 27 Am. Dec. 95; *State v. Portland & Co. R. Co.*, 57 Me. 402; *State v. Freeport*, 43 Me. 198 (*semble*); *Louisville & Co. R. Co. v. State*, 3 Head (Tenn.), 523; *s. c.* 75 Am. Dec. 778. See, also, *People v. Equitable Gaslight Co.*, 5 N. Y. Supp. 19; *State v. Baltimore & Co. R. Co.*, 15 W. Va. 362, 376; *s. c.* 36 Am. Rep. 803. In the case first above cited, Lord Denman, C. J., overruled the contention that a corporation is not indictable for a malféasance, in the following language: “No assumption can be more unfounded. Many occurrences may be easily conceived, full of annoyance and danger to the public, and involving blame in some individual or some corporation, of which the most acute person could not clearly define the cause, or ascribe

them with more correctness to mere negligence in providing safeguards or to an act rendered improper by nothing but the want of safeguards. If A. is authorized to make a bridge with parapets, but makes it without them, does the offense consist in the construction of the unsecured bridge, or in the neglect to secure it? But if the distinction were always easily discoverable, why should a corporation be liable for the one species of offense, and not for the other? The startling incongruity of allowing the exemption is one strong argument against it. The law is often entangled in technical embarrassments; but there is none here. It is as easy to charge one person, or a body corporate, with erecting a bar across a public road as with the non-repair of it; and they may as well be compelled to pay a fine for the act as for the omission.” *Reg. v. Great Northern R. Co.*, 9 Ad. & El. (N. S.) 315, 324.



mitting them, and are violations of the social duties that belong to men and subjects. A corporation which, as such, has no such duties, cannot be guilty in these cases; but they may be guilty, as a body corporate, of commanding acts to be done to the *nuisance* of the community at large.”<sup>1</sup> “A corporation,” says Blackstone, “cannot commit treason, or felony, or other crime in its corporate capacity: though its members may in their distinct individual capacities. Neither is it capable of suffering a traitor’s or felon’s punishment; for it is not liable to corporal penalties, nor to attainder, forfeiture, or corruption of blood. . . . Neither can it be committed to prison; for, its existence being ideal, no man can apprehend or arrest it. And therefore, also it cannot be outlawed; for outlawry always supposes a precedent right of arresting, which has been defeated by the party’s absconding, and that also a corporation cannot do: for which reasons the proceedings to compel a corporation to appear to any suit by attorney are always by distress on their lands and goods. Neither can a corporation be excommunicated; for it has no soul, as is gravely observed by Sir Edward Coke: and therefore also it is not liable to be summoned into the ecclesiastical courts upon any account; for those courts act only *pro salu’e animæ*; and their sentences can only be enforced by spiritual censures: a consideration, which, carried to its full extent, would alone demonstrate the impropriety of these courts interfering in any temporal rights whatsoever.”<sup>2</sup> In an American case, where the subject was well considered, it was said by Green, C. J.: “It is true that there are crimes (perjury, for example), of which a corporation cannot, in the nature of things, be guilty. There are other crimes, as treason and murder, for which the punishment imposed by law cannot be inflicted upon a corporation. Nor can they be liable for any crime of which a corrupt intent or *malus animus* is an essential ingredient. But the creation of a mere *nuisance* involves no such element. It is totally immaterial whether the person

<sup>1</sup> Reg. v. Great North of England R. Co., 9 Ad. & El. (N. S.) 315, 326.

<sup>2</sup> 1 Bla. Com. 476, 477.

erecting the nuisance does it ignorantly or by design, with a good intent or an evil intent; and there is no reason why, for such an offense, a corporation should not be indicted.”<sup>1</sup> From the foregoing considerations, it may be concluded that, while a corporation aggregate may be indicted for offenses involving acts of *misfeasance* as well as for offenses consisting of mere non-feasance, yet that it cannot, in general, be indicted for ordinary crimes and misdemeanors, such as involve a criminal or immoral intent, and such as are often grouped, in books of the common law, under the threefold designation of treason, felony, and breach of the peace.

§ 6421. **Indictable for Criminal Libel.**—When it is conceded that a corporation aggregate may be indicted for an offense consisting of *malfeasance*, there is no logical difficulty in concluding that it may be indictable for the publication of a libel.<sup>2</sup>

§ 6422. **For Keeping a Disorderly House.**—A disorderly house is unquestionably a *public nuisance*; and if a corporation is indictable for any public nuisance which it is capable of committing, a corporation formed, we will say, for the purpose of carrying on a hotel, may become indictable for carrying it on as a disorderly house; and it has been held, by the Supreme Court of New Jersey, that a corporation aggregate may be prosecuted by indictment for such an offense.<sup>3</sup>

§ 6423. **For Obstructing a Public Navigation.**—On the same principle, a corporation is indictable for obstructing a

<sup>1</sup> *State v. Morris &c. R. Co.*, 23 N. J. L. 360, 370.

<sup>2</sup> Such was *said* to be the law by Lewis, J., in *Brennan v. Tracy*, 2 Mo. App. 540, which was a *civil action* for the *malicious prosecution* of such an indictment against a banking corporation and two of its officers. The point

stated in the text was directly adjudged in *State v. Atchison*, 3 Lea (Tenn.), 729; *s. c.* 31 Am. Rep. 663. That it may be liable *civiliter* for a libel, see *ante*, § 6310.

<sup>3</sup> *State v. Passaic County Agric. Soc.*, 54 N. J. L. 260; *s. c.* 23 Atl. Rep. 680; 11 Rail. & Corp. L. J. 178.

navigable river, or other navigable water.<sup>1</sup> Thus, a corporation which has been permitted, under its governing statute, to erect a toll-bridge across a navigable river, but upon the condition of erecting *draw-bridges* of a prescribed width, is indictable for not erecting such bridges.<sup>2</sup>

§ 6424. **For Obstructing a Public Highway.**—A species of nuisance for which indictments have often been sustained against corporations,—and especially against railway companies,—has consisted of obstructing the public highway.<sup>3</sup> We have already noticed the obligation under which a *horse railway company*, licensed to occupy with its tracks the streets of a city, stands, at common law, to restore the surface of the street, as nearly as may be, to its original condition, as well as the obligation which it assumes under the governing statute, or under the terms of its license, to keep that portion of the street occupied by its tracks in repair. For the non-performance of this duty, the company may be indicted and fined.<sup>4</sup> So, if a *steam railroad company* is authorized, by its governing statute, to change the site of any turnpike or public road, but upon condition of reconstructing the same at its own expense,—if it fails so to construct it, it is liable to an indictment and fine.<sup>5</sup> It seems also that, where a *steam railroad company* is permitted to *cross the public streets or highways at the grade*, if it allows its trains to obstruct such highways beyond the time prescribed by the governing statute, an indict-

<sup>1</sup> Com. v. Proprietors, 2 Gray (Mass.), 339 (erecting a bridge across a navigable stream).

<sup>2</sup> *Ibid.*

<sup>3</sup> Reg. v. Great North of England R. Co., 9 Ad. & El. (N. S.) 315; State v. Morris & C. R. Co., 23 N. J. L. 360 (erecting a depot across a public highway); State v. Vermont Cent. R. Co., 27 Vt. 103, 107 (a like offense); Louisville & C. R. Co. v. State, 3 Head (Tenn.) 523; s. c. 75 Am. Dec. 778; Northern Cent. R. Co. v. Com., 90 Pa. St. 300.

<sup>4</sup> Railway Co. v. State, 87 Tenn. 746; s. c. 11 S. W. Rep. 946; 6 Rail. & Corp. L. J. 389.

<sup>5</sup> Pittsburgh & C. R. Co. v. Com., 101 Pa. St. 192. Many of the decisions cite the case of *Lyme Regis v. Henley*, 3 Barn. & Adol. 77, where Lord Tenterden, C. J., said: "We think the obligation to repair the banks and seashores is one which concerns the public, in consequence of which an indictment might have been maintained against the plaintiffs in error for their general default."

ment may be prosecuted against it therefor.<sup>1</sup> A railway company, whose cars are propelled by steam, may, in Pennsylvania, construct its railway across any established road or way, whenever it may be necessary to cross or intersect it; but it must so construct it that it will not impede the passage or transportation of persons or property over such road or way, and if it so constructs it that it becomes a serious inconvenience and dangerous obstruction to travel along the road or way, it may be *indicted* therefor.<sup>2</sup>

§ 6425. **For Committing a Public Nuisance.** — Under the foregoing principles, a corporation is indictable for committing a *public nuisance*, whether the commission of it involves acts of *non-feasance* or *misfeasance*; for, to quote again the observation of Lord Denman, “it is as easy to charge one person, or body corporate, with erecting a bar across a public road, as with the non-repair of it; and they may as well be compelled to pay a fine for the act as for the omission.”<sup>3</sup> Thus, a *canal company* is liable to indictment for the nuisance created

<sup>1</sup> *Com. v. Boston & C. R. Co.*, 135 Mass. 550. In this case the point *adjudged* was that the provision of the Public Statutes of Massachusetts (ch. 112, § 169), prescribing a penalty for obstructing by a railroad and occupying with cars for more than five minutes at one time, a highway, townway, or “street,” does not apply to such an obstruction of a *private way*. No question seems to have been made as to the propriety of proceeding by indictment, in case the offense had been within the statute.

<sup>2</sup> *Northern Central R. Co. v. Com.*, 90 Pa. St. 300.

<sup>3</sup> *Reg. v. Great North of England R. Co.*, 9 Ad. & El. (N. S.) 315, 326; *State v. Morris & C. R. Co.*, 23 N. J. L. 360; *Louisville & C. R. Co. v. Com.*, 13 Bush (Ky.), 388; *s. c.* 26 Am. Rep. 205; *Northern Cent. R. Co. v. Com.*, 90 Pa. St. 300. It should be observed that some of the obsolete and over-

ruled decisions related to the liability of corporations to be prosecuted criminally for nuisances consisting of acts of malfeasance. Thus, in an early Virginia case it was held that a corporation is not indictable for a public nuisance which consists in obstructing a highway by digging it up and placing thereon large quantities of stone or dirt. *Com. v. Swift Run Gap Turnp. Co.*, 2 Va. Cas. 362. In like manner, the early case in Maine, which laid down the doctrine that a corporation cannot be indicted for a crime or misdemeanor consisting of a positive or affirmative act, was a case where it was sought to prosecute a corporation criminally, for committing a public nuisance in erecting a dam across a navigable river. *State v. Great Works Milling & C. Co.*, 20 Me. 41; *s. c.* 37 Am. Dec. 38; overruled in *State v. Portland*, 74 Me. 268; *s. c.* 43 Am. Rep. 586.

by the water of its canal being suffered to *percolate* through its tow-path upon the land of an adjacent proprietor, causing stagnant and noxious pools to form thereon, creating a public nuisance.<sup>1</sup> Upon the same principle, one court has held that a *municipal corporation* is indictable for so constructing its sewers as to create a public nuisance;<sup>2</sup> but another court has held that such a corporation is not indictable for a public nuisance which consists in the drainage, by private persons, of filthy water into the gutters of its streets. But this decision proceeds upon the ground that the nuisance is created personally by private individuals, and that the suffering it to remain consists merely of the non-exercise of its governmental powers, for which, in general, a municipal corporation is not indictable.<sup>3</sup> It has been held that a statute, providing that a railway or other corporation may be indicted for maintaining a public nuisance, may apply to *nuisances created prior to the adoption of the statute*, if continued thereafter in defiance of it.<sup>4</sup>

§ 6426. **For Sabbath-breaking.**—Pressing the law forward beyond its previous lines, the Supreme Court of West Virginia have held, within a comparatively recent period, that a railway company may be indicted for the offense of *Sabbath-breaking*, denounced and punished by a statute of that State against “a *person*.”<sup>5</sup> The same court held, however, that the guilt of the corporation was not made out by *evidence* that on a Sunday named, there was shipped within a certain county over the railroad of the defendant, by its authorized agent, who had a general supervision of its freight trains, some ten or fifteen hoppers filled with coal, that being about half the number of cars usually hauled by an engine, — it appearing

<sup>1</sup> Delaware &c. Canal Co. v. Com., 60 Pa. St. 367; s. c. 100 Am. Dec. 570.

<sup>2</sup> State v. Portland, 74 Me. 268; s. c. 43 Am. Rep. 586.

<sup>3</sup> State v. Burlington, 36 Vt. 521, 524.

<sup>4</sup> State v. Louisville &c. R. Co., 10 Am. & Eng. Rail. Cas. 286.

<sup>5</sup> State v. Baltimore &c. R. Co., 15 W. Va. 362; s. c. 36 Am. Rep. 803. As to whether a corporation is included in the word “person” in penal statutes, see *ante*, § 6285; *post*, § 6434.

that its general superintendent had a standing order not to ship any freight on Sunday except perishable freight and live-stock. The court conceded that the evidence would have been sufficient had it been proved that trains of coal were habitually shipped on Sunday over the defendant's road.<sup>1</sup>

§ 6427. **For Inflicting an Injury Resulting in Death.**—In Maine, New Hampshire, and Massachusetts, statutes exist giving a *remedy by indictment* against corporations for *negligent injuries resulting in death*, the *fine* to go to the widow or next of kin. An example of such a statute is as follows: "Any railroad corporation, by whose negligence or carelessness, or by that of its servants or agents while employed in its business, the life of any person, in the exercise of due care and diligence, is lost, forfeits not less than five hundred, nor more than five thousand, dollars, to be recovered by indictment found within one year, wholly to the use of his widow, if no children; and to the children, if no widow; if both, to her and them equally; if neither, to his heirs."<sup>2</sup> Such statutes give a mere *civil remedy*, and the absurd retention of the proceeding by indictment, where the entire object of the prosecution is to enable a private person to recover *damages*, has no doubt taken place in deference to the old rule of the common law that a *trespass* is merged in a *felony*.<sup>3</sup> The decisions already cited deal with the construction of these statutes and the manner of framing indictments under them; but, as the

<sup>1</sup> State v. Baltimore &c. R. Co., 15 W. Va. 362; s. c. 36 Am. Rep. 803.

<sup>2</sup> Rev. Stat. Me. 1871, p. 455, § 36. By section 7 of chapter 52, these provisions are made applicable to steamboats, stage-coaches, and common carriers. See also Mass. Stat. 1840, ch. 80; Com. v. Boston &c. R. Corp., 11 Cush. (Mass.) 512; Mass. Stat. 1874, ch. 372, § 163; Com. v. Boston & Lowell R. Corp., 126 Mass. 61; Com. v. Boston & Maine R. Co., 129 Mass. 500; s. c. 37 Am. Rep. 382; Gen. Stats. Mass., ch. 63, § 98; Com.

v. Fitchburg R. Co., 10 Allen (Mass.), 189; Com. v. Fitchburg R. Co., 120 Mass. 372; Gen. Stats. Mass., ch. 160, § 34; Com. v. East Boston Ferry Co., 13 Allen (Mass.), 589; Gen. Stats. Mass., ch. 63, § 97; Com. v. Vermont &c. R. Co., 108 Mass. 7; s. c. 11 Am. Rep. 301; Comp. Stat. Mass., ch. 112, § 212; Com. v. Brockton Street R. Co., 143 Mass. 501; Comp. Stat. N. H., 354, § 66; Boston &c. R. Co. v. State, 32 N. H. 215.

<sup>3</sup> 2 Thomp. Neg. (1st ed.), 1281, § 81.

subject is strictly local and peculiar, it will not be further pursued in this connection.

§ 6428. **For a failure to Perform their Public Duties.**—As already indicated,<sup>1</sup> it is the settled law that a corporation may be indicted for the failure to perform those *public duties* which are devolved upon it by the principles of the common law, or by the terms of its charter or governing statute.<sup>2</sup> The most frequent illustration of this principle is found in cases where *counties* and *incorporated burroughs* or *cities* have been proceeded against by indictment for *failing to keep their highways* in repair, or for creating or suffering *public nuisances* to exist within their limits.<sup>3</sup> Of this nature is the public duty imposed upon railway companies, by statute in some of the States,<sup>4</sup> of affording *reasonable transportation facilities* to the public.<sup>5</sup> The same duty unquestionably exists, under the principles of the common law. It is believed that a railway company is indictable for the willful neglect or refusal to perform it, under the principles stated in the next section. Under the principles of the common law, while a railway company may lawfully run its trains at any reasonable *rate of speed*, and no rate of speed is negligence *per se*,—yet it is bound to take reasonable precautions to prevent the enjoyment of this privilege from injuring persons crossing its road upon the public highway. The *habitual failure* to give *signals* or *warnings*, when its trains approach such highway crossings, is, therefore, a *nuisance*, indictable at common law.<sup>6</sup>

<sup>1</sup> *Ante*, § 6419.

<sup>2</sup> *Reg. v. Birmingham &c. R. Co.*, 9 Car. & P. 469; *Susquehanna &c. Turnp. Co. v. People*, 15 Wend. (N.Y.) 267; *Com. v. Proprietors*, 9 Pick. (Mass.) 142.

<sup>3</sup> *Post*, § 6429. Compare *ante*, §§ 6423, 6424, 6425. It has been said that the only admissible remedies for breaches of the duties charged on *railroad corporations* by the railroad act of New York, are *mandamus*, *quo warranto*, and *indictment*. *People v.*

*Albany &c. R. Co.*, 24 N. Y. 261; *s. c.* 82 Am. Dec. 295.

<sup>4</sup> See, for instance, Gen. Laws N. H., ch. 163, § 2.

<sup>5</sup> *State v. Concord R. Co.*, 59 N. H. 85. An indictment, under the New Hampshire statute above cited, need not allege that the acts were *unlawful*, or that the merchandise was the property of the person endeavoring to have it shipped. *Ibid*.

<sup>6</sup> *Louisville &c. R. Co. v. Com.*, 13 Bush (Ky.), 388; *s. c.* 26 Am. Rep. 205.

§ 6429. **For Failing to Keep their Works in Repair.**—We have already had occasion to consider the civil liability of corporations owning public works, to respond in damages to individuals for a failure to keep such works in a suitable state of repair.<sup>1</sup> By the principles of the common law, as well as under various statutes, public corporations, or *quasi*-corporations, such as *counties*, *towns*, and *cities*,<sup>2</sup> *turnpike* companies,<sup>3</sup> *plank-road* companies,<sup>4</sup> *bridge* companies,<sup>5</sup> and *railway* companies,<sup>6</sup> are liable to indictment for the public nuisance arising from their suffering their works to fall into decay, or otherwise to be so used as to create a public nuisance. It has been so held where a *railroad company* allowed a *hand-car* to stand upon its road with buckets and clothing hanging upon it, so as to frighten horses upon the adjacent street, and to obstruct the same and endanger life;<sup>7</sup> and where such company obstructed a turnpike road in the building of its railroad, and failed to restore the turnpike road within a reasonable

<sup>1</sup> *Ante*, § 6357, *et seq.*

<sup>2</sup> *State v. Murfreesboro*, 11 Humph. (Tenn.) 217; *Rex v. Liverpool*, 3 East, 86; *State v. Barksdale*, 5 Humph. (Tenn.) 154. What is said of *municipal corporations* relates to the *non-repair of their highways*. See also *Rex v. Hendon*, 4 Barn. & Advol. 628; *Reg. v. Stretford*, 2 Ld. Raym. 1169; <sup>3</sup> *White's Creek Turnp. Co. v. State*, 16 Lea (Tenn.), 24; *Waterford & C. Turnp. Co. v. People*, 9 Barb. (N. Y.) 161 (indictment at common law, and conviction affirmed); *State v. Godwinsville & C. Road Co.*, 49 N. J. L. 266; *s. c.* 60 Am. Rep. 611 (conviction quashed upon specious reasoning).

<sup>4</sup> *Syracuse & C. Plank Road Co. v. Tully*, 66 Barb. (N. Y.) 25.

<sup>5</sup> *Com. v. Newburyport Bridge*, 9 Pick. (Mass.) 142; *Com. v. Central Bridge Corp.*, 12 Cush. (Mass.) 242.

<sup>6</sup> *Danville & C. R. Co. v. Com.*, 73 Pa. St. 29; *State v. Louisville & C. R. Co. (Ind.)*, 10 Am. & Eng. Rail.

*Cas.* 286; *Louisville & C. R. Co. v. State*, 3 Head (Tenn.), 523; *s. c.* 75 Am. Dec. 778; *State v. Morris & C. R. Co.*, 23 N. J. L. 360; *Northern Cent. R. Co. v. Com.*, 90 Pa. St. 300; *Reg. v. North of England R. Co.*, 9 Ad. & El. (N. S.) 315; *Cincinnati Southern R. Co. v. Com. (Ky.)*, 7 Am. & Eng. Rail. Cas. 91. Where an act, creating a corporation to build a bridge, allowed three years for the completion of the bridge, and prescribed that it should be built with a draw and piers, and the corporation erected the bridge and took tolls for more than a year without building any piers, it was held that it was liable to indictment for such neglect, notwithstanding the *three years* had not elapsed. *Com. v. Newburyport Bridge*, 9 Pick. (Mass.) 142.

<sup>7</sup> *Cincinnati Southern R. Co. v. Com. (Ky.)*, 7 Am. & Eng. Rail. Cas. 91.



time.<sup>1</sup> For the purpose of such an indictment, a street is obstructed when, by reason of the impediment or obstruction, ordinary travel upon it becomes *inconvenient* or *dangerous*; and it is not necessary that there should be an actual injury to any person or vehicle, in order to sustain such indictment.<sup>2</sup> So, a railway company is indictable for failure to *keep its highway crossings in repair*, as by leaving them wet, and with the rails projecting several inches above the street.<sup>3</sup> Such a corporation may be indicted, in England, for disobeying an order of two justices, under a statute, to build certain arches and culverts.<sup>4</sup>

§ 6430. Further of Such Indictments.—It has been held that a *turnpike company* is liable to an indictment, at common law, for a *nuisance*, in suffering its road to be out of repair, notwithstanding that, by the terms of its charter, a *specific penalty* is provided for its neglect to keep its road in repair; and although the act giving the penalty is silent in respect to an indictment,—provided that its charter contains no *negative words*, nor any expression indicating the intention to impair the remedy which the public have at common law.<sup>5</sup> This is merely an extension of the general principle of the common law, that those who are bound to repair a public

<sup>1</sup> Louisville &c. R. Co. v. State, 3 Head (Tenn.), 523; 75 Am. Dec. 778. See also Pittsburgh &c. R. Co. v. Com. (Pa.), 10 Am. & Eng. Rail. Cas. 321.

<sup>2</sup> Cincinnati Southern R. Co. v. Com., *supra*.

<sup>3</sup> Paducah &c. R. Co. v. Com. (Ky.), 10 Am. & Eng. Rail. Cas. 318; Com. v. Hancock Free Bridge Corp., 2 Gray (Mass.), 58 (under a statute).

<sup>4</sup> Reg. v. Birmingham &c. R. Co., 2 Gale & D. 236. A shadowy and untenable distinction has been taken between an indictment against a turnpike company for *neglecting to construct* its road in the manner prescribed by its charter, and such an indictment for failing to maintain it

in the condition of repair therein prescribed, so that it becomes a public nuisance,—with the conclusion that, for a neglect to construct, the company is not indictable, but for a neglect to repair, it is. The reasoning is inconclusive and specious, and it is not made to appear why a turnpike company is not indictable for assuming to shut up a highway against free travel and to demand tolls of travelers, without putting it in the state of usefulness required by its charter. State v. Godwinsville &c. Road Co., 49 N. J. L. 266; s. c. 60 Am. Rep. 611.

<sup>5</sup> Waterford &c. Turnp. Co. v. People, 9 Barb. (N. Y.) 161.

road may be indicted for suffering it to fall into decay, — upon which principle indictments were sustained against the *inhabitants of counties*, and against the mayor and aldermen of incorporated boroughs and cities.<sup>1</sup> In order to render a turnpike road a nuisance by reason of its non-repair, so as to sustain such an indictment, it is not essential that it should be *unsafe* or *impassable*; but any *contracting* or narrowing of the roadway has been held to be a nuisance; and so is the leaving of any *obstruction* in the road, rendering it *less convenient* for public use. And, with reference to this question, it has been ruled that the public have a right that a turnpike road shall be continued substantially in the same manner, as to width and safety, which its charter required at its first construction.<sup>2</sup> It is no *defense* against such an indictment that the company had *no funds* with which to repair the road.<sup>3</sup>

§ 6431. **For Usury.** — A corporation may be indicted under a statute which declares that “every person who, directly or

<sup>1</sup> *Ante*, § 6429.

<sup>2</sup> *Ibid.* Under a statute providing that “whenever any person, liable to the payment of toll, shall sustain any injury, by reason of any turnpike being insufficient or out of repair, the corporation owning said road shall be answerable for such injury, and also liable to indictment for such insufficiency and want of repair of their road,” — a corporation owning a turnpike road, and neglecting to keep it in repair, is liable to indictment, although *no person liable to the payment of tolls has sustained injury* by reason of such want of repair. *Com. v. Hancock Free Bridge Corp.*, 2 Gray (Mass.), 58.

<sup>3</sup> *Ibid.* Although indictments against *municipal corporations*, for permitting their streets to remain out of repair, run against the corporation by the *name* in which it is properly impleaded, and consequently by the name of the *mayor and aldermen*, etc., — yet these officers are *not in-*

*dividually responsible* for the non-feasance. *State v. Barksdale*, 5 Humph. (Tenn.) 154. But the judgment, if in favor of the State, results in a pecuniary *fine* against the corporation. *State v. Murfreesboro*, 11 Humph. (Tenn.) 217. *Municipal corporations* are liable, under the principles of the common law, to indictment or presentment for failing to keep their streets in repair. *Ibid.*; *State v. Barksdale*, 5 Humph. (Tenn.) 154; *Rex v. Liverpool*, 3 East, 86; *Rex v. Stratford-upon-Avon*, 14 East, 348. It has been held that a provision in the charter of a toll-bridge corporation that the bridge should “at all times be kept in good, safe, and passable repair,” requires the company to *light the bridge*, if the jury find, on the trial of an indictment, that such lighting was necessary to make the bridge safe and convenient for passage at night. *Com. v. Central Bridge Corp.*, 12 Cush. (Mass.) 242.

indirectly, receives any interest, discount, or consideration upon the loan or forbearance of any money, goods, or things in action, greater than is allowed by law, is guilty of a misdemeanor.”<sup>1</sup> It is not necessary to state, in an indictment under such a statute, that the usurious interest was taken either upon a “loan” or upon a “forbearance.”<sup>2</sup> It has been held that a *national bank* is subject to indictment, trial, and punishment in a State court, for a violation of a *State law* which makes the receiving of a greater rate of interest than is allowed by law a misdemeanor, — the law being the same as above quoted.<sup>3</sup>

§ 6432. **For Omitting to Stamp Papers.** — During the period when the Revenue Statutes of the United States required the stamping of certain papers, it was held that a *railway company* was liable to indictment for the act of its officer or employé, in issuing receipts for goods, without stamping them, as required by the Federal statute.<sup>4</sup>

§ 6433. **Not Indictable for Acts Authorized by Charter or Statute.** — Although the doing by a corporation, even in a reasonable and proper manner, of acts authorized by its charter or governing statute, does not, under the most enlightened theories, necessarily preclude a right of action for damages in the way of *compensation*, by persons who are damaged by the doing of such acts,<sup>5</sup> — yet the existence of the statutory authorization will obviously *estop the State* from maintaining an indictment for the doing of the act;<sup>6</sup> assuming, of course, that it is properly done, and within the terms of the statutory authorization, and that the statute itself is not unconstitutional. For instance, it was held that an indictment would not lie against a railway company for *frightening horses* on an

<sup>1</sup> *State v. Security Bank*, 2 S. Dak. 538; *s. c.* 51 N. W. Rep. 337; *State v. First Nat. Bank*, 2 S. Dak. 568; *s. c.* 51 N. W. Rep. 587; 6 Bank. L. J. 302; 45 Alb. L. J. 333; 11 Rail. & Corp. L. J. 200.

<sup>2</sup> *State v. Security Bank*, *supra*.

<sup>3</sup> *State v. First Nat. Bank*, *supra*.

<sup>4</sup> *United States v. Baltimore & C. R. Co.*, 7 Am. Law Reg. (N. S.) 757.

<sup>5</sup> *Ante*, § 6371.

<sup>6</sup> *Rex v. Pease*, 4 Barn. & Adol. 30.

adjacent *highway*, by the passage of their locomotives and trains, — Parliament having conferred upon them the authority to build their railway and to operate it by locomotive engines.<sup>1</sup> The same has been held where a railway company occupies a portion of a public road, not exceeding the extent allowed by its governing statute, and obstructs public travel to that extent, and no further;<sup>2</sup> for it is a legal solecism to call that a public nuisance which is maintained by public authority.<sup>3</sup>

§ 6434. **Whether Corporations Indictable for Offenses Denounced against "Persons."** — There is judicial authority for the conclusion that a corporation is indictable for a statutory offense denounced against "persons," — as where the statute recites that "if any *person* shall," etc.<sup>4</sup>

§ 6435. **Offenses by Interstate Railway Companies.** — The Revised Statutes of the United States prohibit *railway companies, carrying cattle, sheep, swine, or other animals*, from one State to another, from confining the same in their cars for a longer period than twenty-eight consecutive hours without unloading them for rest, water, and food, for a period at least of five consecutive hours, unless prevented from so unloading by storm or accidental causes;<sup>5</sup> and provide a penalty for so doing,<sup>6</sup> to be recovered, in a *civil action*, in the name of the United States.<sup>7</sup> In estimating the period allowed for such confinement, the time during which the animals have been so confined, prior to their delivery to the particular carrier, must be included.<sup>8</sup> With this exception, each carrier, it has been held, is liable only for the default occurring upon his own road; so that, if other connecting lines confine the animals

<sup>1</sup> *Rex v. Pease*, 4 Barn. & Adol. 30.

<sup>2</sup> *Danville &c. R. Co. v. Com.*, 73 Pa. St. 29.

<sup>3</sup> *Ibid.*

<sup>4</sup> *State v. Security Bank*, 2 S. Dak. 538; *s. c.* 51 N. W. Rep. 337 (indictment for *usury*); *State v. First Nat. Bank*, 2 S. Dak. 563; *s. c.* 51 N. W.

Rep. 587; 6 Bank. L. J. 302; 45 Alb. L. J. 333; 11 Rail. & Corp. L. J. 200. Compare *ante*, §§ 6285, 6426.

<sup>5</sup> Rev. Stat. U. S., § 4386.

<sup>6</sup> *Ibid.*, § 4388.

<sup>7</sup> *Ibid.*, § 4389.

<sup>8</sup> *Ibid.*, § 4386.

beyond the prohibited time after they pass out of the control of the first carrier, there is no violation of the statute by the first carrier; and this is so, although the first carrier undertook, by contract, for itself and its connecting lines, to carry them through to their ultimate destination.<sup>1</sup>

§ 6436. **Form and Sufficiency of Such Indictments.** — The indictment should be against the corporation *in its corporate name*.<sup>2</sup> Where the indictment is against a municipal corporation for failing to keep its streets in repair at common law, it may conclude with the words, “as at common law,” instead of “against the statute.”<sup>3</sup> An indictment against such a corporation for the non-repair of a highway within a certain limit, charging the corporation with a liability *by prescription* to repair all common highways within such limit, “excepting such as ought to be repaired according to the form of the several statutes in such case made,” was held *bad* for not showing that the highway in question was *not* within any of the *exceptions*.<sup>4</sup> It is necessary to aver, in an indictment against a turnpike company, for the failure to keep its road in repair, that it was under a duty or obligation so to keep it in repair.<sup>5</sup> But it is believed that every fulfillment of a good indictment is had, where the indictment states a given duty to repair, and negatives the performance of the duty.<sup>6</sup> If the manner in which the reparation shall be made is not prescribed by statute, and there is a duty of repairing at common law, then the rule of the common law is that the highway shall be kept *convenient* and *safe*, and that it becomes a *nuisance* when it ceases to be in that condition.<sup>7</sup>

<sup>1</sup> United States v. Louisville &c. R. Co., 18 Fed. Rep. 480.

<sup>2</sup> Reg. v. Birmingham &c. R. Co., 2 Gale & D. 241. Compare Sykes v. People, 132 Ill. 32. For precedents of indictments against corporations, see 4 Went. Prec. 157; 3 Chit. Crim. Law, 587.

<sup>3</sup> State v. Murfreesboro, 11 Humph. (Tenn.) 217.

<sup>4</sup> Rex v. Liverpool, 3 East, 86.

<sup>5</sup> State v. Godwinsville &c. R. Co., 49 N. J. L. 266; s. c. 60 Am. Rep. 611.

<sup>6</sup> Consult on this subject Stretford's Case, 2 Ld. Raym. 1169.

<sup>7</sup> Rex v. Hendon, 4 Barn. & Adol. 628; Waterford &c. Turnp. v. People, 9 Barb. (N. Y.) 161.

§ 6437. **Further of This Subject.**—A designation in an indictment, as “the Vermont Central Railroad Company, a corporation existing under and by force of the laws of this State, duly organized and doing business,” is a sufficient *avermment* of the *existence of the corporation*.<sup>1</sup> It has been held that an indictment against the president and directors of a turn-pike company for allowing their road to become ruinous, should contain an averment “that it was their duty, and of right they ought to have kept the said road in repair”; otherwise judgment will be arrested.<sup>2</sup> On the other hand, it has been held that an indictment charging that a corporation is bound by law to “keep and maintain a bridge in such a condition as to render the same safe and convenient for travelers,” etc., and that the proprietors of said bridge, “regardless of their duty in this behalf, negligently and willfully suffered and permitted said bridge to be and remain in such a condition as to render it unsafe and inconvenient for travelers, by neglecting to keep the same properly and suitably lighted in the night-time, to the great damage, and common nuisance,” etc., sufficiently charges a breach of public duty, without specially alleging that they were bound to light the bridge,—the jury having found that such lighting was necessary to the safety of the travelers.<sup>3</sup> In an indictment *against a natural person* under a statute punishing the issue of fraudulent warehouse receipts, a variance between allegations and the proof in the *name of the corporation* to which the receipts were issued, is fatal.<sup>4</sup>

<sup>1</sup> *State v. Vermont &c. R. Co.*, 28 Vt. 583.

<sup>2</sup> *State v. Patton*, 4 Ired. L. (N. C.) 16.

<sup>3</sup> *Com. v. Central Bridge Corp.*, 12 Cush. (Mass.) 242.

<sup>4</sup> *Sykes v. People*, 132 Ill. 32. An indictment reciting that an act to incorporate the proprietors of a bridge required that there should be a *draw*, and a *pier* on each side of the bridge at the draw, and then alleging that the defendants have neglected to

provide a suitable pier “on each side of the said bridge at the said draw, but have left the said bridge altogether destitute of any pier at the said draw,” was held to be defective, because it contained no direct averment *that a bridge had been built*. *Com. v. Newburyport Bridge*, 9 Pick. (Mass.) 142. As the language above recited *necessarily* implied that the bridge had been built, the decision is a piece of mere nonsense.

§ 6438. **Proceedings Before an Examining Magistrate.** Proceedings directed by statute,<sup>1</sup> for bringing a corporation before an examining magistrate, have been held *not a condition precedent* to the power of a grand jury to indict the corporation.<sup>2</sup>

§ 6439. **Mode of Compelling Appearance.**—A corporation, being an intangible person, *can appear only by attorney*, when sued in any judicial proceeding,<sup>3</sup> and the proceedings to *compel* it to appear to any suit, by attorney, were always, at common law, by *distress* of its lands and goods.<sup>4</sup> So far as the writer knows, the writ of *distringas*, as a means of compelling the appearance of a corporation in judicial proceedings, is unknown and unused in the United States. The Supreme Court of Indiana have held that a *warrant* is the proper process to compel such an appearance; and that, where the proceeding was against a railroad company, a *summons* issued and served by *copies* being left with the *station-agent*, and an *attorney* and *director* of the corporation, was not a sufficient service. But it is to be observed that, in Indiana, the whole system of criminal procedure is *statutory*, and that the ruling of the court is intended to comply with the local statute.<sup>5</sup> In New Hampshire, a *summons* is the only process to be issued to a corporation, to require it to appear and answer an indictment;<sup>6</sup> and if a summons is regularly issued and served, and the corporation makes *default* of appearance, a *judgment by*

<sup>1</sup> In this case Comp. Laws S. Dak., § 7279, *et seq.*

<sup>2</sup> *State v. Security Bank*, 2 S. Dak. 538; *s. c.* 51 N. W. Rep. 337. The court say that the proceedings pointed out by the statute "are only intended as a means of bringing the defendant corporation before the magistrate *after* a grand jury has returned a presentment, and are necessary only because the corporation cannot be brought before him on a bench-warrant, as natural persons are." But we are not acquainted

with any system of criminal procedure under which it is necessary to bring a party before an examining magistrate *after* indictment or presentment found by grand jury.

<sup>3</sup> 1 Bla. Com. 477.

<sup>4</sup> 1 Bla. Com. 477; *Reg. v. Birmingham &c. R. Co.*, 2 Gale & D. 243; *s. c.* 3 Ad. & El. (N. S.) 223; 9 Car. & P. 469.

<sup>5</sup> *State v. Ohio &c. R. Co.*, 23 Ind. 362.

<sup>6</sup> *Boston &c. R. Co. v. State*, 32 N. H. 215.

“*default* may be rendered upon the indictment, as in civil cases.<sup>1</sup> In New Jersey, it is provided by statute<sup>2</sup> that when *summons* on a defendant corporation shall be served, the corporation shall be considered as in court, and as appearing to the indictment; and that the court shall order the clerk to enter an appearance, and indorse the plea of not guilty on the indictment. It is held that this applies only to cases where the corporation does not *voluntarily appear*, and that it has no application to cases where it voluntarily appears by attorney, in which case it is not necessary to take the proceedings pointed out by the statute.<sup>3</sup> Where a duly enrolled attorney of the court appears for the corporation, he is not required to produce any warrant of attorney to appear; but if any other person, on behalf of the corporation, disputes his right to appear, the *burden* is upon such person to show that his appearance was unauthorized.<sup>4</sup>

.. <sup>1</sup> Boston &c. R. Co. v. State, 32 N. H. 215.

<sup>2</sup> N. J. Crim. Proc. Act, § 80.

<sup>3</sup> State v. Passaic County Agric. Soc., 54 N. J. L. 260; s. c. 11 Rail. & Corp. L. J. 178; 23 Atl. Rep. 680.

<sup>4</sup> *Ibid.* We have elsewhere (*ante*, § 2925, note 4) had occasion to note a practice, inherited from the common law, under which, in the case of judgments being rendered against *towns* in New England, the execution may be levied upon the property of any of the inhabitants. It seems that, in the case of an indictment against *counties*, which were *quasi*-corporations, where the indictment always ran against “*the inhabitants*” of the county named, all or any of the inhabitants could be arrested and brought into court to answer the indictment. In the argument of Serjeant Talfourd in *Reg. v. Birmingham &c. R. Co.*, 3 Ad. & El. (N. S.) 223, 229, the following *colloquium* took place: “Coleridge, J. You indict the inhabitants of the

parish, and the men of the county: may you not take any of them? Talfourd, in reply: In practice all of them could not be taken; but any particular inhabitants may be made the defendants, which is otherwise in the case of a corporation. . . . The mode in which a corporation might be reached was discussed in the case of *Thusfeild and Jones, Master and Wardens of the Company of Waxchandlers, Skin.* 27, who, being cited in the spiritual court, for a church-rate on the company’s hall, by their names of baptism and their surnames, with the addition of Master and Wardens of the Company of Waxchandlers, moved for a prohibition, on the ground that they were sued in their natural capacity, when it should be in their politic capacity. But the court said, ‘there was no other way of citing them than this; they could not cite the body politic; and therefore, unless by this way, they had no remedy; and it was not



§ 6440. **Entering the Plea of not Guilty.**—It has been held that, where a corporation *appears by attorney*, it need not appear in the record that the trial court ordered the clerk to enter an appearance and indorse the plea of not guilty, but it will be presumed that it was done.<sup>1</sup>

§ 6441. **Proof of the Fact of Incorporation under an Indictment.**—On the trial of an indictment charging *forgery* of the notes of a bank of another State or county, it is not necessary to prove, by direct evidence, the due incorporation of the bank, but testimony of the most general character is sufficient for the purpose,—such testimony, for example, as that of a banker who testified that he had been in the bank, had seen banking business carried on there, that he had seen the articles of incorporation, etc.<sup>2</sup> On the other hand, the Supreme Court of Illinois have held, in a case where an indictment of a warehouseman for defrauding a banking corporation alleged, not only that the party defrauded was a corporation, but also that it was “organized and incorporated under and by virtue of the laws of this State,”—that the latter averment, although perhaps unnecessarily specific, was a matter of essential description of the corporation alleged to have been defrauded, such as imposed upon the State the burden of *proving the due organization of such corporation* under the laws of the State,—and this notwithstanding the provisions of a statute relating to evidence in criminal cases, that user shall afford *prima facie* evidence of corporate existence. The

like a *distingas* at common law, by which they may take lands or goods of the company; but if the company had neither land nor goods, there was no way to make them appear; but here they said they were cited by their proper names, but in their politic capacity; but if they stood out, then they must lie by the heels in their natural capacity’: and the prohibition was denied.” That, under the laws of New York, a corporation cannot, by

any means, be compelled to appear and submit to the jurisdiction of a court wherein an indictment against the corporation has been filed,—see *People v. Equitable Gas-light Co.*, 5 N. Y. Supp. 19.

<sup>1</sup> *State v. Passaic Agric. Soc.*, 54 N. J. L. 260.

<sup>2</sup> *People v. D’Argencourt*, 32 Hun (N. Y.), 178; s. c. affirmed, 95 N. Y. 624.

court reasoned that the statute in no way attempts to change the rules of evidence by which the corporate *name* may be shown when in dispute.<sup>1</sup>

§ 6442. **Defenses to Indictments.**—Where the indictment is for a failure to perform a duty which it has assumed under its charter, such as, in the case of a *plank-road company*, the duty of keeping its road in *repair*,—it will be no defense that the corporation has *not funds* to enable it to perform the duty.<sup>2</sup> Neither is it a defense to an indictment against a rail-

<sup>1</sup> Sykes v. People, 132 Ill. 32. In this case the prosecution failed because the indictment described the party defrauded as "the Merchants' Loan and Trust Co., organized and incorporated under and by virtue of the laws of the State of Illinois," and the evidence showed that the name of the corporation, at the time when the indictment was found, was the "Merchants' Savings, Loan and Trust Company." As the question of the identity of the corporation related merely to the identity of the offense, and as there was not the faintest probability, on the record, of any mistake, or possibility of a future mistake, in regard to such identity, — the decision, although the opinion was written by a judge distinguished for learning and good sense, is one of that numerous class of decisions in criminal cases which unseat common sense, obstruct the administration of the law, and bring the courts of justice and the law itself into popular contempt. Only one judge (Magruder) dissented.

<sup>2</sup> Waterford &c. Turnp. v. People, 9 Barb. (N. Y.) 161. That the *want of funds* wherewith to make the *repairs* is no answer to a *civil action* for damages growing out of such failure, where the corporation possesses the power of raising the funds, was held

by the House of Lords in Henley v. Lyme Regis, 5 Bing. 91; s. c. 3 Moo. & P. 278; in error to King's Bench, Lyme Regis v. Henley, 3 Barn. & Adol. 77; s. c. in H. L. 2 Clark & Fin. 331; 1 Bing. N. C. 222; 8 Bligh. (N. s.) 620; 1 Scott, 29; reprinted in full in 2 Thomp. Neg. (1st ed.), 626. See also Hartnall v. Ryde Comm'rs, 4 Best & S. 361; Hines v. Lockport, 50 N. Y. 236; affirming s. c. 41 How. Pr. (N. Y.) 435; 5 Lans. (N. Y.) 16; 60 Barb. (N. Y.) 378; Hyatt v. Rondout, 44 Barb. (N. Y.) 385; s. c. affirmed, 41 N. Y. 619; Peach v. Utica, 10 Hun (N. Y.), 477; Hutson v. New York, 9 N. Y. 163; s. c. 59 Am. Dec. 526; s. c. 5 Sandf. (N. Y.) 289; Milledgeville v. Cooley, 55 Ga. 17; Smith v. Wright, 27 Barb. (N. Y.) 621. It has been so held with regard to the civil liability of *overseers of highways*: Hover v. Barkhoof, 44 N. Y. 113. In an action against local boards or commissioners in England, for damages growing out of such negligence, it is not necessary to show affirmatively that the commissioners had funds, or the means of raising funds, to meet any damages which might be recovered against them. Ohrby v. Ryde Comm'r, 5 Best & S. 743; s. c. 10 Jur. (N. s.) 1048; 33 L. J. (Q. B.) 296; 12 Week. Rep. 1079. But the rule seems to be different in the United States, where

way company for obstructing a turnpike road, that it would require an expenditure of from \$5,000 to \$8,000 so to lower the bed of the turnpike as to make it pass under the railway and obviate the obstruction.<sup>1</sup> Nor does the fact that an act of the legislature gives the turnpike company a *specific remedy* for an injury to its rights, impair the right of the Commonwealth to proceed by indictment in such a case, or furnish any defense to the indictment on the part of the railroad company.<sup>2</sup> It is a good defense to an indictment against a corporation for failing to repair a particular bridge, that the duty to make the reparation has been cast by statute upon *another corporation*.<sup>3</sup> Where a turnpike corporation was indicted for not keeping a bridge in repair on the line of its road, but on an *unfinished part* thereof, it was held that it was not liable, because its charter provided that its power should cease and be of no effect so far as related to the unfinished part;<sup>4</sup> and, as will appear from many cases, the fact that some other person or corporation is liable to make the reparation in question, is the ground on which such indictments have often been contested.<sup>5</sup> The mere fact that the charter of a turnpike, toll-road, or bridge company provides a *penalty* for its failure to perform the public duty of keeping its road or bridge in a proper state of repair, does not, in the absence of negative words, afford any bar to an indictment for the failure to perform that duty.<sup>6</sup>

it is sought to recover damages from a *surveyor of highways* personally. *Smith v. Wright*, 27 Barb. (N. Y.) 621.

<sup>1</sup> Northern Cent. R. Co. v. Com., 90 Pa. St. 300.

<sup>2</sup> That a turnpike company is a public highway in such a sense that an indictment will lie for obstructing it as a *public nuisance*, see *Com. v. Wilkinson*, 16 Pick. (Mass.) 175; s. c. 26 Am. Dec. 654.

<sup>3</sup> *Rex v. Ecclesville*, 1 Barn. & Ald. 348.

<sup>4</sup> *State v. Morris Turnp. Co.*, 4 N. J. L. 165; s. c. 7 Am. Dec. 579.

<sup>5</sup> *Rex v. West Riding of Yorkshire*, 5 Burr. 2594; *Rex v. West Riding of Yorkshire*, 2 East, 342; *Rex v. West Riding of York*, 7 East, 588; *Rex v. Sheffield*, 2 T. R. 106; *State v. Godwinsville & Co. Road Co.*, 49 N. J. L. 266; s. c. 60 Am. Rep. 611.

<sup>6</sup> *Simpson v. State*, 10 Yerg. (Tenn.) 525; *Waterford & Co. Turnp. Co. v. People*, 9 Barb. (N. Y.) 161; *State v. Godwinsville & Co. Road Co.*, 49 N. J. L. 266, 273; s. c. 60 Am. Rep. 611.

§ 6443. **The Judgment or Sentence.**—As already stated, according to one view, if the corporation fails to appear, a judgment by *default* may be taken against it, as in civil cases.<sup>1</sup> The usual judgment is, that the corporation pay a *fine*; though this is influenced in all cases by statutes; and we have already noted a class of statutes under which the judgment is for a fine or penalty to go to the *next of kin or heirs* of the person killed through the neglect of the corporation or its servants.<sup>2</sup> The fine, as we have seen, is assessed against the corporation as a political body, and not against its *officers*.<sup>3</sup> Where the indictment is for a *nuisance*, a part of the judgment, under the principles of the common law, is that the *nuisance be abated*.<sup>4</sup> A sentence that a corporation abate the nuisance is proper, although the nuisance may be situated *on the land of another*; for the owner of the soil will not be allowed to control the public right to have it abated, and what the law demands to be done for the benefit of the public, an individual may not resist.<sup>5</sup>

§ 6444. **Indictments for Offenses against Corporations and their Property.**—It may not be amiss to allude, in passing, to the fact that various *statutes* have been enacted, defining and punishing offenses committed *against corporations* and their property,—such as statutes punishing any person who wantonly or maliciously injures any railroad, or places any obstruction or impediment thereon, or salts stock thereon;<sup>6</sup> or making it a criminal offense to wreck railroad trains;<sup>7</sup> or willfully to displace, injure, etc., “any warning sign at any

<sup>1</sup> Boston &c. R. Co. v. State, 32 N. H. 215.

<sup>2</sup> *Ante*, § 6427.

<sup>3</sup> State v. Barksdale, 5 Humph. (Tenn.) 154.

<sup>4</sup> 1 Hawk. P. C., ch. 75, § 14; Reg. v. Cluworth, 1 Salk. 359; s. c. 6 Mod. 234; Rex v. Stead, 8 T. R. 142; State v. Morris &c. R. Co., 23 N. J. L. 360, 370, *per* Green, C. J.

<sup>5</sup> Delaware &c. Canal Co. v. Com.,

60 Pa. St. 367, 374; s. c. 100 Am. Dec. 570; citing Smith v. Elliott, 9 Pa. St. 345.

<sup>6</sup> Ala. Code 1876, § 4239. That this statute creates *three* distinct offenses, see Clifton v. State, 73 Ala. 473.

<sup>7</sup> Ga. Act Oct. 12, 1885. This statute applied to all railroads, whether *duly chartered* or not. Hodge v. State, 82 Ga. 643; s. c. 9 S. E. Rep. 676; 38 Am. & Eng. Rail. Cas. 520.

railroad crossing, or any signal, light, or appliances used to denote the place of any switch, upon any railroad, or any gate or apparatus connected therewith, at any railroad crossing.”<sup>1</sup> Statutes punishing the placing of obstructions upon railroad tracks have been enacted in many, if not in all, of the States. These statutes are intended to promote the public safety, and ought not to receive the construction which judicial narrowness often places upon penal statutes. An indictment under such a statute<sup>2</sup> need not, it has been held, allege that the obstruction was such as would endanger the passage of trains, or throw the engine or cars from the track.<sup>3</sup> Nor is it necessary, in order to make out a case under such an indictment, that a specific intent to injure anyone should be shown.<sup>4</sup> In contrast with these sensible decisions is a narrow decision to the effect that a statute punishing the placing of obstructions upon a railroad track, whereby *cars*, etc., are thrown off, does not apply to the case where an obstruction has been placed on a railroad track which throws off a *hand-car*.<sup>5</sup> An indictment for the *larceny of corporate property* need not specify either that the owner of the property was a corporation, or that, as such, it was capable of owning property.<sup>6</sup> One may be prosecuted for a criminal *libel against a business corporation*, and it is not necessary to allege in the indictment that the corporation has been injured thereby.<sup>7</sup>

<sup>1</sup> N. H. Act Aug. 7, 1889; Laws 485; Deaderick, C. J., and Cocke, J., N. H. 1889, ch. 31, p. 58. dissenting.

<sup>2</sup> Ind. Rev. Stat. 1881, § 1960.

<sup>3</sup> Riley v. State, 95 Ind. 446.

<sup>4</sup> Clifton v. State, 73 Ala. 473.

<sup>5</sup> Harris v. State, 14 Lea (Tenn.),

<sup>6</sup> State v. Shields, 89 Mo. 259; Com. v. Williams, 2 Cush. (Mass.)

582; State v. Scripture, 42 N. H. 485;

State v. Rand, 33 N. H. 216.

<sup>7</sup> State v. Boogher, 3 Mo. App. 442.

## CHAPTER CXLIV.

### CONTEMPTS BY CORPORATIONS.

#### SECTION

6448. A corporation cannot be attached for contempt.

6449. But may nevertheless be punishable for contempt.

6450. Corporate officers punishable for contempt.

#### SECTION

6451. Whether punishable for a criminal contempt.

6452. Contempt in disobeying orders procured by corporations.

#### § 6448. A Corporation cannot be Attached for Contempt.

There are early decisions to the effect that a corporation cannot be *attached* for a contempt of court, committed in refusing to obey its order or judgment.<sup>1</sup> This is obvious, when it is considered that a corporation is *intangible*, and has no *body* that can be arrested or taken by attachment or execution, and that the only means of compelling the attendance of a corporation in a court of justice, at common law, was by a *distrainment* of its lands or goods.<sup>2</sup>

<sup>1</sup> It was resolved, as far back as the eighteenth year of Charles II., in the King's Bench, that "an attachment doth not lie against a corporation; but, if it be granted *nisi*, and the corporation will not restore him, the court will grant a restitution." This was said in a case in which the King's Bench had granted a *mandamus* to restore the plaintiff to the place of one of the approved men of Guilford. Mill's Case, Sir T. Raym. 152. The report of another old case is as follows: "The mayor and commonalty of New Sarum *failed to perform an award* which was made a rule of court by consent, etc.; and Gold moved for some remedy against the corporation. Holt, C. J.: 'If the

breach could be fixed upon any particular person, we will attach him; as where a *mandamus* is directed to the corporation, and any particular person be in fault, we grant an attachment.'" Smith v. Butler, Comb. 326, 327. Another old case is to the effect that no attachment lies against a corporation aggregate to compel the *performance of an award*; though, it would be otherwise if the rule making the award a judgment of the court, were made in a case between A. on the one part, and B. and C. on the other, who comprise the corporation. Approved Men of Guilford v. Mills, 2 Keb. 1.

<sup>2</sup> *Ante*, § 6439; Davis v. New York, 1 Duer (N. Y.), 451, 484.

§ 6449. **But may Nevertheless be Punishable for Contempt.**—But the administration of justice would be exceedingly lame, if a corporation, through its officers, could willfully set at nought the judgment, decree, or order of a court of justice, and escape all punishment therefor. When it is considered that a corporation may be punished for *criminal acts*, although they consist of *misprisions*, and even although they involve *evil intent* on the part of those who wield the power of the corporation,<sup>1</sup>—it must be apparent that there is no substantial difficulty, growing out of the intangible nature of a corporation, in the way of punishing it for those contempts which consist in the disobedience of the judgments, decrees, or orders of a court of justice. It may be cited to answer for such a contempt by a *rule to show cause*, served on its appropriate officer or officers; and, failing to show cause why it should not be punished, a sentence may be entered against it that it pay a *fine*, and this may be enforced by an ordinary execution as in civil cases. If this remedy did not exist against the corporation itself, justice might in many cases be effectually defeated,—as where the officers of the corporation are insolvent, or succeed in placing themselves beyond the reach of the process of the court. We may easily conclude, then, both upon principle and modern authority, that a corporation may be *punished* for those contempts which consist in the disobedience of the judgments, decrees, or orders of a court of justice, made in a case within its jurisdiction.<sup>2</sup>

§ 6450. **Corporate Officers Punishable for Contempt.**—On the other hand, it must be apparent that the administration of justice might in some cases be effectually obstructed and contempts of court go unpunished, unless the *officers and agents* of a corporation could be punished for contempt of court, in disobeying injunctive or other orders *directed against the corporation*. In order to include such officers and agents, it is usual, in drawing an injunctive order against a corporation,

<sup>1</sup> *Ante*, §§ 6419, 6421, *et seq.*

<sup>2</sup> *People v. Albany &c. R. Co.*, 12 Abb. Pr. (N. Y.) 171; *s. c.* 20 How.

Pr. (N. Y.) 358; *Rochester &c. R. Co. v. New York &c. R. Co.*, 48 Hun (N. Y.), 90; *s. c.* 15 N. Y. St. Rep. 686.

to lay the restraint or command, not only upon the corporation itself, but also upon its officers, agents, and servants; and it is understood that, in the case of its violation, not only the corporation itself is amenable to punishment, but also its officers, agents, and servants, whether parties to the proceeding or not, provided they have knowledge of the terms of the order and disobey it willfully. Upon this subject it has been said in a work of reputation: "As a corporation, as such, cannot be attached for contempt, as in case of natural persons, there seems to be no remedy by which an insolvent corporation, having no property to be sequestered, can be compelled to obey a judgment commanding the performance of some specific act, as for example, to acknowledge a satisfaction of judgment, or to execute any other instrument, unless the law will regard a direction to the corporation as a direction to the officers whose duty it is to perform the ordinary business of such corporation. In such case the disobedience to the judgment could be punished as a contempt, and the officers committed until the performance of the required act."<sup>1</sup> Where it appeared that the defendant, in a proceeding for contempt, was the *president* of an *insolvent corporation*, and that a rule *nisi* had been served upon him, to show cause why he should not turn over the assets of the corporation to a *receiver*, in accordance with an order previously entered against the corporation, and he came into court, answered in his individual capacity, and took part in the proceedings by objecting to evidence and cross-examining witnesses,—it was held that the court acquired such *jurisdiction* over him as would authorize it to deal with him for contempt in not obeying the order.<sup>2</sup> The *attorneys* of a corporation may be made amenable to process of contempt, not so much upon the ground of being agents of the corporation, as on the ground of being officers of the court, and privy to the proceedings before the court in which they represent the corporation as counsel. Accordingly, it

<sup>1</sup> 4 Wait's Pr. 206; quoted with Rep. 599. See also McKim v. Odom, approval in Tolleson v. People's Sav. Bank, 85 Ga. 171, 180; s. c. 11 S. E. 3 Bland (Md.), 407.

<sup>2</sup> Tolleson v. People's Sav. Bank, 85 Ga. 171; s. c. 11 S. E. Rep. 599.



has been held that where, in an action by a creditor against a banking corporation, to wind up its affairs on the ground of insolvency, a temporary order is made, restraining the defendant, its officers and agents, from paying out the funds, or otherwise disposing of the effects of the corporation, it is a constructive contempt by the attorneys of the defendant to *advise* its officers and stockholders to file a petition in bankruptcy, with a view of removing its property beyond the jurisdiction of the court, but not a contempt of such a nature as to warrant their suspension or removal as attorneys.<sup>1</sup>

§ 6451. **Whether Punishable for a Criminal Contempt.** — There is a well-known distinction between *criminal* and *remedial* contempts. Roughly speaking, a criminal contempt consists of an obstruction of the administration of justice, while a remedial contempt consists in the disobedience of an order, granted at the instance of a private suitor and for his benefit, — such as an *injunction*, an order to pay *alimony* in a divorce proceeding, and the like. There may be room for casuistry upon the question whether a corporation aggregate can properly be punishable for a strictly criminal contempt, though there is no doubt that its officers or servants, who are its agents in committing the contempt, are so punishable. Suppose, for instance, that the managing officers of a corporation direct its agents to resist the officers of the law in the service of process. This is strictly a criminal contempt; but is the punishment necessarily confined to the *persons* who give the direction, or who execute it? By analogy to the rule that corporations may be liable for the malicious torts of their agents and servants, and especially when the commission of those torts is ordered by their managing officers, — there would seem to be no real difficulty in holding a corporation liable for a criminal contempt in such a case; but no cases are known to the writer where it has been so held.

§ 6452. **Contempt in Disobeying Orders Procured by Corporations.** — It has been held by an able judge that a

<sup>1</sup> *Watson v. Citizen's Sav. Bank*, 5 S. C. 159.

*remedial proceeding as for contempt*, in the disobedience of an *injunction* obtained by non-resident stockholders in a corporation, — in the particular case to enjoin the enforcement of an illegal *tax* against the corporation, — cannot be maintained after the property has been sold to another corporation under a decree of foreclosure, unless the stockholders, who instituted the proceeding for contempt, and who were complainants in the original action, are also stockholders of the corporation purchasing the property at a foreclosure sale, and unless the exemption from taxation protected by injunction follows the property into the hands of the purchaser.<sup>1</sup>

<sup>1</sup> *Secor v. Singleton*, 35 Fed. Rep. 376, opinion by Thayer, J. The learned judge proceeded upon the ground that, in such a case, the prosecutor must have an *interest* in the

proceeding different from that of the *general public*: citing *Hawley v. Bennett*, 4 Paige (N. Y.), 163; *Rap. on Contempt*, § 127; *High on Inj.* (2nd ed.), § 1449.



## **TITLE FIFTEEN.**

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**INSOLVENT CORPORATIONS.**



# TITLE FIFTEEN.

## INSOLVENT CORPORATIONS.

### CHAPTER <sup>CX V</sup>~~CLXV~~.

#### ASSIGNMENTS FOR CREDITORS.

- | SECTION  | SECTION  |
|--|--|
| 6466. A corporation can make an assignment for the benefit of creditors.                           | 6476. Further of this subject.   |
| 6467. What corporations may make such assignments.   | 6477. Validity of an assignment giving assignee discretionary power to sell. |
| 6468. Under general statutes authorizing "debtors" to assign.                                      | 6478. Questioning the validity of the assignment.                            |
| 6469. Such an assignment passes unpaid stock subscriptions.  | 6479. On the ground that it was not made at a proper board meeting, etc.     |
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| 6471. Passes what franchises.  | 6481. What resolution will authorize an assignment.                          |
| 6472. Whether passes rights of action <i>ex delicto</i> .  | 6482. Effect of such an assignment.  |
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| 6474. Formalities in making the assignment.  | 6484. Who eligible as assignee.  |
| 6475. Validity of conditions in such assignments.  | 6485. What if one assignee refuses to qualify.                               |
|  | 6486. May maintain actions upon share subscriptions.                         |
|  | 6487. Schemes of composition or "arrangement."                               |

§ 6466. A Corporation can make an Assignment for the Benefit of Creditors. — Every corporation, as we have seen, is vested with the *jus disponendi* in respect to its property, for the purposes of its creation, and within the scope of its

granted powers, to the same extent as an individual.<sup>1</sup> It also has the power of making contracts, and consequently of contracting debts, and this includes the obligation to pay any debts which it may contract; and the obligation to pay its debts includes the obvious and proper means of making such payment; and where it is insolvent and has not enough assets to pay its debts in full, no juster disposition of its property can be made than an assignment of it to a trustee, for the purpose of having it converted into money, and having the money ratably distributed among its creditors. While, therefore, there have been intimations that a corporation cannot, at common law, and unless empowered thereto by statute, make an assignment of its assets for the benefit of its creditors,<sup>2</sup> yet the better and almost universal opinion is, that it can.<sup>3</sup>

<sup>1</sup> It is said by Chancellor Kent that "independent of positive law, all corporations have the absolute *jus disponendi*, neither limited as to objects nor circumscribed as to quantity; . . . and this common-law right of disposition continued in England until it was taken away, as to religious corporations, by several restraining statutes, in the reign of Elizabeth." 2 Kent Com. 282.

<sup>2</sup> Meloy v. Central Nat. Bank (D. C.), 17 Wash. Law Rep. 68.

<sup>3</sup> Montgomery v. Commercial Bank, 1 Smedes & M. Ch. (Miss.) 632; Grand Gulf R. & C. Co. v. State, 10 Smedes & M. (Miss.) 428; Hopkins v. Gallatin Turnp. Co., 4 Humph. (Tenn.) 403; Hurlbut v. Carter, 21 Barb. (N. Y.) 221; Wright v. Lee, 2 S. Dak. 596; s. c. 51 N. W. Rep. 706; Robins v. Embry, 1 Smedes & M. Ch. (Miss.) 207, 258; De Ruyter v. St. Peter's Church, 3 N. Y. 238; affirming s. c. 3 Barb. Ch. (N. Y.) 119; Hoyt v. Sheldon, 3 Bosw. (N. Y.) 267; Ex parte Conway, 4 Ark. 302; Ringo v. Biscoe, 13 Ark. 563; Chamberlain v. Bromberg, 83 Ala. 576; Fietsam v. Hay, 122 Ill. 293; s. c. 3 Am. St. Rep. 492; Covert

v. Rogers, 38 Mich. 363; s. c. 31 Am. Rep. 319; Pope v. Brandon, 2 Stew. (Ala.) 401; s. c. 20 Am. Dec. 49; Foster v. Mullanphy Planing Mill Co., 92 Mo. 79; s. c. 4 S. W. Rep. 260; Hutchinson v. Green, 91 Mo. 367; Manufacturer's Sav. Bank v. Big Muddy Iron Co., 97 Mo. 38; Catlin v. Eagle Bank, 6 Conn. 233; Buell v. Buckingham, 16 Iowa 284, 296; s. c. 85 Am. Dec. 516, *per* Dillon, J.; Town v. Bank of River Raisin, 2 Doug. (Mich.) 530; Revere v. Boston Copper Co., 15 Pick. (Mass.) 351; Boston Glass Co. v. Langdon, 24 Pick. (Mass.) 49; s. c. 35 Am. Dec. 292; State v. Bank of Maryland, 6 Gill & J. (Md.) 205; s. c. 26 Am. Dec. 561; Union Bank of Tennessee v. Elliott, 6 Gill & J. (Md.) 363; s. c. 26 Am. Dec. 561; Sargent v. Webster, 13 Met. (Mass.) 497; s. c. 46 Am. Dec. 743; Russell v. M'Lellan, 14 Pick. (Mass.) 63; Shockley v. Fisher, 75 Mo. 498; Wyman v. Berry, 3 Wash. 734; s. c. 29 Pac. Rep. 557. In this last case it was held that a statute providing for assignments by insolvent debtors (Wash. Code 1881, ch. 143), which enacted that no as-

§ 6467. What Corporations may Make Such Assignments.

Under this principle, a *banking* corporation,<sup>1</sup> a *manufacturing* corporation,<sup>2</sup> a *trading* corporation,<sup>3</sup> a *building* association,<sup>4</sup> or even an incorporated *religious society*,<sup>5</sup>—may make assignments of all its assets for the benefit of its creditors, and in some cases, with *preferences*, as we shall hereafter see.<sup>6</sup> It has

signment of any debtor, otherwise than as therein provided, should be legal or binding as against creditors, did not include assignments by corporations, but that a common-law assignment by an insolvent corporation was valid. In New York a statute prohibiting moneyed corporations, when insolvent, from giving preferences to their creditors (1 Rev. Stat. N. Y. 591, § 9), has been held to imply the power to make assignments without preferences. *Hurlbut v. Carter*, 21 Barb. (N. Y.) 221; *Hill v. Reed*, 16 Barb. (N. Y.) 280; *Bowery Bank Case*, 5 Abb. Pr. (N. Y.) 415. In the same State, a corporation may pledge its choses in action to a trustee for the benefit of its creditors. *Nelson v. Edwards*, 40 Barb. (N. Y.) 279; *Clark v. Titcomb*, 42 Barb. (N. Y.) 122. It was held in 1843 that a statute of New York, enacted in 1825 “to prevent fraudulent bankruptcies by incorporated companies,” etc., applied to the New York & Erie Railroad Company, so as to invalidate any assignment made by the company of its property in contemplation of insolvency,—the question having been decided as one of statutory construction and of repeal by implication. *Bowen v. Lease*, 5 Hill (N. Y.), 221. As to validity of an assignment under statutes providing that no bank shall make assignments in favor of creditors, and authorizing the bank commissioners to take possession of assets in insolvency,—see *Rossman v. Mc-*

*Farland*, 9 Ohio St. 369. Reviewing such an assignment by *appeal* where it was made pending suit in chancery begun by attachment: *Hall v. Bank*, 14 W. Va. 584.

<sup>1</sup> *McCallie v. Walton*, 37 Ga. 611; *s. c.* 95 Am. Dec. 369; *State v. Bank of Maryland*, 6 Gill & J. (Md.) 205; *s. c.* 26 Am. Dec. 561; *Lenox v. Roberts*, 2 Wheat. (U. S.) 373 (in effect); *Haxtun v. Bishop*, 3 Wend. (N. Y.) 13; *Ex parte Conway*, 4 Ark. 302, 351; *Hopkins v. Gallatin Turnp. Co.*, 4 Humph. (Tenn.) 403; *Flint v. Clinton Company*, 12 N. H. 430; *Warner v. Mower*, 11 Vt. 385; *Dana v. Bank of United States*, 5 Watts & S. (Pa.) 223.]

<sup>2</sup> *Sargent v. Webster*, 13 Met. (Mass.) 497; *s. c.* 46 Am. Dec. 743.

<sup>3</sup> *Pope v. Brandon*, 2 Stew. (Ala.) 401, 405; *s. c.* 20 Am. Dec. 49.

<sup>4</sup> *Harvey v. Cubbedge*, 75 Ga. 793.

<sup>5</sup> *De Ruyter v. St. Peter's Church*, 3 N. Y. 238; affirming *s. c.* 3 Barb. Ch. (N. Y.) 19. In this case, the religious corporation had power “to sell” with the concurrence of the *chancellor*, and, without his concurrence, power “to give, grant, demise, lease, or otherwise dispose of” its property. It was held that it had power to make an assignment for the benefit of its creditors, under an order from the *vice-chancellor*, exercising, under another statute (1 Rev. Stat. N. Y. 168, § 2), the jurisdiction of the chancellor first having been obtained.

<sup>6</sup> *Post*, 6492, *et seq.*



been held that a *foreign corporation* may assign for the benefit of creditors in Pennsylvania, although prohibited by statute from so doing in the State in which it was organized;<sup>1</sup> and so it may in South Dakota, although it has transacted all its business in that State in violation of a statute;<sup>2</sup> for, although the corporation may have violated the law in contracting the debts, it does not violate any law in turning over its property to make a ratable payment of them.

§ 6468. Under General Statutes Authorizing "Debtors" to Assign. — Under a *statute* permitting an assignment to be "made by a *debtor* to any person in trust for his creditors," a corporation may make such an assignment; for, although corporations may not be mentioned in the statute, yet they will be deemed to be within its intendment, in pursuance of the general rule of law that corporations are to be deemed persons for civil purposes.<sup>3</sup> So it has been held that a statute relating to assignments for the benefit of creditors, which empowers "any *debtor*" or "any debtor being insolvent" to assign his property for the benefit of his creditors, *includes corporations* organized for pecuniary gain, such as a mere trading company.<sup>4</sup>

§ 6469. Such an Assignment Passes Unpaid Stock Subscriptions. — Such an assignment passes the *unpaid stock subscriptions*;<sup>5</sup> and it follows that *creditors cannot maintain actions*

<sup>1</sup> Benevolent Order of A. W. Binns v. Sanders, 28 Week. Notes Cas. (Pa.) 321.

<sup>2</sup> Wright v. Lee, 2 S. Dak. 596; s. c. 51 N. W. Rep. 706.

<sup>3</sup> Shockley v. Fisher, 75 Mo. 498; Chew v. Ellingwood, 86 Mo. 260; s. c. 56 Am. Rep. 429; Hutchinson v. Green, 91 Mo. 367; Shultz v. Sutter, 3 Mo. App. 137. The conclusion is strengthened by the following provision in the Revised Statutes of Missouri, establishing a rule for the interpretation of those statutes: "When any subject-matter, party,

or person is described or referred to by words importing the singular number or the masculine gender, several matters and persons, and females as well as males, *and bodies corporate* as well as individuals, shall be deemed to be included." Rev. Stats. Mo. 1879, § 3124. That corporations are "persons," see *ante*, §§ 11, 5689.

<sup>4</sup> Tripp v. Northwestern Nat. Bank, 41 Minn. 400; s. c. 43 N. W. Rep. 60.

<sup>5</sup> *Ante*, § 1818; Lionberger v. Broadway Sav. Bank, 10 Mo. App. 499; Shockley v. Fisher, 75 Mo. 498; Ep.

against the stockholders to enforce the payment of balances due to the corporation upon their subscriptions, because these are collectible by the assignee alone;<sup>1</sup> and it has been held immaterial that, for whatever cause, the assignee has failed to bring suit within two years.<sup>2</sup> The assignment of such a credit will pass *without express words* in the deed: it will be deemed to pass by *general words* which import that the corporation intends to assign *all* its assets for the benefit of its creditors,—as by the following words: “And does now also hereby assign, transfer, convey, and set over unto the party of the second part, all and singular, the real, personal, and mixed property and assets, of every nature, kind, and character, unto said party of the first part, belonging and wheresoever situated, including lands, tenements, goods, chattels, effects, credits, and every other species of property and rights in action at law or in equity.”<sup>3</sup> We have seen that, where a cor-

pright *v.* Nickerson, 78 Mo. 482; Boeppler *v.* Menown, 17 Mo. App. 447, 450; Chamberlain *v.* Bromberg, 83 Ala. 576; Lewis *v.* Glenn, 84 Va. 947; *s. c.* 21 Am. & Eng. Corp. Cas. 569; 6 S. E. Rep. 866. See also Adler *v.* Brick Man. Co., 13 Wis. 63; Webster *v.* Upton, 91 U. S. 65; Hatch *v.* Dana, 101 U. S. 205; Ogilvie *v.* Knox Ins. Co., 22 How. (U. S.) 380.

<sup>1</sup> Savings Asso. *v.* O'Brien, 3 N. Y. Supp. 764; *s. c.* 51 Hun (N. Y.) 45; Hamilton *v.* Glenn, 85 Va. 901; *s. c. sub nom.* Hambleton *v.* Glenn, 9 S. E. Rep. 129. The right to collect unpaid subscriptions passed by an assignment under the late *bankrupt law*: Sanger *v.* Upton, 91 U. S. 56; Erwin *v.* United States, 97 U. S. 392; Glenny *v.* Langdon, 98 U. S. 20; Webster *v.* Upton, 91 U. S. 65; Hatch *v.* Dana, 101 U. S. 205.

<sup>2</sup> Lane *v.* Nickerson, 99 Ill. 284. See also Trimble *v.* Woodhead, 102 U. S. 647.

<sup>3</sup> Lionberger *v.* Broadway Sav.

Bank, 10 Mo. App. 499, 504. To the same effect is Eppright *v.* Nickerson, 78 Mo. 482, 487. It seems that, in Massachusetts, such an assignment does not, by its own vigor, pass the liability of stockholder and directors; because we find a decision in that State where, interpreting such a deed of assignment, to which the particular creditor was a party, it was held that it did not operate to release his right to bring an action against the corporation and the stockholders, to enforce their statutory liability. The reasoning of the court assumes that the right to enforce the statutory liability of stockholders and directors remains in the creditors, and does not pass, by an assignment; and all it holds is, that the language of the particular deed of assignment ought not to be construed as showing an intent to release such a right. Nonantum Worsted Co. *v.* Holliston Mills, 149 Mass. 359; 21 N. E. Rep. 670.

poration has made an assignment of all its assets for the benefit of its creditors, the court which has the superintendence of the administration may make an order requiring the payment of unpaid stock subscriptions, the same as the directors, under the authority vested in them, might have done, while the corporation was a going concern.<sup>1</sup> After such an assessment has been made (or where, under one theory, the whole amount will be required to liquidate the debts, without an assessment being made),<sup>2</sup>—the assignee may maintain an appropriate action, either at law or in equity, to collect the portion assessed against the respective stockholders. In Missouri, it has been held that he may maintain a *suit in equity*, against the corporation and its shareholders, to recover such unpaid subscriptions; and it is no objection to the equitable proceeding that certain creditors of the corporation have already proceeded against certain stockholders, by motion under a statute, to subject to the payment of their debts what is due to the corporation by such shareholders in respect of their shares,—the statutory remedy being merely cumulative, and not exclusive.<sup>3</sup>

<sup>1</sup> *Ante*, § 3537; *Marson v. Deither*, 49 Minn. 425; *s. c.* 52 N. W. Rep. 318.

<sup>2</sup> *Boepler v. Menown*, 17 Mo. App. 447.

<sup>3</sup> *Lionberger v. Broadway Sav. Bank*, 10 Mo. App. 499, 504. It was at one time reasoned that such an assignment passes only the right to collect such subscriptions, where calls have been previously made by the directors, and where the corporation has the present right to sue. *Shultz v. Sutter*, 3 Mo. App. 137. But this conception really involved the result that a *chose in action* may be assigned *in part*, which is not the law,—the right to assign a part of a *chose in action* being denied, because it operates to multiply law suits and oppress debtors. *Mandeville v. Welch*, 5 Wheat. (U. S.) 277; *Love v. Fair-*

*field*, 13 Mo. 300; *s. c.* 53 Am. Dec. 148. Subsequently, it was held in Missouri, in the cases first above cited, that such an assignment passed both the called and uncalled stock subscriptions. Upon the question whether such an assignment passes the individual superadded *statutory liability of stockholders*, there is a difference of opinion. It has been noted in a former title (*ante*, § 3561), that the superadded individual liability of stockholders, in *national banks* is enforceable by the receiver. That an individual statutory liability does not pass under general words in a deed of assignment,—see *Ohio Life &c. Co. v. Merchants' Ins. &c. Co.*, 11 Humph. (Tenn.) 1, 31; *s. c.* 53 Am. Dec. 742.

§ 6470. Does not Pass Power to Assess Stockholders.—

Upon the same ground, it has been held that a corporation cannot transfer the *powers* of its officers, as such, to an assignee, because these powers are a part of its *franchises*. And it is upon this ground that it has been held that the assignee of an insurance company acquires no power to *make assessments* upon premium notes transferred to him under the assignment.<sup>1</sup> It is merely another way of stating the same principle to say that such an assignment does not pass any *discretionary power* possessed by the board of directors, such as the power of *making assessments* against its shareholders to collect any unpaid balance, or any portion of any unpaid balance, of their shares; but such an assessment, when necessary, can only be made by a court of equity, unless there is an enabling statute,<sup>2</sup>—though it has been held that, where the total amount due and payable from all the stockholders will be not more than sufficient to pay the debts of the corporation, no previous assessment, either by the corporation or by a court of equity, is necessary, but that the assignee may sue for the full unpaid balance.<sup>3</sup>

§ 6471. Passes What Franchises.—Such an assignment does not, according to one view, pass the *franchises* of the corporation, in the absence of an enabling statute;<sup>4</sup> though, as we have already seen,<sup>5</sup> what are termed the *secondary franchises* of a corporation are capable of alienation, and are vendible in execution. There is, therefore, no good reason why such an assignment should not pass those franchises which are *vendible* in execution, which are subject to *taxation*, and which, roughly speaking, consist of *the opportunities of making money* which the corporation has, under special privileges which have been conferred upon it by charter, statute, or municipal ordinance,—such as the right to occupy certain streets

<sup>1</sup> Hurlbut v. Carter, 21 Barb. (N. Y.) 221.

<sup>2</sup> Boeppler v. Menown, 17 Mo. App. 447. Compare Shultz v. Sutter, 3 Mo. App. 137.

<sup>3</sup> Boeppler v. Menown, *supra*.

<sup>4</sup> Lehigh Iron Co.'s Estate, 12 Pa. Co. Ct. 257.

<sup>5</sup> *Ante*, § 5352, *et seq.*

of a city with a railroad. The distinction between *primary and secondary franchises* is perfectly clear: A primary franchise is the *right to be a corporation*, and this is vested in the individuals composing the corporation, and not in the corporation itself. Such a franchise is, therefore, not assignable as the property of the corporation, because it is not its property.<sup>1</sup> Besides, if the principle were otherwise, then, by assigning its effects and franchises, the assignee would himself become, to all intents and purposes, a corporation, with the same powers as those possessed by the assignor; and he, in turn, by selling the assets and franchises, would vest in the purchaser at his assignee's sale the same faculty of being a corporation, with all the franchises which his assignor possessed. Such a proposition, it has been justly said, would be startling. It was therefore held that the voluntary assignee for creditors, of a banking corporation, was not entitled to an order for leave to sell "all the rights, privileges, powers, and immunities which were granted by said act incorporating said bank."<sup>2</sup>

§ 6472. **Whether Passes Rights of Action ex Delicto.**—Such an assignment, according to some opinion, passes the right of action which the corporation may have, *ex delicto*, against its directors to recover *damages* for their mismanagement of its affairs.<sup>3</sup>

§ 6473. **Whether the Directors may Make Such an Assignment without Authorization of the Stockholders.**—We have already considered this subject in discussing the *powers* of the *directors* of corporations,<sup>4</sup> with the conclusion that it is within the *discretionary power* of the directors to make an assignment of all the assets of the corporation for a ratable distribution among its creditors, without the assent of the stockholders, unless the charter or governing statute enacts or implies the contrary,<sup>5</sup>—though there is some opposing au-

<sup>1</sup> *Fietsam v. Hay*, 122 Ill. 293; *s. c.* 3 Am. St. Rep. 492.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Wallace v. Lincoln Sav. Bank*, 89

Tenn. 630; *s. c.* 24 Am. St. Rep. 625. See also *ante*, §§ 4122, 4126.

<sup>4</sup> *Ante*, § 3986.

<sup>5</sup> *Chew v. Ellingwood*, 86 Mo. 260,

thority.<sup>1</sup> The practical effect of such an assignment is, in most cases, to put an end to the existence of the corporation, though such is not necessarily its legal effect. Such an assignment, therefore, approaches very near the grade of those constituent acts, the power to do which has not been delegated to the directors, unless by charter, statute, or by-law; and, therefore, it manifestly ought not to be exercised by the directors without the consent of the majority of the stockholders, except in a case of emergency.<sup>2</sup> Nevertheless, it has been held that the directors may make such an assignment, even in opposition to the will of the shareholders.<sup>3</sup> It reasonably follows that such an assignment cannot be impeached at the instance of stockholders in a *collateral proceeding*, on the ground that some of the directors were not legally elected,

273; *s. c.* 56 Am. Rep. 429; *Merrick v. Bank of Metropolis*, 8 Gill (Md.), 59; *Descombes v. Wood*, 91 Mo. 196; *s. c.* 60 Am. Rep. 239; *Tripp v. Northwestern Nat. Bank*, 41 Minn. 400; *s. c.* 43 N. W. Rep. 60 (under a statute); *Hutchinson v. Green*, 91 Mo. 367; *Chase v. Tuttle*, 55 Conn. 455; *s. c.* 12 Atl. Rep. 874; 3 Am. St. Rep. 64; *Boardman v. Keystone Standard Watch Co.* (Pa. C. P.), 8 Lancaster Law Rev. 25; *Sargent v. Webster*, 13 Met. (Mass.) 497; *s. c.* 46 Am. Dec. 743; *Dana v. Bank*, 5 Watts & S. (Pa.) 223; *Ardesco Oil Co. v. North American Min. Co.*, 66 Pa. St. 375; *De Camp v. Alward*, 52 Ind. 468; *Foster v. Mullanphy Planing Mill Co.*, 92 Mo. 79; *s. c.* 4 S. W. Rep. 260. To the same effect, see *Wright v. Lee*, 2 S. Dak. 596; *s. c.* 51 N. W. Rep. 706; *Lehigh Iron Co.'s Estate*, 12 Pa. Co. Ct. 257. There is a note on this subject in 19 Am. & Eng. Corp. Cas 128.

<sup>1</sup> *Gibson v. Goldthwaite*, 7 Ala. 281; *s. c.* 42 Am. Dec. 592; *Bank Comm'rs v. Bank of Brest*, Harr. Ch. (Mich.) 106.

<sup>2</sup> In *Merrick v. Trustees*, 8 Gill (Md.), 59, there was previous authorization by the stockholders.

<sup>3</sup> *Hutchinson v. Green*, 91 Mo. 367; *Descombes v. Wood*, 91 Mo. 196; *s. c.* 60 Am. Rep. 239; qualifying *Eppright v. Nickerson*, 78 Mo. 482, where it was held that such an assignment, if made by the directors without the consent of the stockholders, would be *ultra vires* and void, but only against the stockholders; and that a creditor of the corporation could not make the objection. In so holding it was said by Black, J.: "The corporation, then, has the power to make an assignment, and that power being vested in the directors without restriction, it must follow that they, and they alone, are authorized to make it. It is the duty of the directors to care for the creditors, and when the corporation becomes crippled and unable to meet its obligations in the usual course of business, it is competent for the directors to make an assignment, and this they may do without the consent of the stockholders." *Hutchinson v. Green*, 91 Mo. 367, 375.

where they were directors *de facto*.<sup>1</sup> The principle which upholds the acts of the directors of a corporation, who are such *de facto*, though possibly not *de jure*,<sup>2</sup> upholds an assignment made for the benefit of creditors by a board of directors *elected outside the State* creating the corporation.<sup>3</sup> It is scarcely necessary to add that such an assignment, even if made without original power on the part of the directors, would be validated by the subsequent assent or *acquiescence* of the stockholders;<sup>4</sup> and on the other hand, that a stockholder may be precluded by his *laches* from questioning such an assignment.<sup>5</sup> It need not be said that the directors do not exercise the power held to exist in them by the decisions cited in this section, by formally executing the assignment themselves: they authorize the proper officers of the corporation to execute it.<sup>6</sup>

§ 6474. **Formalities in Making the Assignment.**—Where there is a *statute* providing the formalities necessary in making a deed of assignment by a corporation for the benefit of its creditors, that, of course, must be followed.<sup>7</sup> Where there is no such statute, the instrument of assignment ought to ful-

<sup>1</sup> Boardman v. Keystone Standard Watch Co. (Pa. C. P.), 8 Lancaster Law Rev. 25.

<sup>2</sup> *Ante*, § 3893, *et seq.*

<sup>3</sup> Wright v. Lee, 2 S. Dak. 596; s. c. 51 N. W. Rep. 706; Milliken v. Steiner, 56 Ga. 251, 253.

<sup>4</sup> *Ante*, § 5303; Lehigh Iron Co.'s Estate, 12 Pa. Co. Ct. 257.

<sup>5</sup> Descombes v. Wood, 91 Mo. 196; s. c. 60 Am. Rep. 239; *ante*, § 4494.

<sup>6</sup> Thus, an assignment of all the property and assets of a bank to certain trustees for the benefit of creditors, executed by the president of the corporation, and sealed with its seal, in pursuance of an ordinance of the board of directors, was held valid in *Ex parte Conway*, 4 Ark. 302. In the case of a *bank*, where the assets to be assigned consist of securities, they

may, it has been held, authorize the president, or one of their own number, to assign such securities. *Spear v. Ladd*, 11 Mass. 94; *Northampton Bank v. Pepoon*, 11 Mass. 288; *Stevens v. Hill*, 29 Me. 133. And see *Bank Comm'rs v. Bank of Brest*, *Harr. Ch. (Mich.)* 106.

<sup>7</sup> *Ante*, § 5017; *Tripp v. Northwestern Nat. Bank*, 45 Minn. 383; s. c. 48 N. W. Rep. 4. In this case it was held that a resolution by the directors of an insolvent corporation, authorizing its officers to assign all its assets for the equal benefit of all its creditors, is sufficient to authorize such an assignment, under the Minnesota Insolvent Law of 1881, as against a *subsequent* attachment of the corporate property.

fill the requisites of a formal *deed* of the corporation, to pass the property intended to be passed by it, whether real or personal.<sup>1</sup> The requirement of an *affidavit of good faith* is not necessary, in Montana, because the statute requiring that formality does not apply to assignments for the benefit of creditors.<sup>2</sup> A *bona fide* assignment has been held good, notwithstanding the corporate *seal* was not used.<sup>3</sup> Such assignments have been held valid where, in strictness, they would be good only *in equity*,—as where the board of trustees had not been re-elected and maintained, to the extent of the number required by the statute; where the assignment was not authorized at a regular meeting of the stockholders or trustees; where no corporate seal was affixed to the instrument of assignment, no seal ever having been adopted by the corporation; where the corporation had been created with but three members, who had elected themselves as trustees, and, upon one of them retiring, it had sunk to the *status* of a mere joint-stock partnership, the two remaining stockholders being, in substance, the absolute owners of the property assigned.<sup>4</sup> It has been held that a general assignment for creditors of a corporation is not rendered void by the fact that the *notice* of the stockholders' meeting, at which it was authorized to be made, was given to the *transferees*, and not to the *transferors*, of certain *shares*, the transfers of which were insufficient to pass the legal title, because not formally made in the transfer-books.<sup>5</sup> The reason was that the *by-law* requiring the registry of the transfers was for the benefit of the corporation, which they might *wave*,<sup>6</sup> and that this waiver was binding, not only

<sup>1</sup> Thus, in Texas, where the use of the corporate *seal* is necessary to convey *land*, an unsealed instrument of assignment is invalid, although the inventory shows only personalty. *Shropshire v. Behrens*, 77 Tex. 275; *s. c.* 13 S. W. Rep. 1043.

<sup>2</sup> *Teitig v. Boesman*, 12 Mont. 404; *s. c.* 31 Pac. Rep. 371. What *affidavit* of the president, to the correctness of the *inventory*, is a sufficient compli-

ance with the requirement of § 4668, Comp. Laws S. Dak.: *Wright v. Lee*, 2 S. Dak. 596; *s. c.* 51 N. W. Rep. 706.

<sup>3</sup> *Teitig v. Boesman*, *supra*. But see *Shropshire v. Behrens*, 77 Tex. 275; *s. c.* 13 S. W. Rep. 1043.

<sup>4</sup> *Teitig v. Boesman*, *supra*.

<sup>5</sup> *American Nat. Bank v. Oriental Mills*, 17 R. I. 551; *s. c.* 11 Rail. & Corp. L. J. 206; 23 Atl. Rep. 795.

<sup>6</sup> See *ante*, § 2388.



upon itself, but also upon its creditors.<sup>1</sup> There is no necessity that the *assignee*, trustee or trustees, to whom the assignment is made, should *join* in the execution of the deed;<sup>2</sup> or enter into covenants to perform the trusts. The moment the deed is made, the right of property passes and vests in the assignee, trustee or trustees, named therein, and the relation of trustee and *cestui que trust*, as between them and the creditors, is at once established, so that the corporation cannot recall the deed.<sup>3</sup> Any act done by them which shows their assent will make the deed obligatory upon them; and equity will enforce the trust, and will not allow it to fail for want of a trustee.<sup>4</sup> The fact that the *schedule* attached to such deed of assignment is defective, or that no schedule is attached at all, will not vitiate the assignment.<sup>5</sup> That *only a part of the trustees*, to whom the assignment has been made, have *signed* the deed of assignment, has been held no objection to an *action* to possess themselves of assets being maintained in the names of all, provided they are all before the court; since the court can transfer the possession to those who have signed, and allow them to hold it for the others, and to come in and execute the necessary bonds; and if they fail to come in and execute such bonds within a reasonable time, the court can remove them and appoint others. And it has been held that, in such a case, the trustees who have qualified are entitled to an injunction to aid them in getting possession of the assets, the remedy by an action of replevin being inadequate and incomplete.<sup>6</sup> In respect of the necessity of *recording* such a deed of assignment, it has been held, that the act of one bank

<sup>1</sup> See *ante*, § 2388.

<sup>2</sup> *Flint v. Clinton Co.*, 12 N. H. 430; *Ex parte Conway*, 4 Ark. 302.

<sup>3</sup> *Ex parte Conway*, *supra*.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*; *Robins v. Embry*, 1 Smedes & M. Ch. (Miss.) 207. Where an insolvent Bank executed an assignment of "all and every of its property, effects, rights, and credits, of each and every kind and character

whatsoever, in as full and complete a manner as the same are now owned, held, and possessed by it," and the assignees accepted the trust, the right of property passed to them, together with the right to sue for and recover the rights, credits, etc., belonging to the bank. *Hill v. Western & C. R. Co.*, 86 Ga. 284; s. c. 12 S. E. Rep. 635.

<sup>6</sup> *Ex parte Conway*, 4 Ark. 302.

delivering to another a mass of notes and bills of exchange, as collateral security, for an advance to be used in redeeming the notes of the bank executing the pledge, is not an assignment for the benefit of creditors, within a statute requiring such an assignment to be recorded, and that such a delivery is not invalid for that reason.<sup>1</sup>

§ 6475. **Validity of Conditions in Such Assignments.**—The validity of a condition in such a deed of assignment, by which the assignee is required to *prefer* certain creditors before the others, is considered in another connection.<sup>2</sup> Such an assignment, made by the central board of the Real Estate Bank of Arkansas, was held valid in a *mandamus* proceeding although some of the trustees to whom the assignment was made were indebted to the bank, their indebtedness not being thereby extinguished; although the debtors of the bank were allowed to pay their debts in eight annual installments; although it was not expressed on the face of the deed that the bank was not in failing or insolvent circumstances; and although it was provided that the trustees to whom the assignment was made should give bonds for the faithful execution of their trust,—not to the Governor of the State, but to the attorney of the bank, and his successors in office.<sup>3</sup> It is submitted, in opposition to this untenable decision, that a provision in a deed of assignment, allowing the debtors of the corporation the period of *eight years* in which to liquidate their debts, withdrawing the assets of the corporation during that long period from its creditors, is *fraudulent on its face*, under every conception known to lawyers. In another decision, rendered in the same era of wildcat banks and the insolvencies growing out of them, it was held that such an assignment was not void by reason of allowing *twelve months* for the collection of the debts, which were numerous and due from persons widely scattered, before any distribution should be made, since this was not regarded as unreason-

<sup>1</sup> Griffin v. Rogers, 38 Pa. St. 382.

<sup>2</sup> Post, § 6492, *et seq.*

<sup>3</sup> Ex parte Conway, 4 Ark. 302.

able under the circumstances. Nor was it vitiated by a power which it undertook to confer upon the assignees, of *compromising* with the debtors in such a manner as, in the judgment of the assignees, should be for the interest of the creditors; nor because it prohibited the assignees from paying any claim not first declared valid by the board of directors; nor because the assignees were required to account periodically *to the board of directors*.<sup>1</sup> This decision is deserving of as little respect as the one previously referred to. It attempted to make an assignment of the assets of the bank, to hold the creditors at arm's length for the minimum period of one year, and to keep the assignees under the control of the board of directors. By this legerdemain the directors assumed to assign, and not to assign; to turn over the assets of the bank to an assignee, and yet to hold the assignee by a string and keep him under their superintendence. This corporation was one of those which blossomed plentifully during the "wildcat" and "red-dog" era of American finance. It was a "railroad and banking" corporation,—that is to say, it was a banking corporation which was also authorized by its charter to construct and operate a railroad. After having nearly completed the road and exhausted its means, it was compelled to make an assignment for the benefit of its creditors. The period for completing the road allowed by its charter had nearly expired, and the expiration of the charter without the completion of the road would cause forfeiture of the franchises. The road, in its unfinished condition, was comparatively worthless, and the failure to complete it would involve a total loss to the company of the amount expended, and would diminish the ability of the company to meet and pay its debts. With this predicate, it was further held that a provision in the deed of assignment, authorizing the assignees to borrow \$250,000 to complete the road, and pledging the assets of the company and the profits of the road, for the payment of that sum when borrowed, before any other debts were paid, did not vitiate the assignment; that provisions in the assignment, which conferred upon the trustees

<sup>1</sup> Robins v. Embry, 1 Smedes & M. Ch. (Miss.) 207.

the power of managing and controlling the road, merely operated to assign the profits of the road, with its temporary control, to the assignees, for the benefit of the creditors, and did not vitiate the instrument itself; that a provision reserving power to the directory, to appoint new trustees to fill any vacancies which might occur, did not vitiate the assignment; that a provision requiring the assignees "to pay all the necessary expenses of the president, directors, and company of the bank in the management of the corporation," did not avoid the assignment, as it did not show a fraudulent intent to secure a benefit to the assignors, but a design to obtain a future accruing profit for the benefit of creditors; and that the fact that such assignment made the assignees the joint agents of the bank and the creditors of the bank, in managing the road, and in receiving and disbursing the profits, did not vitiate it.<sup>1</sup>

§ 6476. **Further of this Subject.**—Such an assignment will be good against a judgment creditor, although the charter of the corporation declares that the stockholders shall be personally responsible for the debts of the corporation.<sup>2</sup> It is scarcely necessary to say that a corporation will not be upheld in making an assignment contrary to the provisions of its charter;<sup>3</sup> and it may be assumed that this will be so, although there may be a *general law* which would authorize the assignment contrary to the provisions of the charter. In such a case, it may be assumed that the *special law* of the corporation will govern, in opposition to the general law, under the principle in the interpretation of statutes, *generalia specialibus non derogant*. But the validity of such an assignment, in so far as it operates as the foundation of a right of action by the assignee against the stockholders, resident and nonresident, must in general be determined in accordance with the laws of the State creating the corporation, and within which it is domiciled.<sup>4</sup>

<sup>1</sup> Robins v. Embry, 1 Smedes & M. Ch. (Miss.) 207.

<sup>2</sup> Pope v. Brandon, 2 Stew. (Ala.) 401, 405; s. c. 20 Am. Dec. 49.

<sup>3</sup> Ringo v. Biscoe, 13 Ark. 563.

<sup>4</sup> For example, a corporation created under the laws of Virginia, for the purpose of transacting an express

§ 6477. **Validity of an Assignment Giving Assignee Discretionary Power to Sell.**—There is a division of judicial opinion upon the question whether an assignment which clothes the assignee with power to *sell upon such terms as he may think fit*, is valid. It has been held that an assignment by a corporation of all its property, real and personal, in trust for all its creditors, with direction that the assignees should proceed, with reasonable and convenient dispatch, to convert the property into money and for that purpose to sell and dispose of any and all of the property, in such manner and on such terms as they might deem most for the interest of the trust, was not invalid by reason of the fact that it vested the assignee with this discretion. The court did not perceive how the end to be accomplished, the conversion of the property into money for distribution among the creditors of the company, could have been well and beneficially accomplished without such a fair and rational discretion as was conferred on the assignees. The court saw no attempt in that discretion to hinder and delay creditors, but, on the contrary, it seemed to the court to be a careful precaution to prevent a sacrifice of the property, whereby the creditors would have been injured.<sup>1</sup> But other courts have held that a clause in

and transportation business, and domiciled in that State, executed a deed of trust, pursuant to resolutions of its directors, whereby it conveyed all its property to trustees for the benefit of its creditors, reserving enjoyment of the property until a specified date, unless the trustees should be required by some creditor to take possession; required the trustees to pay out of the trust fund all debts that should become due from the company to its officers and agents during that period, and all debts which the company might incur to railroad companies for transportation, during that period, over and above the net receipts for such transportation; reserved to the grantor all tolls and compensation for the transportation of express matter

not yet delivered to consignees, or not yet transported under existing contracts; and preferred certain creditors over others. It was held that the validity of this deed must be determined by the laws of Virginia, and that, under those laws, it was valid. *Lewis v. Glenn*, 84 Va. 947; *s. c.* 6 S. Rep. 866; 21 Am. & Eng. Corp. Cas. 569. Previously to this decision the Court of Appeals of Maryland, examining the question with reference to the decisions in Virginia, had reached the conclusion that the deed was valid under the laws of Virginia. *Baltimore & c. R. Co. v. Glenn*, 28 Md. 287; *s. c.* 92 Am. Dec. 688.

<sup>1</sup> *McCallie v. Walton*, 37 Ga. 611; *s. c.* 95 Am. Dec. 369.

such an instrument of assignment, conferring upon the assignee the power to sell the assets at such times and upon such terms as he may see fit, has a manifest tendency to hinder and delay the creditors, and hence renders the deed fraudulent in law, and void.<sup>1</sup> And they have especially predicated this conclusion upon clauses conferring upon the assignee, either in express terms or by necessary implication, power to *sell on credit*.<sup>2</sup>

<sup>1</sup> It was so held in *Jessup v. Hulse*, 29 Barb. (N. Y.) 539, where the deed authorized the assignee to "sell, dispose of, and convey the said real estate and personal property, at such times and in such manner as shall be most conducive to the interest of the creditors" of the assignor, "and convert the same into money as soon as may be consistent with the interests of said creditors." This rendered the assignment void, because it conferred the power to delay making sales of the assigned property, and converting the same into money. But see *Townsend v. Stearns*, 32 N. Y. 209, 216. In *D'Ivernois v. Leavitt*, 23 Barb. (N. Y.) 63, 80, the assignment was held void because it authorized the assignee to sell on credit, and also because it clothed him with discretion as to when the proceeds should be divided among the creditors. So, a clause authorizing the assignee to *compromise* with creditors, if he deems best, avoids the assignment, because it obviously tends to delay. *McConnell v. Sherwood*, 84 N. Y. 522, 531; *s. c.* 38 Am. Rep. 537; 61 How. Pr. (N. Y.) 72; *Gazzam v. Poyntz*, 4 Ala. 374; *s. c.* 37 Am. Dec. 745. The same has been held of a clause authorizing the assignee to *continue the debtor's business*, and to invest funds in the completion of certain articles in course of manufacture. *Dunham v. Waterman*, 17 N. Y. 9, 17; *s. c.* 72 Am. Dec.

406; 6 Abb. Pr. (N. Y.) 369. So of an assignment authorizing partnership effects to be applied to the individual debt of a partner. *Ruhl v. Phillips*, 2 Daly (N. Y.), 49. So of an assignment in trust for the assignor, containing a clause designed to postpone the payment of debts until the debtor's death. *Young v. Heermans*, 66 N. Y. 374, 382. Or any other provision departing from the regular course in the payment of the debts. *Gazzam v. Poyntz*, *supra*. The same has been held of a clause authorizing the assignee to sell "upon such terms and conditions as in his judgment may be best," etc. *Shufeldt v. Abernathy*, 12 N. Y. Leg. Obs. 176. But see *Kellogg v. Slauson*, 11 N. Y. 302, 305. A clause authorizing the assignee to sell at public or *private* sale does not invalidate the assignment. *Lord v. Devendorf*, 54 Wis. 491; *s. c.* 41 Am. Rep. 58. A provision for such *delay* as would ordinarily be incidental to the execution of such a trust, where delay is not one of the objects of the deed, does not invalidate it. *Bellows v. Partridge*, 12 N. Y. Leg. Obs. 221; *Curtis v. Leavitt*, 17 Barb. (N. Y.) 309, 316; *s. c.* 15 N. Y. 9, 205; *Spaulding v. Strang*, 38 N. Y. 9, 12; *Hauselt v. Vilmar*, 76 N. Y. 630.

<sup>2</sup> *Hutchinson v. Lord*, 1 Wis. 286; *s. c.* 60 Am. Dec. 381; *Keep v. Sanderson*, 2 Wis. 42; *s. c.* 60 Am. Dec.

§ 6478. **Questioning the Validity of the Assignment.**—It has been held that the validity of such an assignment may be litigated in a proceeding by the assignee to recover damages for a conversion of a portion of the assigned estate, where the substantial defendant is a creditor of the corporation, and the answer sets up that the assignment was made with the intent to hinder, delay, and defraud its creditors.<sup>1</sup> Where a creditor elects to disregard the assignment and *attach* the prop-

404; *Nicholson v. Leavitt*, 6 N. Y. 510; *s. c.* 57 Am. Dec. 499; *Bowen v. Parkhurst*, 24 Ill. 258, 261; *D'Ivernois v. Leavitt*, 23 Barb. (N. Y.) 63, 80; *Ruhl v. Phillips*, 2 Daly (N. Y.), 49; *Porter v. Clark*, 12 How. Pr. (N. Y.) 107, 110; *Kellogg v. Slauson*, 11 N. Y. 302, 305; *Brigham v. Tillinghast*, 13 N. Y. 215, 218; *Rapalee v. Stewart*, 27 N. Y. 310; *Porter v. Williams*, 9 N. Y. 142; *s. c.* 59 Am. Dec. 519; *Billings v. Billings*, 2 Cal. 107; *s. c.* 56 Am. Dec. 319. On the other hand, such a deed is not void because it withholds from the assignee the discretion to *sell on credit*, and requires him to sell only for cash. *Carpenter v. Underwood*, 19 N. Y. 520; *Grant v. Chapman*, 38 N. Y. 293. Compare *Loeschigk v. Bridge*, 42 N. Y. 421, 429; affirming *s. c.* 19 Abb. Pr. (N. Y.) 181; 3 Rob. (N. Y.) 342. The course of decision on this question in the Supreme Court of Wisconsin may be traced by comparing the following cases: *Norton v. Kearney*, 10 Wis. 443, 449 (distinguishing or limiting *Hutchinson v. Lord*, *supra*); *Keep v. Sanderson*, 12 Wis. 352, 362, on second appeal; *Bound v. Wisconsin &c. R. Co.*, 45 Wis. 543, 575 (reaffirming *Hutchinson v. Lord*, *supra*, and *Keep v. Sanderson*, as reported in 2 Wis. 42; *s. c.* 60 Am. Dec. 404); *Lord v. Devendorf*, 54 Wis. 491 (reaffirming the previous cases, and holding that a provision that the assignee shall "with all con-

venient diligence, sell and dispose of the property at public or private sale, as he may deem most beneficial to the interests of the creditors, . . . and convert the same into money," does not authorize a sale on credit, there being nothing said about terms and conditions or prices, as in *Hutchinson v. Lord*, *supra*). See also *Sumner v. Hicks*, 2 Black (U. S.), 532 (following and applying the Wisconsin doctrine); and compare *Beus v. Shaughnessy*, 2 Utah, 492, 501, and *Kellogg v. Slauson*, 11 N. Y. 302. If the provision is intended to delay or hinder creditors by postponing the conversion of the assets into cash, or if it is such as, on the face of it, must inevitably authorize such a delay, it will avoid the assignment. *Curtis v. Leavitt*, 17 Barb. (N. Y.) 316; *s. c.* 15 N. Y. 205; *Jessup v. Hulse*, 29 Barb. (N. Y.) 539, 542; *People v. Kelly*, 35 Barb. (N. Y.) 460. It has been so held of a provision authorizing the trustee to convert any assets into "money or available means," as this was regarded as implying a power to sell on credit. *Brigham v. Tillinghast*, 13 N. Y. 218. So where the provision was that the trust property should be "converted into cash or otherwise disposed of to the best advantage." *Rapalee v. Stewart*, 27 N. Y. 310.

<sup>1</sup> *Wright v. Lee*, 2 S. Dak. 596; *s. c.* 51 N. W. Rep. 706.

erty of the corporation, and thereupon a contest arises between him and the assignee, the question is one which concerns the *title* of the assignee to the property, and it is properly drawn in question in such a proceeding: it is not a question where, in theory of law, the validity of the assignment is subject to *collateral attack*.<sup>1</sup> But if it were, the rule would be the same; since such an assignment is not a *judicial* proceeding, and in every case where any person asserts rights under it as against a stranger, the *burden* is upon him to show at least an assignment *valid* on its face; and the other party may show that it was invalid by reason of extrinsic facts, as that it was not authorized by a legal meeting of the directors.<sup>2</sup> It has been so held where a judgment creditor proceeded to enforce the liability of stockholders, and they set up, by way of defense, that there had been a general assignment by the corporation for the benefit of creditors, whereby the sole right to collect money due by them for their stock had passed to the assignee.<sup>3</sup>

§ 6479. **On the Ground that It was not Made at a Proper Board Meeting, etc.** — Where such an assignment has not been validated by acquiescence or laches, it may obviously be impeached, either by creditors or stockholders, on the ground that it was not made by the directors at a meeting duly convened, — that is to say, on the ground that it was *not made by the board of directors at all*; for the acts of directors are of no validity unless they are regularly assembled and acting as a board, and unless the proper quorum has concurred in the action which is challenged.<sup>4</sup> But here, as in many other cases, the assignment will be supported by the usual *presumption of right-acting*, until the contrary is made to appear by the party challenging it. If, for instance, its validity is drawn in question, on the ground that it does not appear that *notice of the meeting* of the directors at which the

<sup>1</sup> Doernbecher v. Columbia City Lumber Co., 21 Or. 573; s. c. 28 Am. St. Rep. 766; 11 Rail. & Corp. L. J. 153; 28 Pac. Rep. 899.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ante*, §§ 3905, 3932. *et seq.*



assignment is made had been given to all the directors, — the validity of the proceedings will be supported upon the presumption of right-acting, unless it affirmatively appear that such notice was not given. In such a case it was said by Chief Justice Shaw: "It would be hazardous to decide that every vote, passed by an aggregate body, was void, if it did not appear by the record that all were notified. We believe it is not usual, in corporate records, to state how the members were notified. The presumption, '*omnia rite acta*,' covers multitudes of defects in such cases, and throws the burden upon those who would deny the regularity of a meeting, for want of due notice, to establish it by proof."<sup>1</sup> On like grounds, where it was shown, in support of the proceedings of the board of directors, that notice was sent to the absent directors at their respective residences, it was presumed, in the absence of evidence to the contrary, that the *notice specified the purpose* for which the meeting had been called.<sup>2</sup> Such an assignment is not invalid for want of actual notice to the absent directors, if they at the time were *absent from the State*, and they were notified by telegrams sent to their respective addresses within the State, though such telegrams were not received by them. The reason is, that a rule which would require actual notice to be communicated to such of the directors as had departed from the State, in order to the validity of such an assignment, would be a perilous rule; for in such cases the exigency may demand immediate action to save the property and to prevent expense.<sup>3</sup> Again, it may be

<sup>1</sup> Sargent v. Webster, 13 Met. (Mass.) 497; s. c. 46 Am. Dec. 743, 746; quoted with approval in Chase v. Tuttle, 55 Conn. 455; s. c. 3 Am. St. Rep. 64, 69. See also Lane v. Brainerd, 30 Conn. 565.

<sup>2</sup> Chase v. Tuttle, 55 Conn. 455; s. c. 3 Am. St. Rep. 64, 68. The record of a meeting of the directors of a corporation, at which an assignment of the assets of the corporation for the benefit of its creditors was made, be-

gan as follows: "At a special meeting of the directors, called for the purpose of making an assignment for the benefit of all the creditors, pursuant to the statutes," etc. It was held that, upon this record, until the contrary was shown, it would be presumed that the purpose of the meeting was specified in the notice sent to the respective directors. *Ibid.*

<sup>3</sup> *Ibid.*

doubted whether any notice at all is necessary, if the directors are already assembled, unless the governing statute or the by-laws prescribe some formality in respect of notice. Reasoning *obiter* upon this question, it was said: "No formality whatever is prescribed; and if all the directors happened to be together and agreed to hold a meeting immediately, for a particular object within their jurisdiction, we do not see how their action could be impeached on that ground."<sup>1</sup>

**§ 6480. Further of This Subject.**—If the meeting of the board is regularly assembled, according to principles already stated;<sup>2</sup> if, for instance, it is a *stated meeting* where special notice is not required; or if, being a special meeting, all the directors have been notified in pursuance of the governing statute, articles of association, by-law, or other governing instrument of whatever nature,—then a *majority of the quorum assembled* is sufficient for the passage of a valid resolution authorizing a conveyance of the property of the corporation;<sup>3</sup> and where the governing instrument does not otherwise provide, this quorum will be a majority of the board, so that the resolution will be valid if passed by a *majority of a majority*; and it has been so held, but on grounds which are plainly untenable, where the conveyance was made for the purpose of *preferring four members* of this majority as creditors.<sup>4</sup> But a bare majority of the board does not constitute a quorum for the transaction of such business, under statutes which have been enacted, which are merely declaratory of the

<sup>1</sup> Chase v. Tuttle, 55 Conn. 467. In Connecticut, by statute, "the assignment of any corporation may be made by the directors in legal meeting called for such purpose." Conn. Laws 1885, p. 493. By another statute of the same State, "a majority of the directors of any corporation, convened according to the by-laws, shall constitute a quorum for the transaction of business." Gen. Stat. Conn., p. 279, § 12. Under

these statutes, a majority of the board of directors, regularly convened, have power to make an assignment of the assets of the corporation for the benefit of its creditors. Chase v. Tuttle, 55 Conn. 455; s. c. 3 Am. St. Rep. 64.

<sup>2</sup> Ante, § 3935, et seq.

<sup>3</sup> Foster v. Mullanphy Planing Mill Co., 92 Mo. 79; ante, § 3914.

<sup>4</sup> Ibid.

common law,<sup>1</sup> unless they are assembled in pursuance of the governing authority; as for instance, the by-laws and rules of the corporation, and are called together upon due and legal notice given to all of them; and an assignment authorized by a majority of the directors, assembled without such legal notice, is void;<sup>2</sup> nor will it take the case out of the rule that the votes of the absent directors, if they had been present, would not have changed the result, — since they are entitled to be present for the purpose of *consultation*, and of *being heard*.<sup>3</sup>

**§ 6481. What Resolution will Authorize an Assignment.**  
It has been held that a resolution of the directors, authoriz-

<sup>1</sup> Such, for instance, is the statute of Arkansas: Mansf. Ark. Dig. Stat., §§ 964-969.

<sup>2</sup> *Simon v. Sevier Asso.*, 54 Ark. 58; s. c. 14 S. W. Rep. 1101; *Doernbecher v. Columbia City Lumber Co.*, 21 Or. 573; s. c. 28 Am. St. Rep. 766; 28 Pac. Rep. 899; 11 Rail. & Corp. L. J. 153.

<sup>3</sup> *Ante*, §§ 707, 3936; *Doernbecher v. Columbia City Lumber Co.*, 21 Or. 573; s. c. 28 Am. St. Rep. 766; 29 Pac. Rep. 899. In this case, a judgment creditor of a corporation sued its stockholders to enforce their liability for unpaid subscriptions for stock. During the pendency of the suit, three of the directors, without any notice to the other two directors, privately met and passed a resolution authorizing the president and secretary to assign all its property for the benefit of its creditors; and in pursuance thereof a deed of assignment was executed. It was held that the assignment was void. Nor did the fact that one of the absent directors was beneficially interested in the judgment on which the suit was based, and was a member of the corporation, excuse the failure to notify him. *Ibid*. It has been held that the record of the directors' meeting

showing that four of the five directors were in attendance, and that two voted in favor of the adoption of such a resolution, and one against it, will be sufficient to show its adoption, where the minutes are signed and approved by the president, he being one of the four members present, and there is nothing else to show how he voted: *Rollins v. Shaver Wagon & Co.*, 80 Iowa, 380, 388; s. c. 20 Am. St. Rep. 427; 45 N. W. Rep. 1037. But this decision, which sustained the assignment, although some of the relatives of the directors were preferred as creditors, is not entitled to any more respect than the other decisions of the same court, which hold that conveyances by insolvent corporations, for the purpose of preferring their own directors as creditors, over their general creditors, are valid. The record not only did not show that the resolution had been carried by a majority of the quorum present, but it showed the contrary; and the act of the president, in authenticating the minutes of the corporation, was in no sense a vote upon the resolution; since it would have been his duty to authenticate the minutes, although he had voted against the resolution.

ing the president and secretary to execute "judgment notes, chattel mortgages, bills of sale, or *other instruments*, in their judgment necessary to the financial interest of the company," gives them power to execute an assignment of book accounts to secure a debt.<sup>1</sup> Another court has held that a resolution of the directors of an insolvent corporation, empowering the vice-president to use all means, to do all acts, and *make all deeds* by him necessary or proper, to conserve the best interests of the association, and to use the corporate seal for such purposes, — is large enough to authorize him to make an assignment of the property of the corporation for the benefit of its creditors; notwithstanding a proviso in the same resolution authorizing the treasurer to receive all moneys and to act as manager until the business is closed.<sup>2</sup>

§ 6482. **Effect of Such an Assignment.** — The assignment by a corporation of all its property for the benefit of its creditors *does not extinguish it as a corporation*, or disable it from maintaining an action, unless the subject-matter of the action passed from it by the assignment;<sup>3</sup> though it may amount to a *de facto* dissolution, such as lets in the remedies of the creditors against stockholders.<sup>4</sup> Where the directors of a bank, *just before the expiration of its charter*, transferred the property to trustees for the benefit of the stockholders, the assignment was held to terminate all the interest which the corporation had in the property, and to vest the legal title in the trustees, and the beneficial interest in the stockholders.<sup>5</sup>

§ 6483. **Assignment After Notice of Motion for Injunction.** — An assignment of the effects of a corporation, after *notice to the president of a motion for an injunction and receiver*, will not be permitted to stand. It has been justly characterized as a fraud upon the court and its process. It was so

<sup>1</sup> Commercial Nat. Bank v. Burch, 141 Ill. 519; s. c. 33 Am. St. Rep. 331; 31 N. E. Rep. 420; modifying 40 Ill. App. 505.

<sup>2</sup> Huse v. Ames, 104 Mo. 91; s. c. 15 S. W. Rep. 965.

<sup>3</sup> Boston Glass Manufactory v. Langdon, 24 Pick. (Mass.) 49; s. c. 35 Am. Dec. 292.

<sup>4</sup> Ante, § 3345.

<sup>5</sup> Stevens v. Hill, 29 Me. 133.

held, but in a case where the motion for an injunction and receiver had been allowed *before* the execution of a deed of assignment;<sup>1</sup> but the principle would have been exactly the same if the diligence of the managers of the corporation had outrun that of the petitioning creditors.

§ 6484. **Who Eligible as Assignee.**—This subject will be considered in another title in reference to *receivers*.<sup>2</sup> It has been held that a *solicitor* of an insolvent corporation, who has advised and been intimately associated with its management, alleged to have been fraudulent, should be removed when appointed by it as its assignee in insolvency.<sup>3</sup> The fact that the assignee is, or has been, a *stockholder*, or is himself *insolvent*, does not necessarily disqualify him from exercising the trust, though it is a circumstance which a jury may consider as bearing on the question of the good faith of the assignment.<sup>4</sup> It has even been held that such a deed is not void, although made to the *president* of the corporation, who, in that character, executed the deed as grantor.<sup>5</sup> Nor is it invalid because made to persons who, under the charter, are ineligible to the office of *trustees* of the corporation.<sup>6</sup> There is one extraordinary decision to the effect that an assignment made by a governing board of a banking corporation to fifteen trustees, all of them stockholders and ten of them members of the board making the assignment,—the ten constituting a two-thirds' majority of such board,—is not for that reason invalid.<sup>7</sup>

§ 6485. **What if One Assignee Refuses to Qualify.**—An assignment for the benefit of creditors creates a *trust*, and

<sup>1</sup> Leavitt v. Tylee, 1 Sandf. Ch. (N. Y.) 207.

<sup>2</sup> Post, § 6868, et seq.

<sup>3</sup> Failey v. Stockwell, 2 Pa. Dist. Rep. 197; s. c. 12 Pa. Co. Ct. 403.

<sup>4</sup> Covert v. Rogers, 38 Mich. 363; s. c. 31 Am. Rep. 319.

<sup>5</sup> Pope v. Brandon, 2 Stew. (Ala.) 401; s. c. 20 Am. Dec. 49.

<sup>6</sup> De Ruyter v. St. Peter's Church, 3 N. Y. 238.

<sup>7</sup> Ex parte Conway, 4 Ark. 302. An apology is due to the profession for even citing this decision. A candid reading of it will disclose that it is one of the most indefensible decisions to be found in any American book of judicial reports.

the assignee is a *trustee*.<sup>1</sup> If one of several trustees refuses to accept and execute the trust, the whole estate will vest in the others who act, as much so as though the refusing trustee were dead, or as though the trust had never been tendered to him.<sup>2</sup> So, if a corporation makes to two persons an assignment for the benefit of its creditors, and one of them refuses to qualify, all the powers of the trust vest in the other, and he may proceed alone to collect the assets and execute the trust.<sup>3</sup> In such a case an *allegation in a pleading* that "said White failed and refused to qualify as assignee under said deed," was regarded as tantamount to an averment of declination of the trust on the part of White.<sup>4</sup>

§ 6486. May Maintain Actions upon Share Subscriptions. The assignee may, of course, sue for and collect the unpaid share subscriptions. If he could not do this, the assignment would to this extent be nugatory.<sup>5</sup>

§ 6487. Schemes of Composition or "Arrangement."—The power to compel all the creditors to acquiesce in a scheme of "arrangement," determined upon by a stated majority of them, cannot be exercised by a court, under American theories, unless conferred by a statute; and such a statute, it seems, will not, if enacted by the legislature of a State, be valid, because it will be within the inhibition of that clause of the constitution of the United States against State legislation impairing the obligation of contracts. Such a provision existed in the late bankruptcy act, and was no doubt with the power of Congress. The Parliament of England, whose power is untrammelled by the restraints of a written constitution, exercises this power; and so does the Parliament of the Dominion of Canada. One of the statutes enacted in England

<sup>1</sup> Perry on Trusts, § 585; Shockley v. Fisher, 75 Mo. 498, 502.

<sup>2</sup> King v. Donnelly, 5 Paige (N. Y.), 46; Perry on Trusts, § 273; Hill on Trustees, p. 225, *et seq.* Compare *Ex parte Conway*, 4 Ark. 302.

<sup>3</sup> Shockley v. Fisher, 75 Mo. 498, 502.

<sup>4</sup> *Ibid.*

<sup>5</sup> Shockley v. Fisher, 75 Mo. 498, 502; Nathan v. Whitlock, 9 Paige (N. Y.), 152; Thomp. Stock., § 340; *ante*, § 3553. Compare § 1818.

in the exercise of this power is known as the Joint Stock Companies Arrangement Act, 1870. By this act power is given to the court superintending the winding up of a company to sanction schemes of arrangement, determined upon by a majority in number and three-fourths in value of its creditors.<sup>1</sup> Under this statute, the court will not sanction a scheme, as of course, because it has been approved by a large majority of the creditors, but the court must be satisfied that the arrangement is fair and equitable.<sup>2</sup>

<sup>1</sup> The second section of the statute is as follows: "Where any compromise or arrangement shall be proposed between a company, which is, at the time of the passing of this act or afterwards, in the course of being wound up, either voluntarily or by or under the supervision of the court, under the *Companies Act*, 1862 and 1867, or either of them, and the creditors of such company, or any class of such creditors, it shall be lawful for the court, in addition to any other of its powers, on the application, in a summary way, of any creditor or the liquidator, to order that a meeting of such creditors, or class of creditors,

shall be summoned in such manner as the court shall direct, and, if a majority in number, representing three-fourths in value, of such creditors or class of creditors, present, either in person or by proxy, at such meeting, shall agree to any arrangement or compromise, such arrangement or compromise shall, if sanctioned by an order of the court, be binding on all such creditors or class of creditors, as the case may be, and also on the liquidator and contributories of the said company."

<sup>2</sup> *Re Empire Mining Co.*, 44 Ch. Div. 402.

## CHAPTER CXLVI.

### PREFERRING CREDITORS.

#### SECTION

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§ 6492. **Doctrine that an Insolvent Corporation cannot Prefer Particular Creditors.** — There are two doctrines upon this subject. One, — and the only one which is deserving of any respect, — is, that the assets of a corporation are a *trust*



*fund for its creditors*;<sup>1</sup> that, when the corporation becomes insolvent, or when its affairs reach such a state that its stockholders or directors find themselves obliged to deal with its assets in view of its approaching suspension, they can only deal with them in the character of trustees for its creditors; that this necessarily means that they can only deal with them as trustees for *all* its creditors, and not for particular creditors whom they may desire to pay in preference to the others,—that is, to pay out of money which equitably belongs to the others. This doctrine, in short, is that a corporation, being insolvent, or dealing with its funds in contemplation of insolvency, and not in the ordinary course of its business, has no power to prefer particular creditors.<sup>2</sup>

§ 6493. **Statutory Affirmations of This Doctrine.**—*Statutes* exist in some of the States prohibiting such preferences. Such was a statute of Georgia relating to insolvent banks.<sup>3</sup> Such also was a statute of New York relating to *moneyed corporations*,<sup>4</sup> construed as applicable to *mutual insurance companies*.<sup>5</sup> Such also is a statute of

<sup>1</sup> *Ante*, §§ 1569, 2961, *et seq.*

<sup>2</sup> *Lippincott v. Shaw Carriage Co.*, 25 Fed. Rep. 577; *Howe v. Sanford Fork & Co.*, 44 Fed. Rep. 231; *White & c. Man. Co. v. Pettes Imp. Co.*, 30 Fed. Rep. 864; *Adams v. Kehlor Milling Co.*, 35 Fed. Rep. 433; *Beach v. Miller*, 130 Ill. 162; *s. c.* 17 Am. St. Rep. 291; 22 N. E. Rep. 464; *Haywood v. Lincoln Lumber Co.*, 64 Wis. 639; *s. c.* 26 N. W. Rep. 184; *Olney v. Conanicut Land Co.*, 16 R. I. 361; *s. c.* 18 Atl. Rep. 181; *Rouse v. Merchants' Nat. Bank*, 46 Ohio St. 493; *s. c.* 15 Am. St. Rep. 644; 22 N. E. Rep. 293; 5 L. R. A. 378; 22 Chic. Leg. News, 41; *Hope v. Valley City Salt Co.*, 25 W. Va. 789; *Gillet v. Moody*, 3 N. Y. 479; *State v. Brockman*, 39 Mo. App. 131; *Kankakee Woolen Mill Co. v. Kampe*, 38 Mo. App. 229; *Consolidated Tank Line Co. v. Kansas City Varnish Co.*, 45 Fed. Rep. 7; *Goodyear Rubber Co. v.*

*Scott Co.*, 96 Ala. 439; *s. c.* 11 South. Rep. 370; *Kendall v. Bishop*, 76 Mich. 634; *s. c.* 43 N. W. Rep. 645 (*semble*); *Smith Middlings Purifier Co. v. McGroarty*, 136 U. S. 237 (under laws of Ohio); *Gibson v. Trowbridge Furniture Co.*, 96 Ala. 357; *s. c.* 11 South. Rep. 365; *Thompson v. Huron Lumber Co.*, 4 Wash. 600; *s. c.* 30 Pac. Rep. 741; *Tripp v. Northwestern Nat. Bank*, 45 Minn. 383 (under a statute).

<sup>3</sup> Ga. Code, § 4429; *Hill v. Western & c. R. Co.*, 86 Ga. 284; *s. c.* 12 S. E. Rep. 635.

<sup>4</sup> 1 R. S. New York, 591, §§ 9, 10.

<sup>5</sup> *Furniss v. Sherwood*, 3 Sandf. (N. Y.) 521. The transfer of a note made by such a company, when insolvent, as *further security* for an existing loan made previous to insolvency, on an understanding or verbal agreement with its president that the lender shall be at all times kept ade-

the same State "to prevent fraudulent bankruptcies by incorporated companies," which will be separately considered.<sup>1</sup> Such also is the statute of that State, enacted in the year 1882, relating to transfers<sup>2</sup> by banking corporations.<sup>3</sup> Such also is a recent statute of Arkansas. Doubtless similar statutes exist in other States.

**§ 6494. Doctrine that an Insolvent Corporation can Prefer Creditors.**—The other doctrine is frequently met with in the decisions of courts whose judges, in their opinions, mouth the proposition that the assets of a corporation are a trust fund for its creditors; but it mocks that doctrine, — or rather, it obliterates it entirely, — since it necessarily proceeds upon the proposition that an insolvent corporation, or a corporation whose stockholders or directors anticipate its insolvency, has the same power, in dealing with its assets, which an individual, under like circumstances, has. The doctrine, in these cases, is that corporations, when insolvent or in contemplation of insolvency, may dispose of their assets so as to prefer favored creditors, although the result may be to leave nothing for others, who stand on a footing equally meritorious.<sup>4</sup> According to this low conception, in the absence of

quately secured with collaterals, is in violation of this statute, and cannot be sustained. *Ibid.*

<sup>1</sup> *Post*, § 6514.

<sup>2</sup> *Post*, § 6519.

<sup>3</sup> 28 Am. Law Rev. 93.

<sup>4</sup> *Garrett v. Burlington Plow Co.*, 70 Iowa, 697; *s. c.* 59 Am. Rep. 461; 29 N. W. Rep. 395; *Stratton v. Allen*, 16 N. J. Eq. 229; *Wilkinson v. Bauerle*, 41 N. J. Eq. 635; *s. c.* 7 Atl. Rep. 514; *Allis v. Jones*, 45 Fed. Rep. 148; *Warfield v. Marshall County Canning Co.*, 72 Iowa, 666; *s. c.* 2 Am. St. Rep. 263; 34 N. W. Rep. 467; *Bier v. Gorrell*, 30 W. Va. 95; *s. c.* 8 Am. St. Rep. 17; 3 S. E. Rep. 30; *Planters' Bank v. Whittle*, 78 Va. 737; *Flint & Co. v. Dewey*, 14 Mich. 477; *Ringo v. Biscoe*, 13 Ark. 563; *Catlin v. Eagle Bank*, 6 Conn

233; *Lippincott v. Shaw Carriage Co.*, 25 Fed. Rep. 577; *Dana v. Bank of United States*, 5 Watts & S. (Pa.) 223; *Schroeder v. Mason*, 25 Mo. App. 190; *Albany & Co. v. Southern Agric. Works*, 76 Ga. 135; *s. c.* 2 Am. St. Rep. 26; *State v. Bank of Maryland*, 6 Gill & J. (Md.) 205; *s. c.* 26 Am. Dec. 561; *Sargent v. Webster*, 13 Met. (Mass.) 497; *s. c.* 46 Am. Dec. 743; *Lexington Life & Co. v. Richardson*, 17 B. Mon. (Ky.) 412; *s. c.* 66 Am. Dec. 165; *St. Louis v. Alexander*, 23 Mo. 524, *per* Ryland, J.; *Manhattan Brass Co. v. Webster*, 37 Mo. App. 145; *Breene v. Merchants' & Co. Bank*, 11 Colo. 97; *s. c.* 20 Am. & Eng. Corp. Cas. 532; 17 Pac. Rep. 280; *Pyles v. Furniture Co.*, 30 W. Va. 123; *s. c.* 2 S. E. Rep. 909; *Foster v. Mullanphy Planing Mill Co.*, 92

statutory prohibitions, common in insolvent laws, the directors of an *insolvent corporation* have authority to convey all the property of the corporation to one of its creditors, upon con-

Mo. 79; s. c. 4 S. W. Rep. 200; 10 West. Rep. 273; affirming s. c. 16 Mo. App. 150; *Palmer v. Hutchinson Grocery Co.* (Miss.), 11 South. Rep. 789; *Vail v. Jameson*, 41 N. J. Eq. 648; s. c. 7 Atl. Rep. 523; *Bergen v. Porpoise Fishing Co.*, 42 N. J. Eq. 397; s. c. 8 Atl. Rep. 523. By the *New Jersey Act* of Feb. 16, 1829, "to prevent frauds by incorporated companies," all sales or transfers of its property, by an incorporated company, either after insolvency or suspension, or in contemplation of insolvency, were forbidden and declared void as to creditors, though good as to *bona fide* purchasers for value. See N. J. Rev. 1846, p. 129. These provisions were construed as requiring the affairs of any incorporated company, on becoming insolvent, to be put in a train of proceedings, the form of which the statute prescribed, whereby its property was distributed among its creditors, and as *forbidding the preference* of any creditor, after insolvency, known or contemplated. *Coryell v. New Hope &c. Bridge Co.*, 9 N. J. Eq. 457; *Van Wagenen v. Paterson Sav. Bank*, 10 N. J. Eq. 13; *State Bank v. Bank of New Brunswick*, 3 N. J. Eq. 266; *Kinsela v. Cataract City Bank*, 18 N. J. Eq. 158; *Wells v. Rahway White Rubber Co.*, 19 N. J. Eq. 402. But in the more recent revision of the statutes of New Jersey, these provisions were omitted, and the act to prevent frauds by incorporated companies was repealed. N. J. Rev., p. 1395, § 411. With the statutory prohibition out of the way, the courts of that State have fallen in line with the decisions in other States, which hold that insolvent corporations have the

same power to prefer their creditors that individuals have. *Wilkinson v. Bauerle*, 41 N. J. Eq. 635; s. c. 7 Atl. Rep. 514; *Vail v. Jameson*, 41 N. J. Eq. 648; s. c. 7 Atl. Rep. 523; *Bergen v. Porpoise Fishing Co.*, 42 N. J. Eq. 397; s. c. 8 Atl. Rep. 523; *Bates v. Elmer Glass Co.* (N. J. Eq.), 15 Atl. Rep. 246. Under the *Pennsylvania Act* of 1836, an *attachment-execution* did not lie against a corporation. Nor could the property of an insolvent corporation be seized for the benefit of a particular creditor; and the test of insolvency was the absence of tangible property. *Ridge Turnp. Co. v. Peddle*, 4 Pa. St. 490. But now, it seems that a corporation may, in that State, give a *judgment note* for an honest debt to one of its members. *Rendall v. Jackson*, 1 Pa. Dist. Rep. 726. But see *Re Clymer Distilling Co.*, 2 Pa. Co. Ct. 111. In Arkansas, an assignment of all its assets by a bank, which never had any capital, except what it had borrowed under a scheme by which it was propped up by the credit of the State, was upheld, though it contained an elaborate scheme of *preferences*, dividing the creditors, for this purpose, into *seven classes*, and making the officers of the corporation *first*. *Ex parte Conway*, 4 Ark. 302. This right of the same corporation to prefer creditors was reaffirmed and rendered worse by an additional holding, to the effect that a creditor might buy up its bills and set them off to the extent of their face value, accrued *interest*, and the *penalty* of ten per cent per annum, denounced by the charter against the bank for suspending specie payments. *Ringo v. Biscoe*, 13 Ark. 563.

dition that he shall apply the property to the payment of his claim and pay over the surplus, if any, to the treasurer of the corporation. The theory is, that the mere insolvency of a corporation does not convert its effects into a trust fund for the benefit of its creditors,<sup>1</sup> in the sense which excludes this power. A *deed* of the corporation is not necessary to effect such an assignment, if no real estate is included in the transfer. The *vote* of the directors, coupled with acts on the part of the assignee indicative of his acceptance of the assignment, makes an agreement binding upon the corporation.<sup>2</sup> So, where a corporation, for the purpose of securing certain of its notes on which the directors were accommodation indorsers, assigned certain bonds which were part of its assets, at a time when suits were pending against it for the appointment of a receiver, it was held that the assignment, if made in good faith, was valid.<sup>3</sup>

**§ 6495. Reasons Given in Support of This Doctrine.—**

The power of a corporation to prefer its creditors has been regarded as a necessary corollary from the premise that a corporation, speaking in general terms, may do all that, in like circumstances, an individual may do.<sup>4</sup> The same reasoning may operate to invalidate an assignment of its assets by a corporation. If, for instance, there is a statute governing the subject of assignments by insolvent debtors for the benefit of their creditors, and this statute prohibits the making of preferences in such an assignment, an assignment by a corporation of all its property, in which it prefers particular creditors

<sup>1</sup> *Dana v. Bank of United States*, 5 Watts & S. (Pa.) 223, 247; *Catlin v. Eagle Bank*, 6 Conn. 233; *Union Bank v. Ellicott*, 6 Gill & J. (Md.) 363; *State v. Bank of Maryland*, 6 Gill & J. (Md.) 205; *s. c.* 26 Am. Dec. 561.

<sup>2</sup> *Sargent v. Webster*, 13 Met. (Mass.) 497; *s. c.* 46 Am. Dec. 743.

<sup>3</sup> *Planters' Bank v. Whittle*, 78 Va. 737.

<sup>4</sup> *Foster v. Mullanphy Planing Mill Co.*, 92 Mo. 79, 87, 88. In this case a deed of trust, given to secure certain creditors of the corporation, was held valid, against the objection, made by an attaching creditor, that it gave a preference to, and secured the debts of four of the directors who participated in the resolution of the board authorizing the execution of the deed.

and gives the surplus to the corporation itself, is void. It is so held under the statutes of Michigan, which provide that all transfers, made in trust for the use of the grantor, are void as against creditors,<sup>1</sup>—the court proceeding upon the principle of its previous decisions, that a corporation may, if authorized by its directors, assign its property on the same terms as a private person might do.<sup>2</sup> But this principle would not operate to invalidate the mortgaging or conveying, out and out, by a corporation, of a *portion* of its property, to secure particular creditors. Occasionally an opinion is met with, which endeavors to reason in favor of the right to prefer creditors, in the face of the proposition that the assets of an insolvent corporation are a *trust fund for its creditors*; and in one case this reasoning was to the effect that such assets are not a trust fund for the creditors until a court of equity lays hold of them, for the purpose of distribution among the creditors, and that, until that is done, the same right to prefer creditors exists on the part of the corporation, and the same remedies on the part of its creditors, as in the case of natural persons.<sup>3</sup> In Kentucky, the doctrine that a corporation may prefer its creditors is sought to be upheld in the face of the doctrine that its assets are a *trust fund* for its creditors, by the following reasoning: "The officers of a railroad company hold the earnings and profits of its roads as a trust fund for the payment of its debts. But, in the absence of contract liens, or rights created by legal proceedings, they may exercise a reasonable and proper discretion as to the order in which the debts shall be paid. And this discretion cannot

<sup>1</sup> Kendall v. Bishop, 76 Mich. 634. The conveyance in this case was held void for two reasons, one of which was that it provided that the corporation should receive back the surplus after satisfying the creditor who had been preferred. But this case seems to be overruled by Bank of Montreal v. Potts Salt &c. Co., 93 Mich. 342. A decision in Massachusetts, where there was the same

provision, holds the conveyance good. Sargent v. Webster, 13 Met. (Mass.) 497; s. c. 46 Am. Dec. 743.

<sup>2</sup> Town v. Bank of River Raisin, 2 Dougl. (Mich.) 530. See also Bank Comm'rs v. Bank of Brest, Harr. Ch. (Mich.) 106.

<sup>3</sup> See, for instance, Breene v. Merchants' &c. Bank, 11 Colo. 97; s. c. 20 Am. & Eng. Corp. Cas. 532; 17 Pac. Rep. 280.

be taken from them by notice to the company that a particular creditor intends to demand a preference.”<sup>1</sup>

§ 6496. **The Fallacy of These Reasons.** — It is thus perceived that the courts which have adopted the doctrine that an insolvent corporation may prefer its creditors, have jumped at the conclusion by reasoning that, in the absence of statutory prohibitions, a corporation has the same power in disposing of its property that an individual has. But in adopting this hasty conclusion, they have overlooked the fact that the analogy between an insolvent individual and an insolvent corporation wholly fails in this, — that, although an insolvent individual may turn over his property to certain of his creditors whom he desires to prefer, and may, by so doing, hinder and delay the others, yet he merely hinders and delays them; he does not, by that act, *destroy himself*; he still *lives*; and he may, and often does, get on his feet again, and acquire property and discharge his previous obligations. But when a corporation becomes insolvent, and ceases to have the means of carrying out the objects of its creation, and dispossesses itself of all its property, it *destroys itself*, and becomes *ipso facto*, *dissolved*, and, in fact, is regarded as a dissolved corporation for many purposes, having reference to the rights of creditors.<sup>2</sup> An assignment for the benefit of creditors is, in point of fact and experience, an *end* of the corporation; and to this statement there is not one exception in a thousand cases, as every lawyer and judge knows. The corporation, after such a catastrophe, not only has nothing more for its unpreferred creditors, but it never will have anything more for them. Its act of exhausting its assets in preferring particular creditors deprives the others of *all remedy*, unless in those cases where the law has left them the remedy of proceeding against its stockholders. When a corporation suspends business and makes an assignment, by reason of insolvency, its situation is analogous to that of an individual debtor under a bankrupt

<sup>1</sup> Newport &c. R. Co. v. Douglass, 12 Bush (Ky.), 673, 710, opinion of the court by Lindsay, C. J.

<sup>2</sup> *Ante*, § 3345.

law, which, upon his surrendering his property for the benefit of his creditors, discharges him from any further liability for his debts. The individual is discharged *de jure*, by operation of the statute of bankruptcy; the corporation is discharged *de facto*, by operation of the natural laws of its existence. But the remedy of the creditor is not determined in the one case any more effectually than in the other. We ask the judges who are upholding this principle that a corporation may prefer its creditors, whether a statute of bankruptcy was ever enacted in England or in this country, which allowed an insolvent debtor to assign his property for the benefit of certain preferred creditors, postponing the others, and which then discharged him from liability for all his debts? That is exactly the effect of the rule which allows a corporation to prefer its creditors. It allows it to hand over its property to certain favored creditors, and then go out of existence and leave the rest of its creditors utterly remediless. The writer wishes to weigh his words carefully, and not to speak disrespectfully of the judicial courts; but he feels that he does not characterize this doctrine in the language which it deserves unless he calls it an infamous doctrine which is not supported by any underlying principle of justice. It gives added weight to the calamity which the public suffer through the fact of nearly every form of industry passing into the hands of limited liability corporations. The infamy is intensified where the *directors* are allowed to appropriate the property of the corporation in payment of debts due from the corporation to themselves, leaving its other creditors hopelessly without remedy.

**§ 6497. Doctrine that It can Prefer its Own Stockholders.**—The doctrine that a corporation can prefer its creditors has been carried to the extent of holding that, in the absence of any legislative prohibition, it can prefer one of its own stockholders, to the exclusion of its other creditors;<sup>1</sup> and this, although, under the governing statute,

<sup>1</sup> Reichwald v. Commercial Hotel Co. v. Page, 17 B. Mon. (Ky.) 412; Co., 106 Ill. 439; Lexington Life &c. s. c. 66 Am. Dec. 165; Whitwell v. 5122

the stockholders are liable for the debts of the corporation, in a primary sense, as partners, so that an execution issuing from a judgment recovered against a corporation may, in the event of a deficiency of corporate assets, be levied upon the property of the stockholders.<sup>1</sup>

**§ 6498. Doctrine that It can Prefer its Own Directors. —**

It is to be regretted that some of the American courts have carried the right of an insolvent corporation to prefer creditors to the extent of holding that it may not only prefer creditors who are its own *shareholders*, but may prefer such as are its own *directors*.<sup>2</sup> This infamous doctrine has been

Warner, 20 Vt. 425 (holding that stockholders, securing to themselves a preference, are not guilty of such a *fraud* as renders them personally liable to creditors).

<sup>1</sup> Sargent v. Webster, 13 Met. (Mass.) 497; s. c. 46 Am. Dec. 743. Where such an assignment was made for the payment of liabilities on which the assignee was an indorser for the corporation, upon condition that the assignee give a bond to the corporation binding him to apply the proceeds of the property to the payment of such indorsed notes, and to account for such application, and pay over the balance, if any, — the court found nothing in the assignment which was void as against creditors, in such a sense as to sustain an attachment against the property assigned; and, the property having been attached by another creditor, the assignee recovered it in replevin. It was admitted that the conveyance would be fraudulent if made by an individual, because repugnant to the letter and spirit of the insolvent laws. But, as corporations were not subject to the insolvent laws at that time, and as the court saw nothing in such an assignment which was not in fur-

therance of the purposes of the corporation, one of those purposes being to pay its debts and to enable it to go on successfully with its business by the aid of new assessments, or to wind up and settle upon terms most advantageous to the stockholders, — the court sustained the assignment. *Ibid.*, opinion by Shaw, C. J.

<sup>2</sup> Farmers' &c. Bank v. Wasson, 48 Iowa, 336; s. c. 30 Am. Rep. 398; Warfield v. Marshall County Canning Co., 72 Iowa, 666; s. c. 2 Am. St. Rep. 263; 19 Am. & Eng. Corp. Cas. 194; 34 N. W. Rep. 467; Foster v. Mullanphy Planing Mill Co., 92 Mo. 79; Bank of Montreal v. Potts Salt &c. Co., 90 Mich. 345; s. c. 51 N. W. Rep. 512; Hills v. Stockwell &c. Furniture Co., 23 Fed. Rep. 432, 434 (under Michigan law); Smith v. Skeary, 47 Conn. 54; Central R. &c. Co. v. Claghorn, 1 Speers' Eq. (S. C.) 545 (insolvency not found as a fact); Planters' Bank v. Whittle, 78 Va. 737 ("providing they did it with the utmost good faith"); Buell v. Buckingham, 16 Iowa, 284; s. c. 85 Am. Dec. 516; Garrett v. Burlington Plow Co., 70 Iowa, 697; s. c. 59 Am. Rep. 461. Compare Hallam v. Indiana Hotel Co., 56 Iowa, 178.



pushed to the extent of allowing the directors and shareholders of a corporation to prefer themselves at the expense of its creditors at large, although the director or shareholder *may have voted for the proposition*.<sup>1</sup> A conception which proceeds upon a similar level is that the fact that the directors had *falsely represented to the public*, by means of the letter heads on which they conducted the business correspondence of their company, that it had a certain capital, does not estop them from preferring themselves before the general creditors of the company, whom they have thus deceived into giving credit to it.<sup>2</sup> It cannot escape attention that this doctrine offers a new inducement to the incorporation of every species of business, because it gives the members of corporations an advantage over their creditors which the members of partnerships do not possess. A *partnership* cannot distribute its assets to its partners in preference to its creditors; but under this miserable doctrine, if it becomes incorporated, it can do so.

§ 6499. Reasoning of the Judges so Holding.—It would not be profitable to quote the mouthings of judges upon this question; but it is strange that judges can be found so destitute of a sense of justice as to announce the following proposition: "There is nothing, either in law or equity, which forbids a member, or even a director, of a corporation, from contracting with it, and, like any other individual, he has a right to prescribe his own terms, which the corporation are at liberty to accept or reject; and when the contract is concluded, he stands in the same relation to the other creditors of the corporation as any other individual would under the same circumstances. *When the question of priority arises, it must depend on the bona fides of the transaction, fraud or no fraud. If, by greater diligence, and without fraud, he has fairly gained an advantage over the other creditors, he is entitled to re-*

<sup>1</sup> Warfield v. Marshall County Canning Co., 72 Iowa, 666; s. c. 2 Am. St. Rep. 263; Foster v. Mulanphy Planing Mill Co., 92 Mo. 79.

<sup>2</sup> Warfield v. Marshall County Canning Co., 72 Iowa, 666; s. c. 2 Am. St. Rep. 263.

*tain it.*"<sup>1</sup> Undoubtedly the directors have a right to contract with the corporation while it is a going concern, provided they do it fairly;<sup>2</sup> but, in general, they are the only ones whose knowledge of the internal affairs of the corporation will enable them to predict, in any state of circumstances, whether it can continue a going concern or must suspend and go into liquidation; and to say that when they avail themselves of this knowledge, as against outside creditors, who have, and from the nature of the case can generally have, no such knowledge, they are merely exercising "greater diligence and without fraud," is a strange perversion of language, and one which exhibits a low sense of justice. The principle under consideration does not, of course, apply to the case where directors advance money to the corporation in good faith, while it is a solvent and a going concern, to enable it to prosecute its ordinary business, and the corporation, while still a solvent and a going concern, repays this advance.<sup>3</sup> Nor does the principle have any necessary connection with a case where, a corporation being in difficulties, some of its

<sup>1</sup> *Central R. &c. Co. v. Claghorn*, 1 Speers' Eq. (S. C.) 545, 562; quoted with approval in *Pianters' Bank v. Whittle*, 78 Va. 737, 742.

<sup>2</sup> *Ante*, § 4059.

<sup>3</sup> *Holt v. Bennett*, 146 Mass. 437. In this case, Devens, J., drew the proper distinction in the following language: "The position of the plaintiff appears to be, that a corporation, intending in good faith to proceed with its business, and to render the patents available which it possesses, cannot pay its directors money which it has borrowed from them in the ordinary course of business, without rendering them responsible for the amount which they thus receive, to any of its creditors whose debts may then be owing from it, although not then due and payable. This is quite untenable. The cases cited by the plaintiff,—which hold that where a

corporation is insolvent, it cannot make conveyances of its property in contemplation of such insolvency, for the security of its directors, who are also its creditors, to the exclusion of others,—do not require examination or discussion. They have no relation to a case like that at bar. There was no reason why this corporation should not conduct its business in the ordinary manner, even if, incidentally, debts for borrowed money were paid to its directors, this being done fairly and in its prosecution of the object for which it was formed. Nor was there any reason why the plaintiff should have his debt paid in advance because the money of the corporation was being used to pay debts then payable, to purchase materials, and to defray other legitimate expenses." *Ibid.*, 438, 439.

directors come to its rescue and advance money and take a mortgage to secure their present advances, and thereby help the corporation out of its difficulties, and put it upon its feet so that it becomes prosperous,—after which, other of its members, who failed or refused to aid it in its difficulties, come forward, and, in a suit brought in its name, endeavor to make the directors, who have purchased its property under their mortgage at a foreclosure sale, account for the profits which they have realized.<sup>1</sup>

§ 6500. **That It can Prefer Them although the Debts are in Excess of the Statutory Limit.**—One court has proceeded upon a conception so poor as to hold that *directors* may, by mortgage of the corporate property, *prefer themselves* as creditors, although they have, in violation of their duty, allowed the corporation to become indebted in excess of the limit prescribed by its governing statute.<sup>2</sup> One can readily understand why such misconduct on the part of the directors should not be allowed to prejudice the junior creditors of the corporation, who became such in consequence of the fraud of the directors in concealing from them the true state of its indebtedness; but it should seem that it ought to constitute a good reason why they should not be allowed to prefer themselves over the creditors whom they have thus defrauded.

§ 6501. **That Such a Preference Gives No Right of Attachment.**—It is easier to sustain the view that the fact that the directors of a corporation use the corporate funds in preferring creditors of the corporation, themselves among the num-

<sup>1</sup> Such, in substance, was *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587. This case rests on considerations of justice which are made perfectly clear in the opinion of the court by Mr. Justice Miller, and it is a gross perversion of the doctrine therein announced to cite the case in favor of the proposition that, when it becomes apparent to the directors that the cor-

poration cannot go on, they have a right to prefer themselves over other general creditors, by taking security for past advances which they made to it without security.

<sup>2</sup> *Garrett v. Burlington Plow Co.*, 70 Iowa, 697; *s. c.* 59 Am. Rep. 461; *Warfield v. Marshall County Canning Co.*, 72 Iowa, 666; *s. c.* 2 Am. St. Rep. 263.

ber, gives to a creditor who is not preferred no right of *attachment* against the corporate funds.<sup>1</sup> The reason is that, if such a preference can be avoided, it can only be avoided on the principle that the assets of the corporation are a *trust fund* for its creditors, which means that they are a *joint trust* for *all* of its creditors; and that, from the nature of the case, such a trust cannot be enforced at law. Indeed, to allow the postponed creditors to attach on the ground that the directors have made a conveyance of the corporate assets in violation of this trust, would not result in upholding or enforcing the trust, but would result in a further violation of it, by which the attaching creditors would be let in to a preference.

**§ 6502. That the President of a Corporation can Prefer Himself as a Creditor over the Corporation.**—This is on a level with the conception that the *managing officer* of a corporation can be allowed so to intrigue as to prefer himself *over the corporation*, as a creditor of one of its stockholders. The court reason that the rule that a managing officer of a corporation, such as its president, must act toward the corporation with the utmost good faith in the discharge of his official duties, and cannot speculate out of his trust, does not require him to sacrifice his own rights, under contracts between himself and third persons, which have no reference to the business of the corporation, nor to postpone his own rights to those of the corporation; that an insolvent debtor has the legal right to prefer one creditor over another, and the preferred creditor has an equal right to accept such a preference; that it is no breach of trust for the president of a corporation to accept a preference over the corporation from an insolvent who is at the same time indebted to him and to the corporation; and that he may even accept an assignment by such insolvent of his shares in the very corporation of which he is president, provided the corporation has no express lien thereon.<sup>2</sup>

<sup>1</sup> *Foster v. Mullanphy Planing Mill Co.*, 92 Mo. 79, 90; affirming *s. c.* 16 Mo. App. 150.

<sup>2</sup> *Farmers' &c. Bank v. Wasson*, 48 Iowa, 336; *s. c.* 30 Am. Rep. 398.

§ 6503. **Doctrine that It cannot Prefer its Own Directors and Officers.**—The better doctrine, and one resting on principles of justice too obvious for explanation or comment, is that when a corporation is insolvent, or when it reaches such a condition that its creditors see that they must deal with its assets in the view of its probable suspension, — they cannot use those assets to prefer themselves, as creditors or sureties, in respect of past advances, to the prejudice of its general creditors.<sup>1</sup> The doctrine of these cases is, that a director who uses the property of the corporation to prefer himself as a creditor may be charged in equity to the extent of the property so diverted, as a *trustee* for all the creditors equally.<sup>2</sup>

§ 6504. **Further of This Doctrine.**—We have already seen that judicial opinion is not unanimous upon the ques-

<sup>1</sup> Lippincott v. Shaw Carriage Co., 25 Fed. Rep. 577; Howe v. Sanford Fork &c. Co., 44 Fed. Rep. 231; Consolidated Tank Line Co. v. Kansas City Varnish Co., 45 Fed. Rep. 7; Williams v. Jackson Co. Patrons, 23 Mo. App. 132; Goodyear Rubber Co. v. Scott Co., 96 Ala. 439; s. c. 11 South. Rep. 370; Gibson v. Trowbridge Furniture Co., 96 Ala. 357; s. c. 11 South. Rep. 365; Haywood v. Lincoln Lumber Co., 64 Wis. 639; Smith v. Putnam, 61 N. H. 632; Beach v. Miller, 130 Ill. 162; s. c. 17 Am. St. Rep. 291; 14 N. E. Rep. 698; reversing s. c. 23 Ill. App. 151 (distinguishing Merrick v. Peru Coal Co., 61 Ill. 479, and Harts v. Brown, 77 Ill. 226); Roseboom v. Whittaker, 132 Ill. 81; s. c. *sub nom.* Roseboom v. Warner, 23 N. E. Rep. 339; Richards v. New Hampshire Ins. Co., 43 N. H. 263; Port v. Russell, 36 Ind. 60; s. c. 10 Am. Rep. 5; Drury v. Cross, 7 Wall. (U. S.) 299; Ogden v. Murray, 39 N. Y. 202; Sprague-Brimmer Man. Co. v. Murphy Furnishing Goods Co., 26 Fed. Rep. 572; Arkansas Valley Agric. Soc. v. Eic-

holtz, 45 Kan. 164; s. c. 25 Pac. Rep. 613; Cleveland Rolling Mill Co. v. Crawford (Ill. C. C.), 9 Rail. & Corp. L. J. 171 (property already in hands of receiver); Carey v. Wadesworth (Ala.), 11 South. Rep. 350; Sicardi v. Keystone Oil Co., 149 Pa. St. 148; s. c. 24 Atl. Rep. 163; Appeal of Kerstetter, 149 Pa. St. 148; s. c. Atl. Rep. 163; Kankakee Woolen Mill Co. v. Kampe, 38 Mo. App. 229; State v. Brockman, 39 Mo. App. 131; Farmers' Loan & T. Co. v. San Diego Street Car Co., 45 Fed. Rep. 518 (pledge made contrary to purpose declared in resolution); Olney v. Conanicut Land Co., 16 R. I. 597; s. c. 27 Am. St. Rep. 767; 18 Atl. Rep. 181; 6 Rail. & Corp. L. J. 414; 40 Alb. L. J. 325; 29 Cent. L. J. 333; 5 L. R. A. 361.

<sup>2</sup> Beach v. Miller, 130 Ill. 162; s. c. 17 Am. St. Rep. 291; reversing s. c. 23 Ill. App. 151; Goodyear Rubber Co. v. Scott Co., 96 Ala. 439; s. c. 11 South. Rep. 370; Neufeld v. Moll, 37 Ill. App. 535. There is a note on this subject of directors preferring themselves in 19 Am. & Eng. Corp. Cas. 98.

tion of the right of the directors of a corporation to contract with it and become its creditors at all.<sup>1</sup> The evils which flow from the exercise of this right are freely recognized, even by those courts which have felt bound to concede it. But if, in addition to a concession of the right to become creditors of the corporation of which they are members and governors, that is to say, to become in a sense *creditors of themselves*, the right is conceded to them of preferring themselves over other creditors in contemplation of insolvency,—then an extension is given to the doctrine such as must be odious to justice in the last degree. The spectacle of a failing debtor keeping his assets from his creditors under the pretense of preferring his wife as a creditor is even less repulsive. We therefore find that the view that directors or other officers of a corporation can, in the presence or in the prospect of corporate insolvency, prefer themselves as creditors, *in respect of debts previously contracted*, over other general creditors, is almost universally repudiated by the courts. After the corporation has actually become *dissolved* and has gone into liquidation, then there is no room for controversy upon the question; for then its assets, which were previously a *trust fund* for its stockholders,<sup>2</sup> become a trust fund for its creditors *and stockholders*; and its directors, if they remain in custody of those assets, hold them as trustees for its creditors first and its stockholders next.<sup>3</sup> The principle here spoken of is not necessarily confined to that *formal dissolution* which takes place under the judgment or decree of a court of competent jurisdiction; but it equally extends to that *de facto* dissolution which takes place when the corporation suspends business by reason of insolvency and goes into liquidation.<sup>4</sup> The governing principle is, that the directors and managers of *insolvent corporations* are trustees of the funds, as well for the creditors as for the corporation, and are bound to apply them *pro rata*, and cannot use them to exonerate themselves to the injury of

<sup>1</sup> *Ante*, § 4059, *et seq.*

<sup>2</sup> *Ante*, §§ 1569, 2951.

<sup>3</sup> *Clark v. San Francisco*, 53 Cal.

306.

<sup>4</sup> *Ante*, § 3345.

other creditors.<sup>1</sup> That such is the rule of distribution, results from the principle that equity is equality, and that in the administration of assets in equity, all who stand in equal relations are entitled to share equally. This obligation to hold the assets of the corporation as a trust fund for equal distribution among its creditors attaches to the directors, not only when they have voted the corporation to be insolvent,<sup>2</sup> but whenever the fact that it must discontinue business by reason of insolvency comes to their knowledge.<sup>3</sup> This knowledge of insolvency is not, and cannot from the very nature of things, be a positive knowledge: it is a reasonable belief, founded upon probabilities having reference to the company's affairs. It is sufficient to put an end to the right of directors to prefer themselves as creditors, for them to know that it is probably insolvent;<sup>4</sup> though sometimes, it is to be confessed, the courts have gone far in indulging a want of knowledge or judgment on the part of directors in this particular.<sup>5</sup> The only sound principle, then, is that the directors of the corporation cannot prefer themselves as creditors, either when it is in fact insolvent,<sup>6</sup> or when its condition is such that the act is done by them in contemplation of its insolvency.<sup>7</sup> It

<sup>1</sup> *Richards v. New Hampshire Ins. Co.*, 43 N. H. 263; *Olney v. Conanicut Land Co.*, 16 R. I. 597; *s. c.* 27 Am. St. Rep. 767; 5 L. R. A. 361; 29 Cent. L. J. 333; 40 Alb. L. J. 325; 6 Rail. & Corp. L. J. 414; 18 Atl. Rep. 181.

<sup>2</sup> *Williams v. Jackson County Patrons*, 23 Mo. App. 132.

<sup>3</sup> *State v. Brockman*, 39 Mo. App. 131; *Third Nat. Bank v. Elliot*, 42 Hun (N. Y.), 121; *s. c.* 3 N. Y. St. Rep. 390.

<sup>4</sup> *Lamb v. Cecil*, 28 W. Va. 653; *Lamb v. Pannell*, 28 W. Va. 663.

<sup>5</sup> Thus, where it did not appear that a corporation was insolvent at the time its board of directors executed judgment bonds to secure debts due certain of the directors, or that

there was any collusion or actual fraud, the mere entry of judgment on the bonds, after the supposed insolvency of the corporation, was held not such a fraud in law as to warrant the continuance of an injunction restraining the sale of corporate property on execution issued on the judgment. *Appeal of Neal*, 129 Pa. St. 64; *s. c.* 18 Atl. Rep. 564.

<sup>6</sup> *Olney v. Conanicut Land Co.*, 16 R. I. 597; *s. c.* 27 Am. St. Rep. 767; 5 L. R. A. 361; 29 Cent. L. J. 333; 40 Alb. L. J. 325; 6 Rail. & Corp. L. J. 14; 18 Atl. Rep. 181; *Beach v. Miller*, 130 Ill. 162; *s. c.* 17 Am. St. Rep. 291; 22 N. E. Rep. 464; *Hopkins's Appeal*, 90 Pa. St. 69.

<sup>7</sup> See the cases previously cited in this section, and cases cited in

need scarcely be added that any arrangement by which the directors turn the property of the company over to themselves, without consideration, or without even assuming an obligation to pay its just debts, is an arrangement which, though happy for the directors, will not be permitted to stand if properly challenged.<sup>1</sup>

§ 6505. **Illustrations.**—The directors of an insolvent corporation voted a conveyance of all its property to secure a debt due to another corporation. Certain of the directors so voting were directors of the other corporation. It was held that, *prima facie*, the transaction was fraudulent as to other creditors.<sup>2</sup> - - - The directors of an insolvent corporation gave a preference to the estate of the *deceased president*. The board voting the preference consisted of but three persons, two of whom were brothers of the deceased, and one the agent of his estate. It was held that the preference was invalid as against other creditors.<sup>3</sup> - - - A stockholder and director of an insolvent corporation, who was also its creditor, undertook to secure a preference for himself, with the co-operation of his co-directors, by prosecuting an action at law against it. It was held that this amounted to an unlawful preference, by way of assignment and transfer of property, in contemplation of insolvency, within the meaning of a statute.<sup>4</sup> The president of a corporation, with knowledge or in contemplation of its actual insolvency, provided for the payment of a debt to *his wife* out of the assets of the

next section; also *West v. West & Co. Man. Co.*, 44 Hun (N. Y.), 623, *mem.*; *s. c.* 19 N. Y. St. Rep. 256; *King v. Union Iron Co.*, 33 N. Y. St. Rep. 545; *s. c.* 9 Rail & Corp. L. J. 45; 11 N. Y. Supp. 603. There is a note on this subject in 19 Am. & Eng. Corp. Cas. 98. Whether a director of an insolvent bank, with full knowledge of its insolvency, can withdraw his deposits from the bank, was mooted in *Lamb v. Laughlin*, 25 W. Va. 300.

<sup>1</sup> *Hilles v. Parrish*, 14 N. J. Eq. 380. It was also held that the fact that the complaining party was himself acting fraudulently towards the company, will not justify a violation

of their duties on the part of the directors. *Ibid.*

<sup>2</sup> *Sweeny v. Sugar & Co. Refining Co.*, 30 W. Va. 443; *s. c.* 8 Am. St. Rep. 88.

<sup>3</sup> *Adams v. Kehlror Milling Co.*, 35 Fed. Rep. 433.

<sup>4</sup> *King v. Union Iron Co.*, 58 Hun (N. Y.), 601, *mem.*; *s. c.* 33 N. Y. St. Rep. 545; 9 Rail. & Corp. L. J. 45; 11 N. Y. Supp. 603. It was, however, held that no judgment would be rendered against him *by way of punishment*, but that all parties would, as far as possible, be placed *in statu quo*. *Ibid.*



## 5 Thomp. Corp. § 6507.] INSOLVENT CORPORATIONS.

corporation to the exclusion of other creditors. It was held that his action could not be permitted to stand in the way of other creditors.<sup>1</sup> - - - A majority of the directors of an insolvent corporation conveyed the property of the company to two of the stockholders, A. and B., under an agreement by which a part of the directors were to be interested in the purchase, and by which they, with A. and B., were to pay therefor. A. and B. afterward procured an assignment of a judgment and execution which had been levied on all the property of the company, and were proceeding to sell the property on the execution, when a junior judgment creditor obtained an injunction restraining such sale, on a bill alleging that the conveyance to A. and B. was fraudulent and without consideration, and that it was calculated to prevent anyone from bidding at the sale. The answer, filed by A. and B., stated it to be a part of the arrangement that the consideration money for the conveyance should be paid and applied directly on account of the company to the creditors thereof; but it did not allege that they ever paid, or secured, or promised, or intended to pay the consideration, or any part of it, in the way in which consideration money is usually paid or secured. It was held that the injunction should not be dissolved.<sup>2</sup>

§ 6506. **Whether Directors can Prefer their Own Relatives.**—The power of directors of insolvent corporations to prefer their own relatives stands in reason on much the same footing as their power to prefer *themselves*. It has been held that such directors cannot prefer *their relatives* who are corporation creditors.<sup>3</sup> But, where the rule of the particular jurisdiction allows the directors to *prefer themselves*, they can, for just as good reasons, *prefer their relatives*.<sup>4</sup>

§ 6507. **Assignments to a Single Creditor, Leaving Other Debts Unpaid.**—The logical deduction from the proposition

<sup>1</sup> West v. West &c. Man. Co., 44 Hun (N. Y.), 623, 630, *mem.*; s. c. 9 N. Y. St. Rep. 256.

<sup>2</sup> Smith v. Loomis, 5 N. J. Eq. 60.

<sup>3</sup> Adams v. Kehlor Milling Co., 35 Fed. Rep. 433; s. c. on rehearing, 36 Fed. Rep. 212; West v. West &c. Man. Co., 44 Hun (N. Y.), 623, 630, *mem.*; s. c. 9 N. Y. St. Rep. 256.

Effect of the managing officer of a corporation creating fictitious debts in favor of *his wife*, and transferring corporate assets in pretended payment: Jeffery v. Butler Paper Co., 37 Ill. App. 96.

<sup>4</sup> Rollins v. Shaver Wagon &c. Co., 80 Iowa, 380; s. c. 20 Am. St. Rep. 427; 45 N. W. Rep. 1037.

that an insolvent corporation has the same power to dispose of its property, for the purpose of preferring particular creditors, that an insolvent individual has, is that it may turn over any or all of its property to a single creditor in payment of his debt, or upon a trust to pay his debt out of it, and return the residue to the corporation. That an insolvent *individual* or a partnership may make an absolute conveyance of all its property, in payment of a single debt, and leave other debts unpaid, provided it is done without the express purpose of hindering other creditors, but with the mere purpose of paying an honest debt,—is unfortunately well established in American law.<sup>1</sup> But in respect of a corporation, such an assignment has been held valid by one court,<sup>2</sup> and void by another;<sup>3</sup> the latter court proceeding upon the ground that it was a conveyance in trust for the benefit of the assignor, and consequently within the statute against fraudulent conveyances. It has been held by a court which denies the right of an insolvent corporation to prefer its creditors, that the insolvency of a corporation, at the time of making a conveyance of its property, does not affect the validity of the conveyance, where its operation is merely to transfer, in the absolute payment of a debt, property which had been previously conveyed as security for the same debt, and at a time when the corporation was solvent,<sup>4</sup>—a conclusion which seems plain enough.

### § 6508. Releasing its Property to an Attaching Creditor.

Where an insolvent corporation has no means to contest *attachment* suits, and where the result of efforts to dissolve attachments would be doubtful, it is not a breach of trust for the directors, on advice of counsel, and in good faith, to make an advantageous sale of the corporate assets to an attaching creditor, on condition that he cancel his own debt and discharge the debts of the other attaching creditors. In such a

<sup>1</sup> *Lampson v. Arnold*, 19 Iowa, 479, 487.

<sup>2</sup> *Kendall v. Bishop*, 76 Mich. 634.

<sup>3</sup> *Sargent v. Webster*, 13 Met. (Mass.) 497; *s. c.* 46 Am. Dec. 743.

<sup>4</sup> *O'Conner Min. &c. Co. v. Coosa Furnace Co.*, 95 Ala. 614; *s. c.* 36 Am. St. Rep. 251; 10 South. Rep. 290.

## 5 Thomp. Corp. § 6510.] INSOLVENT CORPORATIONS.

case, the assets cannot be followed by the creditors, as a *trust fund*, into the hands of the attaching creditor.<sup>1</sup>

§ 6509. **Mortgages and Other Assignments to Secure Present Advances.**—The inability of a corporation to deal with its property, when insolvent or in contemplation of insolvency, for the purpose of preferring particular creditors, whether this inability is imposed by judicial decision or by statute, does not extend so far as to prevent a corporation, even when insolvent, from making, in good faith, transfers or mortgages of its property to secure present advances of money to be used in paying its debts, in extricating itself from its difficulties, or otherwise in continuing its business;<sup>2</sup> and this is none the less so where the mortgage is made to an *officer* of the corporation.<sup>3</sup> In line with this theory, it has been held that a mortgage by an insolvent corporation to secure advances made while it was solvent, upon the faith of a promise by one of its officers to give such security, is valid as against its creditors and receiver.<sup>4</sup> But such transactions will be closely *scrutinized* whenever properly called in question in a judicial proceeding. If, therefore, the directors sell property of the corporation to a member of the board to raise money to pay debts, it must appear that there was a necessity for the sale, and that the property was bought by the director in open market, at a fair price, without any undue advantage over the corporation, in good faith, and without the slightest unfairness.<sup>5</sup>

§ 6510. **When Assignee Holds Property as Trustee.**—Where an assignment has been made to a creditor, upon a trust to apply the profits of the assigned property to reim-

<sup>1</sup> White &c. Man. Co. v. Pettes Importing Co., 30 Fed. Rep. 864.

<sup>2</sup> Skinner v. Smith, 134 N. Y. 240; s. c. 31 N. E. Rep. 911; affirming s. c. 10 N. Y. St. Rep. 81; Damarin v. Huron Iron Co., 47 Ohio St. 581; s. c. 26 N. E. Rep. 37.

<sup>3</sup> Mullanphy Sav. Bank v. Schott,

135 Ill. 655; s. c. 25 Am. St. Rep. 401; 26 N. E. Rep. 640; Twin-Lick Oil Co. v. Marbury, 91 U. S. 587.

<sup>4</sup> Brower v. Brooklyn Trust Co., 21 N. Y. Supp. 324.

<sup>5</sup> Crescent City Brewery Co. v. Flanner, 44 La. An. 22; s. c. 10 South. Rep. 384.

burse himself and to pay the other debts of the corporation, his position is analogous to that of a trustee, and in that character he must *return to the stockholders* the remnant of property in his hands, after the purposes of the *quasi* trust have been subserved.<sup>1</sup>

§ 6511. **Payments in Due Course of Business.** — Payments made by a corporation, in due course of its business, and with the expectation of being able to continue the same, are *not fraudulent preferences*, in the absence of an express statute making them so. The most conspicuous illustration of this statement is found in the case of a *run on a bank*, which, in the hope of resisting the run, continues payment until its available resources are exhausted, and then suspends. Here, its assignee or receiver cannot maintain an action against a depositor, who, even down to the last hour, has been fortunate enough to withdraw his deposit. In like manner, it has been held that a corporation, intending in good faith to proceed with its business, can pay to its *directors* money borrowed from them, without rendering them responsible to its creditors.<sup>2</sup>

§ 6512. **Executing Judgment Notes.** — A favorite way of preferring particular creditors is by the execution of what are called *judgment notes*, — that is to say, a note containing a *power of attorney to confess a judgment* thereon against the maker. The execution of such a note is, of course, not invalid as a preference to the particular creditor, where no attempt is made to confess a judgment upon it.<sup>3</sup> And where a corporation executed judgment bonds to certain of its directors, at a time when it was solvent, without any fraudulent intent, but to protect them as indorsers for the corporation, — the mere use by them of the bonds, by entering

<sup>1</sup> Pioneer Gold Min. Co. v. Baker, 20 Fed. Rep. 4.

72; Dutcher v. Importers' &c. Nat. Bank, 59 N. Y. 5.

<sup>2</sup> Holt v. Bennett, 146 Mass. 437; s. c. 16 N. E. Rep. 5; 6 New Eng. Rep.

<sup>3</sup> Matson v. Alley, 141 Ill. 284; s. c. 31 N. E. Rep. 419.

judgments and issuing executions thereon, after the corporation became insolvent, was held not of itself fraudulent.<sup>1</sup>

§ 6513. **Effect upon Creditors of Failing to Obtain Preferences.**—The creditor of an insolvent corporation, who has endeavored to procure a preference and failed, is not, for that reason, to be *punished* by being deprived of a right to participate in the distribution of its assets,—and this, although he may even be a *stockholder* or *director*.<sup>2</sup>

§ 6514. **Under the New York Statute to Prevent Fraudulent Bankruptcies by Incorporated Companies.**—A statute has long existed in New York,—and such a statute ought to exist in every State,—providing that, whenever any incorporated company shall have refused the payment of any debt, it shall not be lawful for such company, or any of its officers, to assign or transfer any of its property or choses in action, to any of its officers or stockholders, directly or indirectly, for the payment of any debt; and that it shall not be lawful for such a company to make any transfer or assignment, in contemplation of insolvency, to any person or persons whatever.<sup>3</sup> This statute was intended to prevent an assignment which should give a preference to the officers or stockholders, and to secure the making of a fair dividend among the *bona fide* creditors. An *assignment* made, not in contemplation of insolvency, and made to assignees who are not officers or stockholders of the corporation, in trust *for the payment of all its debts pro rata*, is valid.<sup>4</sup>

§ 6515. **This Statute Avoids What Payments and Transfers.** A statute which should avoid every payment made by a corporation in the course of its business, after it might become theoretically insolvent, would produce more confusion and calamity than it would

<sup>1</sup> Neal's Appeal, 129 Pa. St. 64; s. c. 18 Atl. Rep. 564.

<sup>2</sup> Thompson v. Huron Lumber Co., 4 Wash. 600; s. c. 30 Pac. Rep. 741. Similarly, see King v. Union Iron Co., 58 Hun (N. Y.), 601; s. c. 33 N. Y. St. Rep. 545; 9 Rail. & Corp. L. J. 45; 11 N. Y. Supp. 603.

<sup>3</sup> 3 Rev. Stats. N. Y. (8th ed.), p. 1729, § 4.

<sup>4</sup> Haxtun v. Bishop, 3 Wend. (N. Y.) 13; Hurlbut v. Carter, 21 Barb. (N. Y.) 221; De Ruyter v. St. Peter's Church, 3 Barb. Ch. (N. Y.) 119; Hill v. Reed, 16 Barb. (N. Y.) 280. *Contra*, Harris v. Thompson, 15 Barb. (N. Y.) 62.

remedy; and accordingly it has been held, under this statute, that a payment or transfer, made by a corporation, even when actually insolvent, is not to be deemed void, as made with intent to prefer a particular creditor, unless the *intent*, as well as the insolvency, is *alleged* and *proved*.<sup>1</sup> In other words, proof that, at the time of the transfer, the corporation was insolvent, is not conclusive that the transfer was made in violation of the statute, but the act must have been done *because* of an existing or contemplated insolvency.<sup>2</sup> The meaning is, that payments made by an insolvent corporation, — as for instance, a banking corporation, — in the usual course of its business, and under such circumstances that they would have been made and in the same way if it had been entirely solvent, are not within the prohibition of the statute.<sup>3</sup> The statute is not limited to transfers made prior to an insolvency; but a transfer made *after an actual suspension* has been held to be a transfer made “in contemplation of insolvency.”<sup>4</sup>

**§ 6516. What Transfers It does not Avoid.** — The statute does not, of course, prohibit *valid mortgages* to secure particular creditors, made by corporations when they are not insolvent.<sup>5</sup> Nor was a transfer void under the statute, where the corporation did no more

<sup>1</sup> *Curtis v. Leavitt*, 15 N. Y. 9, 109, 138, 198; modifying *s. c.* 17 Barb. (N. Y.) 309.

<sup>2</sup> *Paulding v. Chrome Steel Co.*, 94 N. Y. 334.

<sup>3</sup> *Dutcher v. Importers' &c. Bank*, 59 N. Y. 5.

<sup>4</sup> Thus, where a bank, being in difficulties, for the purpose of raising some money, procured one of its customers to draw two post-dated checks, which the bank certified, and on which the customer raised money at another bank, which he turned over to the former bank, and this bank suspended on the following day, and, to reimburse the bank which had advanced the money on the checks, furnished the drawer with \$5,000 in cash and certain discounted notes, which he delivered to such bank, taking up the post-dated checks, — it was held that the receiver of the bank

perpetrating the swindle could maintain an action against the other bank to recover the securities thus transferred, the transfer being within the prohibition of the statute. *Robinson v. Bank of Attica*, 21 N. Y. 406. In another case the statute is frittered away, so as to make the words “in contemplation of insolvency” mean something more than a mere *expectation* of insolvency, and to make them mean nothing less than to prohibit a provision against the *results* of insolvency in respect of the particular transferee, where he is already a creditor, and where the *object of the transfer to him* is to take the debt out of a ratable distribution of the assets. *Heroy v. Kerr*, 8 Bosw. (N. Y.) 194; *s. c.* 21 How. Pr. (N. Y.) 409.

<sup>5</sup> *Everson v. Eddy*, 59 Hun (N. Y.), 620; *s. c.* 12 N. Y. St. Rep. 872.

than transfer the legal title of the goods to one who already had possession of them, and who had a *valid lien* upon them for more than their value.<sup>1</sup> The statute does not, of course, extend to the prejudice of the rights of *bona fide sub-purchasers* for value. Thus, although the assignee of a corporation had notice of its insolvency (which invalidated the transfer as to him, as against the creditors of the corporation), yet a purchaser from him, in good faith and for value, without notice of the insolvency, obtained a valid title.<sup>2</sup>

**§ 6517. How Far It Prohibits Preferences Obtained by Means of Actions against the Corporation.**—The purpose of the statute was to prevent unjust discrimination among creditors, through the *affirmative action* of the corporation, by restraining it from making the prohibited conveyances; but otherwise it leaves its property to be taken and disposed of in due course of law. Therefore, the corporation is not bound, under the operation of the statute, any more than an insolvent individual is, to take steps to prevent its creditors from commencing hostile proceedings which may result in preferences to the most vigilant. It is not, for instance, obliged to *defend any action* brought against it for a valid debt, against which there is no valid legal defense, for the sole purpose of defeating a *preference* among its creditors; but it *may suffer a default*, and thus allow the vigilant creditors to obtain a preference.<sup>3</sup> But it is well known that *suffering judgments by default*, to be obtained by particular creditors, is a favored method resorted to by insolvent debtors, to prefer them, under the agreeable images of legal sanctity; and therefore the principle of this decision ought to be restrained to cases where the corporation is merely passive, and where the action of the particular creditor proceeds fairly and openly. It is a gross perversion of justice to allow the statute to be evaded by a *collusive proceeding* between particular creditors and particular officers of the corporation; and such, it is to be regretted, was plainly the case

<sup>1</sup> New York Fourth Nat. Bank v. American Mills Co., 137 U. S. 234; s. c. 9 Rail. & Corp. L. J. 30. He had a factor's lien.

<sup>2</sup> Hoyt v. Sheldon, 3 Bosw. (N. Y.) 267.

<sup>3</sup> Varnum v. Hart, 119 N. Y. 101; s. c. 28 N. Y. St. Rep. 262; 23 N. E. Rep. 183; reversing s. c. 25 N. Y. St.

Rep. 755; 6 N. Y. Supp. 346. That a *judgment* against the corporation is not void under the statute unless recovered by the active procurement of an officer of the corporation,—see Dickson v. Mayer, 26 Abb. N. Cas. (N. Y.) 257; s. c. 12 N. Y. Supp. 651; 35 N. Y. St. Rep. 482.

which the Court of Appeals of New York thus stamped with its approval.<sup>1</sup> Subsequently the same court thought better of this question, and held that an *attachment* levied upon the assets of the corporation, by a creditor who is also one of its directors, is void under the statute, although the attaching creditor has no control over the assets at the time of his levy, and although the proceeding is strictly hostile as between him and the corporation.<sup>2</sup>

<sup>1</sup> The case was that certain creditors of a corporation, whose claims against it were valid and past due, and against which there was no defense, knowing the corporation to be insolvent, and for the purpose of obtaining a preference over other creditors, commenced an action against it, and procured summons to be served upon one of its directors, under an arrangement with him that he would not disclose the service to the other officers. He carried out the arrangement, and, in this manner and by this collusion, suffered the particular creditors to obtain judgments by default. The corporation had no real estate, and its property was levied upon and sold under executions issuing upon these judgments. Afterwards it passed into the hands of a receiver; and in an action brought by him to have the judgments declared void, it was held that the arrangement did not constitute an assignment or transfer within the meaning of the statute; that the statute had not been violated, and that the action was not maintainable. *Varnum v. Hart*, *supra*. Comment upon such a decision is unnecessary. A later statute of New York, relating to *moneyed* corporations, contains this language: "No such conveyance, assignment, or transfer, nor any payment made, judgment suffered, lien created, or security given, by any such corporation, when insolvent, or in contemplation of insol-

vency, with the intent of giving a preference . . . shall be valid in law." New York Laws 1882, ch. 409, § 187. A similar statute in the same State, relating to *limited partnerships*, provides as follows: "Every sale, assignment, or transfer of any of the property or effects, of such partnership, . . . and every judgment confessed, lien created or secured . . . shall be void." Rev. Stats. N. Y., pt. 1 ch. 4, title 1, art. 1, § 20. In a case involving the construction of *this last statute*, it was said that the provisions "do not avoid payments made, or judgments suffered, or require a creditor to account for anything received by the creditor of the partnership or of either of the partners . . . . Those sections clearly do not inhibit, or apply to, judgments recovered *against the members* of a limited partnership, *in invitum*, or suffered by them, by default or otherwise." *Van Alstyne v. Cook*, 25 N. Y. 489, 493. But here again, the observations quoted ought to be limited to cases of judgments *fairly obtained*, and the principle ought not to be allowed to apply to judgments obtained surreptitiously, or by trickery, collusion, or fraud.

<sup>2</sup> *Throop v. Hatch Lithographic Co.*, 125 N. Y. 530; *s. c.* 26 N. E. Rep. 742; affirming *s. c.* 11 N. Y. St. Rep. 532. To the same effect is *King v. Union Iron Co.*, 58 Hun (N. Y.), 601; *s. c.* 9 Rail. & Corp. L. J. 45; 33 N. Y. St. Rep. 545; 11 N. Y. Supp.



§ 6518. **Has No Extra-territorial Force.** — As statutes have *no extra-territorial operation*, except so far as they are allowed to operate in other jurisdictions by mere comity, this statute does not forbid a preference made by an insolvent corporation organized under the laws of another State.<sup>1</sup> And we suppose that citizens of New York could, by procuring themselves to be incorporated under the laws of New Jersey, while living in New York, and transacting all of their corporate business there, effectually evade the provisions of the statute, to the prejudice of some of their creditors, under other decisions in that State.<sup>2</sup>

§ 6519. **Under the New York Act of 1882, Relating to Transfers by Banking Corporations.** — A judicial controversy long existed in New York upon the question whether the statute referred to in the preceding section, related to that class of corporations described in the statutes of New York as "*moneyed corporations*." This controversy should have been promptly settled by the legislature; but, so far as the writer knows, no attempt was made to settle it until 1882, when a statute<sup>3</sup> was passed declaring that no conveyance, or transfer of the effects of a bank, exceeding in value \$1,000, except in the ordinary course of business, shall be valid unless authorized by a previous resolution of its board of directors; and that no conveyance or transfer given in contemplation of insolvency, by way of preference to a particular creditor, shall be valid. A transfer in a single transaction, not in the ordinary course of business, by the cashier of a bank, of a number of separate securities, the value of no one of which equals \$1,000, but the aggregate

603. But in such a case, no judgment by way of *punishment* will be rendered against the creditor. *Ibid.* For a case not within this principle upon these facts, see *Bicknell v. Speir*, 18 N. Y. St. Rep. 590.

<sup>1</sup> *Hill v. Knickerbocker Electric Light & Co.*, 18 N. Y. Supp. 813; s. c. 45 N. Y. St. Rep. 761.

<sup>2</sup> *Demarest v. Flack*, 128 N. Y. 205; s. c. 28 N. E. Rep. 645. See 26 Am. Law Rev. 194; 27 *Id.* 252; 28 *Id.* 414; *United States Vinegar Co. v. Schlegel*,

143 N. Y. 537, 542. This statute was held in one case to invalidate an assignment made in contemplation of insolvency by a corporation, of all of its property, in trust for the ratable payment of its creditors (*Harris v. Thompson*, 15 Barb. (N. Y.) 62); but as elsewhere seen (*ante*, § 6514), the contrary is the settled construction of the statute.

<sup>3</sup> 2 Rev. Stats. N. Y. (8th e.), d p. 1554, §§ 186, 187.

value of which was in excess of that sum, was within the prohibition of the statute.<sup>1</sup>

§ 6520. Remedies in Equity against Assignee. — A bill by the creditors of an insolvent corporation, alleging a fraudulent combination and collusion between the assignee and the debtors of the institution, to injure and defeat the creditors; and stating that some two or three hundred thousand dollars' worth of property was transferred by the corporation to the assignees for the payment of its debts, nearly nine years before; that no account has been rendered by the assignees; that all accounting has been refused by them when called for; that they have received a portion of the funds and appropriated them to their own use; that they have failed to collect a large amount of the debts, or to take any step for that purpose; and have fraudulently combined and colluded with the debtors of the corporation to settle their debts in such a way as to defeat the creditors, — presents the strongest possible case for the interposition of a court of equity.<sup>2</sup>

<sup>1</sup> *Atkinson v. Rochester Printing Co.*, 114 N. Y. 168; *s. c.* 21 N. E. Rep. 178; 23 N. Y. St. Rep. 155; 1 Bank. L. J. 180; affirming *s. c.* 43 Hun (N. Y.), 167. When, therefore, a bank cashier, knowing that the bank was insolvent, and was to suspend business the next day, gave to a depositor certain drafts belonging to the bank, amounting in the aggregate to more than \$1,000, but each draft being for a *less sum*, — it was held that the transfer was void, and this, with-

out regard to the fact whether the transferee had knowledge of the embarrassed condition of the bank when he made his deposits, or not. Nor could a witness in an action by the receiver of the bank, against the transferee, be permitted to state that, in his opinion, one of the drafts was not worth its face value, — though the transferee might show that he had brought suit on it and that a valid defense had been interposed. *Ibid.*

<sup>2</sup> *Stocks v. Van Leonard*, 8 Ga. 511.

## CHAPTER CXLVII.

### FRAUDULENT CONVEYANCES BY CORPORATIONS.

SECTION	SECTION
6526. General doctrine as to fraudulent conveyances by corporation.	6532. When such transactions not impeached by way of defense in actions at law.
6527. Fraudulent diversions of the property of the corporation.	6533. Saving the rights of <i>bona fide</i> purchasers.
6528. "Credit Mobilier" arrangements.	6534. Assignment of all the property of the corporation in fraud of its creditors.
6529. Evidence to show insolvency.	6535. Transfers <i>pendente lite</i> .
6530. Conveyances to directors or officers of the corporation.	6536. Other conveyances rendered void by statute.
6531. Ratification, acquiescence, estoppel.	6537. Consenting to judgments.

§ 6526. **General Doctrine as to Fraudulent Conveyances by Corporations.** — The *assets* of a corporation, being in theory of equity, a *trust fund for its creditors*,<sup>1</sup> it is true, in the case of a corporation as in that of a natural person, that any conveyance of its property without authority of law, and in fraud of existing creditors, is void as against them;<sup>2</sup> although, as already seen,<sup>3</sup> corporations are, according to the best judicial opinion, disabled in respect to the disposition of their assets, to a greater extent than natural persons, in so far as they cannot *prefer their own creditors*, — yet in most respects the question whether a conveyance made by a corporation will be fraudulent as against its creditors is tested by the same rules and principles which are applicable when the question arises

<sup>1</sup> *Ante*, §§ 1569, 2951.

<sup>2</sup> 2 Story's Eq. Jur., § 1252; Curran v. Arkansas, 15 How. (U. S.) 304; Railroad Co. v. Howard, 7 Wall. (U. S.) 392; Graham v. Railroad Co., 102 U. S. 148, 161; Goodin v. Cincin-

nati &c. Canal Co., 18 Ohio St. 169; s. c. 98 Am. Dec. 95; Vance v. McNabb Coal &c. Co., 92 Tenn. 47; s. c. 20 S. W. Rep. 424; Wabash &c. R. Co. v. Ham, 114 U. S. 587, 594.

<sup>3</sup> *Ante*, § 6503.

in respect of conveyances made by natural persons. For this reason, it will not be necessary to pursue the subject to any great extent, nor to do more than refer to decisions which seem to present phases of the subject peculiar to corporations aggregate.<sup>1</sup>

**§ 6527. Fraudulent Diversions of the Property of the Corporation.**—If the directors, in breach of their trust, commence making, or threaten to make, fraudulent diversions of the property of the corporation, from the purposes named in the charter, governing statute, articles of association, or other governing instrument, the *stockholders* may have an *injunction* to restrain such illegal acts.<sup>2</sup> An insolvent corporation cannot, by resolution or otherwise, *give away* the effects belonging to it, to the prejudice of creditors;<sup>3</sup> and any arrangements entered into between the corporation and its stockholders, with the view of defeating the claims of creditors, by which the stockholders are allowed to purchase depreciated and repudiated claims, and thus to extinguish their indebtedness for their shares, would be void, both at law and in equity. Where a county was indebted to an insolvent corporation, by a subscription evidenced by its bonds executed and delivered to the company, and those bonds were surrendered to the county pursuant to a *consent decree*, in a suit to which the creditors of the corporation were not made parties,—it was held that the surrender amounted to a release of the liability of the county and to a giving-away of the assets of the corporation, such as constituted a fraud upon its creditors.<sup>4</sup> As the creditors are

<sup>1</sup> Circumstances under which conveyances by corporations have been held *not fraudulent*: *Coaldale Coal Co. v. State Bank*, 142 Pa. St. 288; *s. c.* 21 Atl. Rep. 811; *Schlesinger v. Kansas City &c. R. Co.*, 39 Fed. Rep. 741; *Fogg v. Blair*, 139 U. S. 118.

<sup>2</sup> *Ante*, § 4518. See, on this subject, *Starbuck v. Mercantile Trust Co.* (Super. Ct. Conn.), 9 Rail. & Corp. L. J. 203. Liability to creditors of one

who, without consideration, has received from an insolvent corporation its second mortgage bonds: *Christensen v. Illinois &c. Bridge Co.*, 5 N. Y. Supp. 925; *s. c.* 52 Hun (N. Y.), 478; *s. c.*, on former appeal, *sub nom.* *Christensen v. Eno*, 106 N. Y. 97.

<sup>3</sup> *Ante*, §§ 1512, 1517, 1576, *et seq.*

<sup>4</sup> *Morgan County v. Allen*, 103 U. S. 498.

preferred before the stockholders in the final distribution of the assets of the corporation, if, by whatever arrangement or device, the property of the corporation is distributed among its stockholders or diverted into the hands of particular stockholders or directors, before the payment of its debts, or transferred for their benefit to third persons, who do not take as *bona fide* purchasers for value, and the corporation subsequently becomes dissolved, or becomes so disorganized that it cannot be made answerable at law; or if other circumstances concur giving to a court of equity jurisdiction to lay hold of its assets;—such a court will follow the assets so diverted, and impound them and apply them to the payment of its creditors according to their respective priorities.<sup>1</sup> When, therefore, the *president* of a corporation, serving without salary and without any agreement therefor, transfers his shares to others, by which means they acquire a majority of the shares of the corporation and elect themselves directors, and thereupon *vote him a salary for his past services*, thus applying the funds of the company in part payment of their indebtedness to him for the shares which he has transferred to them,—they become liable to its receiver for the sum so voted to him;<sup>2</sup> but he, if ignorant of the source from which the money came, is not liable.<sup>3</sup> The foregoing principles have no application where the rights of creditors are not concerned. In such cases the question will then concern the *rights of the stockholders*, and it will be, whether the complaining stockholders have been prejudiced by any *redistribution* of the assets of the corporation, whereby an excessive appropriation has been diverted to other stockholders.<sup>4</sup> But it has nevertheless been held that a

<sup>1</sup> *Pier v. George*, 17 Hun (N. Y.), 207; *Heggie v. People's Building &c. Asso.*, 107 N. C. 581; *s. c.* 12 S. E. Rep. 275; *Hill v. Gruell*, 42 Mo. App. 411; *Ellis v. Ward*, 137 Ill. 509; *s. c.* 25 N. E. Rep. 530; *Hastings v. Drew*, 50 How. Pr. (N. Y.) 254.

<sup>2</sup> *Ellis v. Ward*, *supra*.

<sup>3</sup> *Ibid.*

<sup>4</sup> It has been held that the prohi-

bition, in the California Civil Code, against any division and distribution of the capital stock of a corporation, except on dissolution, after payment of debts, does not make invalid a distribution of the stock of a new corporation among the stockholders of two former corporations, in pursuance of an arrangement for the benefit and interest of all the parties, whereby

company having various debtors, as well as creditors, may provide that if the evidence of the debts due by it are obtained by its debtors, and filed for cancellation, the one shall extinguish the other.<sup>1</sup> But whether an insolvent corporation will be permitted so to deal with its assets as to pay those creditors in full who happen to be indebted to it, by allowing them an *offset*, is a doubtful question, depending upon considerations already gone into.<sup>2</sup>

§ 6528. "**Credit Mobilier**" Arrangements. — Let us consider a well-known class of transactions between two corporations, where a majority of the directory of one corporation constitutes a majority of the directory of the other corporation. Here, there is the constant temptation in the governing majority of the two corporations, by making contracts between the two corporations, which are valid upon their face and valid at law, to cheat the minority stockholders of the one or the other. All that can be said of such contracts is that they are *not void on their face*, nor voidable upon a showing of the mere fact that a majority of the directory of one corporation, authorizing or voting for the contract, also composed a majority of the directory of the other corporation, in like manner authorizing it or voting for it; but that they are *voidable only on proof of fraud or unfair dealing*.<sup>3</sup> This proposition is stated differently in different decisions, but the statements all go back to the same principle. To impeach the action of the board of directors of a corporation, on the ground that they are interested in the affairs of another corporation which has purchased a controlling interest in the stock of the former, with a view to making such directors, or the latter corporation, responsible, — it is said that there must be distinct charges of misconduct supported by proof, and

litigation between the former corporations is settled, and the stockholders occupy relatively the same position in the new company which they held in the old ones. *Kohl v. Lilienthal*, 81 Cal. 378; *s. c.* 20 Pac. Rep. 401.

<sup>1</sup> *Goodwin v. McGehee*, 15 Ala. 232.

<sup>2</sup> *Ante*, § 3785, *et seq.*

<sup>3</sup> *O'Conner Min. &c. Co. v. Coosa Furnace Co.*, 95 Ala. 614; *s. c.* 36 Am. St. Rep. 251; 10 South. Rep. 290. Compare *ante*, § 4079, *et seq.*

that the mere fact of their interest is insufficient.<sup>1</sup> It has been held that an *accounting, at the suit of shareholders*, cannot be granted on the ground that the affairs of a corporation are directed by a controlling stockholder in the interest of another corporation of which he is president, and that all the officers and directors are subject to his absolute control and direction, where there is nothing to show fraud in the management of the affairs of the corporation, or even that the manner of conducting its business has not been wise,—although the corporation is insolvent and all the product of its business has been purchased by the other company.<sup>2</sup>

§ 6529. **Evidence to Show Insolvency.**—Where the quality of the conveyance depends upon the question of the known insolvency of the corporation at the time when it was made, it is justly held that evidence showing that the corporation was then absolutely insolvent is sufficient to sustain a finding that its *president* was actually informed of the fact,—the reason being that he is *presumed to know* the condition of the company, and that it is, by reason of his trust relation to the stockholders and creditors, his duty to know it.<sup>3</sup>

§ 6530. **Conveyances to Directors or Officers of the Corporation.**—We have considered, in a former chapter,<sup>4</sup> the question of the validity of *assignments* and *conveyances* made by insolvent corporations *to their directors or officers for the purpose of preferring them as creditors*,—exhibiting the regrettable fact of a difference of judicial opinion upon so plain a question. We have also had occasion to note the doctrine that individual directors may deal with the corporation as

<sup>1</sup> Davis v. United States Electric Power &c. Co., 77 Md. 35; s. c. 25 Atl. Rep. 982.

<sup>2</sup> Wheeler v. Pullman Iron &c. Co., 143 Ill. 197; s. c. 32 N. E. Rep. 420; 17 L. R. A. 818. For a scheme of *reinsurance*, where the whole reserve of the company had been transferred, without security, to another company

whose stock had been bought up by the managers of the victim company, see Mason v. Cronk, 35 N. Y. St. Rep. 859. And see *ante*, § 4484.

<sup>3</sup> Sicardi v. Keystone Oil Co., 149 Pa. St. 148; s. c. 24 Atl. Rep. 163; Appeal of Kerstetter, 149 Pa. St. 148; s. c. 24 Atl. Rep. 163.

<sup>4</sup> *Ante*, §§ 6498, 6503.

strangers, but always subject to a judicial inquiry into the good faith of the transaction, when it is properly challenged by a party entitled to challenge it.<sup>1</sup> We have further noted that arrangements between two corporations controlled by the same directory are not void on their face, but subject to judicial impeachment upon like grounds.<sup>2</sup> Conveyances made by a corporation to its directors are, for reasons there disclosed, *not void on their face*,<sup>3</sup> but, when challenged by creditors or stockholders not participating therein or not estopped by acquiescence, laches, or other circumstances,—they will be *subjected to severe judicial scrutiny*, and will be set aside unless entirely fair. A court of equity will not permit the directors of a corporation, who are trustees not only for its stockholders, but also in a sense for its creditors, to dispose of the corporate property to themselves, or for their individual benefit,<sup>4</sup>—and this will be especially so where there has been a sale of corporate property by a single *director* who has *acted both as buyer and seller*. In case of such a sale, when not made in good faith, or when not producing the full value of the property, the directors taking part in it will be answerable to the creditors for what was thereby lost.<sup>5</sup> When, therefore, a board of directors, in order to raise money for the corporation, sold certain of its property to a member of the board, the sale

<sup>1</sup> *Ante*, § 4059.

<sup>2</sup> *Ante*, § 4079.

<sup>3</sup> *O'Conner Min. &c. Co. v. Coosa Furnace Co.*, 95 Ala. 614; *s. c.* 36 Am. St. Rep. 251; 10 South. Rep. 290.

<sup>4</sup> *Farmers' Loan & T. Co. v. San Diego Street Car Co.*, 45 Fed. Rep. 518. In this case it appeared, upon proceedings to foreclose a mortgage, that the bonds of a street car company, issued pursuant to a vote of the stockholders, "for the purpose of extending and constructing" the road, purchasing rolling stock and equipments, and paying "for labor done and to be done in the construction"

and operation of the road,—were never sold to procure funds for this purpose, but that, after ineffectual attempts to sell them, they had been *pledged* by the president and vice-president of the mortgaging company to secure antecedent debts of the company, which, to a large extent, were due to other companies, of which these officers were also officers and directors. It was held that the pledge ought to be set aside, as having been made without authority and in fraud of the rights of the stockholders.

<sup>5</sup> *Wilkinson v. Bauerle*, 41 N. J. Eq. 635.



would have stood if this alone had appeared, but when it further appeared that the sale had been rendered necessary by the *mismanagement* of the directors, the court concluded that the sale ought to be set aside at the instance of the corporation itself.<sup>1</sup> Under certain general provisions of the Civil Code of California,<sup>2</sup> which are no more than declaratory of the general principles under which courts of equity have always proceeded, or professed to proceed, in holding trustees to the line of their duty,—it has been held that, if the secretary of a corporation, who is also its general manager, and to whom all its affairs are committed, *secretly purchases* its property in his own name, *at execution or tax sales*, he is guilty of a breach of trust; and that, in order to redeem from such purchases, the corporation need do no more than to repay him his expenditures, and is not bound, at the same time, to pay him his *arrears of salary*; since the payment in full of such arrears would be giving him an advantage over its other creditors, in violation of the provisions of the statute,<sup>3</sup> and, it may be added, in violation of general principles of equity already stated.<sup>4</sup>

**§ 6531. Ratification, Acquiescence, Estoppel.**—Whether such a transaction is impeached by creditors or shareholders, or by the corporation itself, in a suit in equity asking for affirmative relief, or by way of defensive proceedings in a court of equity,—the right to relief against it will be lost by circumstances of laches, acquiescence, or estoppel.<sup>5</sup> Here, as in every other case, there is no prescribed rule as to the length of time during which a passive acquiescence in what has taken place will bar the right to relief in equity, but each case must

<sup>1</sup> Crescent City Brewing Co. v. Flanner, 44 La. An. 22; s. c. 10 South. Rep. 384.

<sup>2</sup> Civ. Code Cal., §§ 2228, 2230, 2233, 2234.

<sup>3</sup> San Francisco Water Co. v. Pattee, 86 Cal. 623; s. c. 25 Pac. Rep. 135; referring especially to § 2228.

<sup>4</sup> *Ante*, § 4022.

<sup>5</sup> Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, is the leading American case on this subject. For the governing principle, see *ante*, § 4494, *et seq.*; also § 5314.

depend upon its own circumstances.<sup>1</sup> Where the validity of the transfers of the assets of a corporation depended upon a supposed ratification by all its stockholders, and it appeared that a resolution, ratifying all the "acts of the officers," had been adopted by a vote in which only five shares out of a total of 2,500, except those held by the directors themselves, were represented,—it was held that this could not be regarded as a ratification of the acts of the directors, done in their own interests and to the prejudice of the creditors of the corporation.<sup>2</sup>

**§ 6532. When Such Transactions not Impeached by Way of Defense in Actions at Law.**—The transactions made by the directors of a corporation within the limits of their powers, and such as would stand, when challenged in a court of equity, if made in good faith, cannot be impeached by way of defense in an action in a court of law, except in those jurisdictions where equitable defenses are allowed to be set up to legal actions. To this statement there may be exceptions, growing out of the well-known fact that the jurisdiction of courts of law and equity in regard to fraud is concurrent. But where a corporation, by one of its directors, assigned one of its stock notes to certain of its directors, as security for advances, and they afterwards brought suit upon it in the name of the corporation for their own benefit, and the corporation was, at the time and had ever since remained, insolvent, and the defendant, at the time of the assignment and of the bringing of the suit was a stockholder,—it was held that he could not avail himself, by way of defense to the suit, of the fact that the note had been assigned in fraud of the corporation, even if such were the fact, but that, in order to set aside the assignment on that ground, he must go into equity.<sup>3</sup> As stated in another place,<sup>4</sup>

<sup>1</sup> *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587.

<sup>3</sup> *Protection Ins. Co. v. Ward*, 28 Conn. 409.

<sup>2</sup> *Farmers' Loan & T. Co. v. San Diego Street Car Co.*, 45 Fed. Rep. 518.

<sup>4</sup> *Post*, § 6533.

fraudulent conveyances can never be set aside as against the rights of *innocent* sub-purchasers for value; and on a similar principle, where credit has been given on the faith of the ostensible ownership of property, created by an assignment otherwise voidable, such an assignment cannot be set aside to the prejudice of the creditors of the assignee.<sup>1</sup>

§ 6533. **Saving the Rights of Bona Fide Purchasers.** — The doctrine that a fraudulent conveyance is cured after the property passes into the hands of a *bona fide* purchaser, for value and without notice, applies, of course, to fraudulent conveyances made by corporations, and to preferential assignments made by them in jurisdictions where the power to make such assignment is not admitted. And whether, as in some States, the rights of subsequent purchasers are saved by statute or not, the principle is equally operative; and under it a depositor or other *bona fide* creditor of an insolvent bank, who draws his check upon the bank, and thereby withdraws his deposit from it, without notice of its insolvent condition, or without reasonable grounds to believe that it is insolvent, will be protected as a *bona fide* purchaser, and will not be obliged to refund to its assignee or receiver, although not in strictness a purchaser.<sup>2</sup> But, if the sub-purchaser has made his purchase from an officer of the corporation, and such sub-purchaser occupies fiduciary relations to the corporation, and has full knowledge of the manner in which the officer acquired his title, — the title of such sub-purchaser must, of course, stand or fall with that of his grantor.<sup>3</sup>

§ 6534. **Assignment of All the Property of the Corporation in Fraud of its Creditors.** — Where there is a statute governing the subject of assignments for the benefit of creditors, and

<sup>1</sup> *Hirsch v. Norton*, 115 Ind. 341; s. c. 17 N. E. Rep. 612; 15 West. Rep. 318.

<sup>2</sup> It was held that such a person would be protected as a *bona fide*

purchaser under section 4429 of the Georgia Code: *Hill v. Western & C. R. Co.*, 86 Ga. 284; s. c. 12 S. E. Rep. 635.

<sup>3</sup> *San Francisco Water Co. v. Pattee*, 86 Cal. 623; s. c. 25 Pac. Rep. 135.

such statute is applicable to assignments by corporations,—then an assignment by a corporation, ostensibly for its creditors, which does not substantially pursue the requirements of the statute, will be voidable.<sup>1</sup> For instance, in Missouri, the statute relating to assignments for creditors provides that the assignment shall be for the ratable benefit of all the creditors. Under that statute, an instrument purporting to be an assignment for the benefit of creditors, which undertakes to give preferences to some of the creditors, will be, to that extent, void, and will stand for the equal benefit of all the creditors,—saving always the rights of those who have previously acquired valid liens or preferences.<sup>2</sup> In such cases the question frequently arises, often difficult of solution, whether the instrument is an assignment for creditors, such as is contemplated by the statute, or whether it is a mortgage outside of the statute.<sup>3</sup> Outside of these considerations, assignments by corporations may be void, as being within the statutes relating to fraudulent conveyances,—as where they are of such a nature that they may be justly characterized as a conveyance *to the use of the grantor*. Such has been held to be the case where an assignment, with preferences, required the assignee to restore the remainder to the corporation itself. Here, it was set aside at the instance of creditors who had been deferred.<sup>4</sup> Assignments for the osten-

<sup>1</sup> Where the particular mode in which the affairs of a certain class of corporations shall be wound up, in case of insolvency, is prescribed by statute, an assignment, made manifestly with a view to evade the provisions of the statute, cannot be sustained. *Bank Comm'rs v. Bank of Brest*, Harr. Ch. (Mich.) 106.

<sup>2</sup> *Crow v. Beardsley*, 68 Mo. 435; *Ring v. Ring*, 12 Mo. App. 88; *Douglass v. Cissna*, 17 Mo. App. 44.

<sup>3</sup> See *Hargadine v. Henderson*, 97 Mo. 375; *Re Zwang*, 39 Mo. App. 356; *Rosenthal v. Frank*, 37 Mo. App.

272; *Smith &c. Implement Co. v. Thurman*, 29 Mo. App. 186; *Bascom v. Rainwater*, 30 Mo. App. 483. Compare *Kerbs v. Ewing*, 22 Fed. Rep. 693; *Freund v. Yaegerman*, 26 Fed. Rep. 812; *Clapp v. Nordmeyer*, 25 Fed. Rep. 71; *White v. Cotzhausen*, 129 U. S. 329.

<sup>4</sup> *Kendall v. Bishop*, 76 Mich. 634; *s. c.* 43 N. W. Rep. 645. In this case, a vote of the directors authorized the giving of a chattel mortgage of all the property of the company, to a trustee, for the purpose of securing certain of its creditors, reserving to the

sible benefit of all the creditors of the corporation may also be invalid on their face, as disclosing an evident purpose on the part of the corporation making the assignment, to hinder and delay its creditors. An assignment by a banking and railroad corporation, which showed upon its face an intention to postpone the creditors of the corporation, to use the effects of the bank for the completion of the railroad, to pay the trustees enormous salaries, and to make no dividend among the creditors of the bank until these objects were accomplished, — was void, under the circumstances, as fraudulent against the creditors who had not become parties to it.<sup>1</sup> But it has been reasoned that, unless the intent to hinder and delay the creditors is clearly visible in an assignment made for the general benefit of creditors, and having otherwise the appearance of fairness, it will not be held obnoxious to the statutes of 13 and 27 Elizabeth.<sup>2</sup> In such a case the court will not infer a *fraudulent intent* on the part of the managers of the corporation, unless such an inference is clearly warranted by the language of the deed of assignment.<sup>3</sup> Where the validity of such an assignment is drawn in question in a court of law, the good faith of the directors in the passage of the resolution authorizing it, and the necessity or expediency of it, are *questions of fact for the jury*.<sup>4</sup>

company the right to sell its goods and manufactures in the ordinary course of its business. It was held that this did not authorize a clause in the mortgage giving the trustee the power to take possession, if he should deem himself insecure; to continue the business of the corporation; to buy new stock and material; to complete manufactures; to dispose of the property, and, out of the proceeds to pay certain debts, and turn over the surplus to the corporation.

<sup>1</sup> Bodley v. Goodrich, 7 How. (U. S.) 276. Compare Arthur v. Commer-

cial &c. Bank, 9 Smedes & M. (Miss.) 394; s. c. 48 Am. Dec. 719; Fellows v. Commercial &c. Bank, 6 Rob. (La.) 246; Ex parte Conway, 4 Ark. 302; Ringo v. Biscoe, 13 Ark. 563.

<sup>2</sup> McCallie v. Walton, 37 Ga. 611; s. c. 95 Am. Dec. 369.

<sup>3</sup> *Ibid.* See also Nye v. Van Huse, 6 Mich. 329; s. c. 74 Am. Dec. 690. To the same effect, see Palmer v. Mason, 42 Mich. 146, 150; Watkins v. Wallace, 19 Mich. 57, 75; Gay v. Bidwell, 7 Mich. 519, 523.

<sup>4</sup> De Camp v. Alward, 52 Ind. 468.

§ 6535. **Transfers Pendente Lite.** — Unless there is a statute making the *lien of a judgment relate back* to the date of the commencement of the action, the commencement of an action against a debtor will not have the effect, as a mere conclusion of law, of rendering an assignment or conveyance of his property, made prior to the recovery of a judgment therein, void as against the plaintiff in the action, though it will undoubtedly be an evidentiary circumstance bearing upon the question of good faith in making the assignment. An action brought for the mere purpose of recovering a debt, and not for the purpose of recovering possession of property, does not affect the world with notice, under the common-law doctrine of *lis pendens*. Therefore, one who, in ignorance of the commencement of such an action, purchases, in good faith, and for value, the property of the defendant therein, will get a good title as against the plaintiff therein. The attachment laws were designed to meet cases of the kind under consideration; and where a creditor desires to fasten a lien upon the property of his debtor, so as to anticipate any conveyance thereof which the debtor may make to his prejudice, he must proceed by attachment, giving bond under the statute, and taking the consequences of his action. These propositions seem to be truisms. Nevertheless, several cases are found which are to the effect that conveyances made by corporations of all their property, while actions are pending against them by their creditors to recover their debts, are void as to such creditors.<sup>1</sup> But, upon examination, they will be found to rest upon other principles, — such as, that the assets of a corporation are a *trust fund* for all its creditors, and that creditors have a species of *equitable lien* thereon, both as against the stockholders and any transferees thereof, except those purchasing in good faith and for value;<sup>2</sup> or that it is not competent for the *trust*

<sup>1</sup> *Cole v. Millerton Iron Co.*, 133 N. Y. 164; s. c. 28 Am. St. Rep. 615; 30 N. E. Rep. 847; *Olney v. Conanicut Land Co.*, 16 R. I. 597; s. c. 27 Am. St. Rep. 767; 5 L. R. A. 361; 29 Cent. L. J. 333; 40 Alb. L. J. 325; 6

*Rail. & Corp. L. J.* 414; 18 Atl. Rep. 181; *United States v. Church of Jesus Christ &c.*, 5 Utah, 351; s. c. 15 Pac. Rep. 473.

<sup>2</sup> *Cole v. Millerton Iron Co.*, *supra*.

tees of a corporation, after a general creditor has commenced an action against it to recover his debt, to make a conveyance of its property to *secure themselves* for antecedent advances made by them to the corporation;<sup>1</sup> or they will be found to rest on peculiar states of fact.<sup>2</sup>

**§ 6536. Other Conveyances Rendered Void by Statute.**— Under a statute of North Carolina,<sup>3</sup> any conveyance or mortgage of its property, executed by a corporation, is void as to creditors existing at the time of the execution of the conveyance, who shall *commence proceedings* to enforce their claims against the corporation within *sixty days* after the registration of the conveyance.<sup>4</sup>

**§ 6537. Consenting to Judgments.**— Consenting to judgments in actions seemingly adversary but really collusive, is a favorite device resorted to by insolvent debtors, with the aid of astute lawyers, to prefer their creditors. Fraud is none the less fraud because it is able to assume the outward sanctity of a legal judgment; and while the necessary effect of every judgment is to conclude the parties to it, except in the cases of judgments fraudulently concocted, yet a judgment contrived for the purpose of defrauding persons who were not parties to the proceeding, possesses neither sanctity nor validity as against them. When, therefore, an insolvent corporation allowed judgments to be taken against it before the expiration of the time prescribed by the statute for answering, it was

<sup>1</sup> *Olney v. Conanicut Land Co., supra*. In this case the court say, in answer to the argument that the complainants were not creditors at the time when the mortgage to secure the directors was made: "True, they had not reduced their claims to judgment; but the claims existed, and the defendants had notice of them by the commencement of suits. As trustees for creditors, we think the directors were as much bound to care for those who had given them notice of their claims by suits, in case they should

succeed in obtaining judgments, as for those whose claims had been already ascertained. Their action was taken with full knowledge that these claims might ripen into judgments entitled to payment from the property of the company." 16 R. I. 597, 603; s. c. 27 Am. St. Rep. 767.

<sup>2</sup> Such was the case of *United States v. Church of Jesus Christ, &c., supra*.

<sup>3</sup> N. C. Code, § 685.

<sup>4</sup> *Duke v. Markham*, 105 N. C. 138; s. c. 10 S. E. Rep. 1003.

held that it had made an unlawful transfer of its property in contemplation of insolvency, within the meaning of a statute of New York elsewhere considered.<sup>1</sup> So, where a sale of the property of an insolvent railroad company took place under a decree foreclosing a mortgage thereon, which decree was made in pursuance of an arrangement between the mortgagees and the stockholders, the creditors not being parties, under which the mortgagees, in their order of preference, were to get more or less of their debt, — 100 to 30 per cent, — and the stockholders were to get the residue of the proceeds of the sale, — nearly 16 per cent of the par value of their shares, — the arrangement was held fraudulent as against general creditors; and this, although the road was mortgaged for an amount far above its real value, and although, on a sale in open market, it did not bring enough to pay even the mortgage debts; so that, in fact, if there had been an ordinary foreclosure, and one which had taken place independently of any arrangement between the mortgagees and the stockholders, the entire proceeds of the sale would have gone to the mortgagees.<sup>2</sup>

<sup>1</sup> *Kingsley v. Bath Bank*, 31 Hun (N. Y.), 329; *ante*, § 6517.

<sup>2</sup> *Railroad Co. v. Howard*, 7 Wall. (U. S.) 392.



## CHAPTER CXLVIII.

### SELLING OUT TO A NEW CORPORATION.

#### SECTION

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6542. And receive pay in the stock of a new corporation.

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#### SECTION

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#### § 6541. Power of a Corporation to Sell All its Property.

For reasons already stated,<sup>1</sup> a corporation having no public duties to perform ordinarily has the same power to sell all of its property that an individual has; and this includes the right to make a sale of all of its property in a single transaction;<sup>2</sup> and this is especially so where there is a statute conferring upon corporations the same power in regard to the disposition of their property which natural persons have. Nor is it a good argument against the existence of such a power that it would defeat the objects of the incorporation.<sup>3</sup> Thus, a corporation organized to deal in lands may sell all its lands in bulk, and provide for the adjustment of its debts; and such arrangement is not a winding up, since the proceeds will belong to it and may be reinvested, and the corporation

<sup>1</sup> *Ante*, §§ 4446, 6466.

<sup>2</sup> *Buell v. Buckingham*, 16 Iowa,

<sup>3</sup> *Manufacturers' Sav. Bank v. Big Muddy Iron Co.*, 97 Mo. 38. 284; s. c. 85 Am. Dec. 516, 524.

will still exist.<sup>1</sup> A corporation organized for manufacturing, mining, trading, or other purposes which involve no duty on its part toward the public, such as are assumed by railway, canal, turnpike, and other *quasi*-public corporations, has the undoubted power to sell all of its property and go out of business whenever it finds that its business is unprofitable, or whenever in its discretion it sees fit to do so.<sup>2</sup>

§ 6542. **And Receive Pay in the Stock of a New Corporation.** — Nor is it beyond the power of such a corporation to sell all its property to a new corporation, and to receive pay therefor in stock of the new corporation, the stock being taken in lieu of money, to be distributed among those stockholders of the new corporation who are willing to receive it, or to be converted into money for those who do not desire to retain it. This is not a sale by a trustee to himself for his own benefit, but it is a sale to another corporation for the benefit and with the consent of the *cestuis que trustent*, the old stockholders. Being open, fair, and not collusive, and devised as a mode of payment for the property of the old corporation, the transaction is not open to objection by a minority of the stockholders.<sup>3</sup> Accordingly, it has been held that, where a company organized for the purpose of creating a water power finds that it can no longer profitably use its privileges, and its water power has been extinguished by contract with the Commonwealth, it may sell its lands, and receive payment therefor in its own stock.<sup>4</sup>

<sup>1</sup> Sewell v. East Cape May Beach Co., 50 N. J. Eq. 717; s. c. 25 Atl. Rep. 929.

<sup>2</sup> Treadwell v. Salisbury Man. Co., 7 Gray (Mass.), 393; s. c. 66 Am. Dec. 490; Miners' Ditch Co. v. Zellerback, 37 Cal. 543; s. c. 99 Am. Dec. 300, 316.

<sup>3</sup> Treadwell v. Salisbury Man. Co., 7 Gray (Mass.), 393; s. c. 66 Am. Dec. 490, 500. Compare Hodges v. New England Screw Co., 1 R. I. 312; s. c. 53 Am. Dec. 624; Com. v. Smith, 10

Allen (Mass.), 448, 455; s. c. 87 Am. Dec. 672; Re New South Meeting House, 13 Allen (Mass.), 497, 513; Despatch Line v. Bellamy Man. Co., 12 N. H. 205; s. c. 37 Am. Dec. 203; Leggett v. New Jersey Man. Co., 1 N. J. Eq. 541; s. c. 23 Am. Dec. 728.

<sup>4</sup> Dupee v. Boston Water Power Co., 114 Mass. 37. *Interpretation of a stockholders' resolution* held not to authorize a contract to pay all the debts of the selling corporation absolutely, in consideration of a transfer of its

§ 6543. **But not to the Prejudice of its Creditors.**—But the rule is different where the rights of the creditors of the selling corporation are concerned. The reason is plain. Such an arrangement has the effect of ultimately distributing the assets of the selling corporation to its own shareholders;<sup>1</sup> whereas such assets are a *trust fund* for the benefit of its creditors.<sup>2</sup> It has therefore been held that a sale by a corporation of all its property to another corporation, to be paid for in stock of the latter, which stock is to be distributed among the stockholders of the former, or any other arrangement which will have the effect to withdraw the capital of the company and turn it over to its stockholders except in the manner provided for by law, is a violation of that provision of the California Corporation Act of 1853, which forbids the trustees “to divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of the company,” and is void as to any creditor of the corporation, either prior or subsequent, who had no notice of the arrangement at the time of giving the credit.<sup>3</sup> So, a corporation having outstanding debts cannot transfer its entire property by a *lease* for 999 years, so as to prevent the application of it, at its full value, to the satisfaction of its debts; but the property will be followed into the hands of the lessee, and a court of equity will decree the payment by the lessee of a judgment recovered against the lessor.<sup>4</sup> And in general, whenever such a conveyance is made under circumstances which characterize it as *fraudulent* as against existing creditors, it will be set aside in equity at the suit of such creditors;<sup>5</sup> or other appropriate relief will be accorded them. Thus, a sale of all the property

property: *Bi-Spool &c. Co. v. Acme Man. Co.*, 153 Mass. 404; *s. c.* 26 N. E. Rep. 991.

<sup>1</sup> As to this, see *ante*, § 1511 *et seq.*, and § 1576, *et seq.*

<sup>2</sup> *Ante*, § 2054, *et seq.*

<sup>3</sup> *Martin v. Zellerback*, 38 Cal. 300; *s. c.* 9 Cal. Dec. 365. Circumstances under which creditor assigning his

claim upon agreement for shares in new corporation, not bound to make a tender: *Manistee Lumber Co. v. Union Nat. Bank*, 143 Ill. 490; *s. c.* 32 N. E. Rep. 449.

<sup>4</sup> *Chicago &c. R. Co. v. Third Nat. Bank*, 134 U. S. 276.

<sup>5</sup> See the preceding chapter.

of a corporation, in consideration of a greater part of the stock of another company, organized only to acquire such property, and whose stock is based only on the property, has been held invalid as against the creditors of the selling corporation.<sup>1</sup>

§ 6544. **Nor to the Prejudice of Stockholders.** — Where a corporation has a lawful existence after the expiration of its charter, but solely for the purpose of winding up its affairs, a majority in interest of its stockholders cannot sell its property to a new corporation, of which they are directors and stockholders, at a valuation estimated by themselves, against the will of the minority, and compel such dissenting stockholders either to receive shares of stock in the new corporation in return for their old shares, or to be paid therefor on a basis of the estimated valuation of the property; but the minority may have the property publicly sold and converted into money, and the money distributed.<sup>2</sup> As we shall see hereafter, the general doctrine is that a corporation cannot cease to exist of its own will, and without the consent of the State, but that its life continues until the expiry of its charter, or until it has been dissolved in due course of law.<sup>3</sup> Accordingly, it is held that a business corporation cannot *sell all of its property to a foreign corporation*, organized through its procurement, with a majority of non-resident trustees, for the purpose of taking its place and its assets and carrying on its business, — this being a virtual dissolution of the pre-existing corporation. And while the stockholders, who have assented to such an unlawful distribution of the corporate property, may be *estopped* thereby, *dissenting stockholders* are *not estopped*; and the *State* may demand that those officers of the corporation who perpetrated the wrong shall make restitution. Nor, does the fact that the trustees, in making the transfer, acted in good faith, render the act valid; nor does the difficulty

<sup>1</sup> Vance v. McNabb & Co. Coal Co., 92 Tenn. 47; s. c. 20 S. W. Rep. 424.      <sup>2</sup> Mason v. Pewabic Min. Co., 133 U. S. 50; ante, § 4548.

<sup>3</sup> Post, § 6678, et seq.

which may attend the final adjustment of rights, as between the assenting and dissenting stockholders, constitute a defense to an action by the State, prosecuted under a statute, to compel the trustees of the precedent corporation to account for breaches of their trust.<sup>1</sup> But, where a corporation *sells* to another corporation a *specific item of property*,—and perhaps the rule is applicable to a case where it sells all its property,—and the sale is open, fair, and free from fraud or guilty connivance, the purchasing company is not bound to see to the proper distribution of the purchase price, whether it consists in money or in shares of the stock of the purchasing company; and therefore, if the purchase price is paid in shares of the purchasing company, a *pledgee* holding shares of the selling company will not have a standing in court to establish a lien on the property sold, on the ground that distribution was not made to him, of his proportion of the shares of the purchasing company, which were paid over to the selling company as the purchase price of the property sold, but that such distribution was made to his *pledgor*.<sup>2</sup>

§ 6545. **Cannot Give Away All of its Property to a New Corporation.**—But a majority of the members of a corporation, such as an incorporated secret or *benevolent society*, cannot, by resolution, *donate* the property of such corporation to a new corporation of which such majority are members.<sup>3</sup>

§ 6546. **Circumstances under Which Such Proceedings Ultra Vires.**—It has been held, by a Federal court in Ohio, that a solvent corporation, created under the laws of that State, engaged in a profitable business, cannot sell its plant and assets for a consideration, the greater part of which consists of the stock and bonds of another corporation, to be organized to carry on the business of the former, where no

<sup>1</sup> *Peeples v. Ballard*, 134 N. Y. 269; *s. c.* 17 L. R. A. 737; 48 N. Y. St. Rep. 166; 32 N. E. Rep. 54; rehearing denied, 48 N. Y. St. Rep. 846; 32 N. E. Rep. 611.

<sup>2</sup> *Leathers v. Janney*, 41 La. An. 1120.

<sup>3</sup> *Polar Star Lodge v. Polar Star Lodge*, 16 La. An. 53.

exigency exists making such sale necessary for the protection of the stockholders of the former corporation; for the reason that, under the laws of Ohio, as established by the highest State tribunal, one corporation cannot become the owner of the stock of another, unless authority to do so is clearly conferred by statute.<sup>1</sup> The *manager* of a corporation cannot transfer all its assets in payment of its indebtedness, without the authority or consent of the board of directors.<sup>2</sup>

§ 6547. **Creditors of the Old Corporation have an Equitable Lien on the Assets thus Transferred.** — Where one corporation transfers all its assets to another corporation, and thus practically ceases to exist, without having paid its debts, the purchasing corporation takes the property subject to an *equitable lien or charge* in favor of the creditors of the selling corporation.<sup>3</sup> We have already seen<sup>4</sup> that where a corporation *reorganizes* under a new form of reincorporation, by which all the assets of the old corporation are transferred to the new, such assets pass into the hands of the new corporation, charged with an obligation, on its part, to pay all the debts of the old corporation.<sup>5</sup> This is a necessary extension of the doctrine that the assets of a corporation are a *trust fund*, for its creditors.<sup>6</sup> Such being the quality which equity annexes to them, when the corporation elects to go out of ex-

<sup>1</sup> *Easum v. Buckeye Brewery Co.*, 51 Fed. Rep. 156. It is worthy of note that the action was for *damages* for a *breach of the contract* thus to sell. That one corporation cannot become a stockholder in another under the laws of Ohio, see *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350; *s. c.* 38 Am. Rep. 594. And see on the subject generally, *ante*, § 5719.

<sup>2</sup> *Goodyear Rubber Co. v. Scott Co.*, 96 Ala. 439; *s. c.* 11 South. Rep. 370.

<sup>3</sup> *National Bank v. Texas Investment Co.*, 74 Tex. 421, 431; *Brum v. Merchants' Mut. Ins. Co.*, 16 Fed. Rep. 140; *Hibernia Ins. Co. v. St. Louis & C. Transp. Co.*, 13 Fed. Rep.

516; *Harrison v. Union Pacific R. Co.*, 13 Fed. Rep. 522; *Heman v. Britton*, 88 Mo. 549; *Blair v. St. Louis & C. R. Co.*, 24 Fed. Rep. 148; *Fogg v. St. Louis R. Co.*, 17 Fed. Rep. 871; see also *Pollock Contracts*, p. 200, *et seq.*; *Re Empress Engineering Co.*, 16 Ch. Div. 125; *Vance v. McNabb Coal Co.*, 92 Tenn. 47; *s. c.* 20 S. W. Rep. 424.

<sup>4</sup> *Ante*, §§ 265, 266.

<sup>5</sup> *McVicker v. American Opera Co.*, 40 Fed. Rep. 861; *Island City Sav. Bank v. Sachtleben*, 67 Tex. 420.

<sup>6</sup> *Ante*, §§ 1569, 2951.

istence, to dispossess itself of them, and to transfer them to another corporation, *equity follows the trust fund* into the hands of the new taker, and charges the property in the hands of such taker with the debts of the transferor. In other words, the corporation receiving the assets is *charged in equity, as a trustee* in respect of such property, with the payment of the debts of the antecedent corporation,<sup>1</sup>—this being another branch of the doctrine of *following trust funds* hereafter considered.<sup>2</sup> And, while the right to *follow a trust fund into the hands of a third party* depends upon the answer to the inquiry whether such third party took it with *knowledge of the trust*, the case being one where the trustee who transferred it to him had a power of disposition,—yet in such a case as we are supposing, where one corporation transfers all its assets to another, *not in the ordinary course of business*, the very circumstances of the case imply full knowledge on the part of the transferee of all the facts necessary to charge the property in his hands with the debts of the transferor; and the case is still clearer where the corporation receiving the transfer *agrees to assume and pay the debts* of the corporation making it,—in which case, under the principles of equity and under the modern codes of procedure, the creditors of the transferring corporation may maintain a direct action against the transferee corporation upon the contract, as a contract made for their benefit.<sup>3</sup> The principle has no application to a sale

<sup>1</sup> *Leathers v. Janney*, 41 La. An. 1120; s. c. 6 South. Rep. 884; 6 L. R. A. 661; *National Bank v. Texas Investment Co.*, 74 Tex. 421; s. c. 12 S. W. Rep. 101; 6 Rail. & Corp. L. J. 373.

<sup>2</sup> *Post*, § 7084, *et seq.*

<sup>3</sup> See *ante*, § 267, near the end; also *National Bank v. Texas Investment Co.*, 74 Tex. 421; s. c. 12 S. W. Rep. 101; 6 Rail. & Corp. L. J. 373. In this case, a petition by a creditor of an insolvent company which alleged that the insolvent corporation transferred its assets to another com-

pany, which agreed to pay its debts; that among the assets were 288 shares of corporate stock in a cattle company, which certain defendants had acquired with full notice of the facts; that by reason thereof said defendants were trustees for the creditors of the insolvent corporation; but had transferred the stock and misapplied the proceeds,—was held to state a cause of action, as the second company took the assets subject to a lien in favor of the creditors of the old company, which practically ceased to exist. Where creditors of an insol-

made *in the usual course of business*;<sup>1</sup> nor does it apply in a case of a *sale* for a full consideration, albeit of the entire property of the selling corporation, to another; and it has been held that if the consideration for the sale is the *assumption* and payment by the purchasing company of the *mortgage debts* of the selling company, to the full value of all the property conveyed, the sale will not be set aside in favor of other *unsecured creditors* of the selling company, nor will they have a lien on the property for which full value has been paid in good faith.<sup>2</sup>

§ 6548. **Effect of thus Selling out.** — Undoubtedly the fact that a corporation sells all of its property to another corporation, and thereby disables itself from carrying out the purposes of its existence, while, for certain purposes, working a *dissolution de facto*,<sup>3</sup> will not work a technical, *legal dissolution*; but the corporation, nevertheless, continues to exist *de jure*, for the purpose of suing and being sued.<sup>4</sup> But where the trustees of a *water company*, together with the stockholders, sold the entire stock, and delivered the property of the corporation to a purchaser, who took possession thereof; and, three years thereafter, no intermediate act having been done by them, a majority of the trustees met, allowed an account against the company, and drew a check therefor; — it was held that they were not trustees *de jure or de facto*, and had no

vent railroad company give written authority to an agent to purchase the road and transfer to a new corporation to complete the road, for the purpose of securing their indebtedness, and subsequently the corporation is consolidated with another, one of the creditors who sues to recover the value of his interest, upon the ground that the property was converted without his consent, can recover only his proportionate share of stock of the corporation to which, as the evidence shows, the road, with his consent,

was transferred. *Deposit Bank v. Barrett* (Ky.), 13 S. W. Rep. 337; *s. c.* 11 Ky. L. Rep. 910.

<sup>1</sup> *National Bank v. Texas Investment Co.*, *supra*, per Gaines, J.

<sup>2</sup> *Warfield v. Marshall County Canning Co.*, 72 Iowa, 666; *s. c.* 2 Am. St. Rep. 263.

<sup>3</sup> *Ante*, § 3345.

<sup>4</sup> *Post*, §§ 6720, 6721; also ch. 184, art. IV; *Island City Sav. Bank v. Sachtleben*, 67 Tex. 420; *Brinkerhoff v. Brown*, 7 Johns. Ch. (N. Y.) 217.



power to bind the corporation.<sup>1</sup> Where a *steamship company* went into liquidation and transferred all its property to another corporation, and subsequently, in a *collision* between one of the steamships so transferred and other vessels, the plaintiff's intestate was killed, and she, by mistake, brought an action against the old company and prosecuted it to judgment,—it was held that this judgment could not be enforced in equity against its former property in the hands of the new company, thus transferred before the time when the alleged cause of action arose, although the debts of the old company had been assumed by the new.<sup>2</sup>

§ 6549. **Ratification of Such Selling out by the Stockholders.**—Assuming that such a sale of all the assets of the corporation, as we are considering, has taken place under circumstances where *dissenting stockholders* are entitled to maintain a proceeding to avoid it,—as where it has been done by the directors without the consent of the stockholders, expressed in general meeting or otherwise,—yet here, as in other cases,<sup>3</sup> the stockholders may *ratify* it, so as to conclude them from making further objections; and such ratification may be inferred from that species of *tacit acquiescence* which consists in the entire failure to protest or to take any steps to repudiate or set aside the sale.<sup>4</sup> A stockholder who participated in the sale will not be allowed to avoid the contract after it has been thus ratified by the *acquiescence* of the other stockholders.<sup>5</sup> But, where the sale proceeds in *fraud* of the rights of stockholders; a *majority* cannot, of course, ratify it so as to conclude a dissenting stockholder.<sup>6</sup>

<sup>1</sup> Orr Water Ditch Co. v. Reno Water Co., 17 Nev. 166; s. c. 30 Pac. Rep. 695.

<sup>2</sup> Gray v. National Steamship Co., 115 U. S. 116. Effect of such a selling out upon the right of recovery on a promissory note payable "when the first locomotive engine on the M. railroad shall arrive" in town: Askew v. Hooper, 28 Ala. 634.

<sup>3</sup> Ante, §§ 4497, 5270, 5318.

<sup>4</sup> Stokes v. Detrick, 75 Md. 250; s. c. 23 Atl. Rep. 846.

<sup>5</sup> Berry v. Broach, 65 Miss. 450; s. c. 4 South. Rep. 117.

<sup>6</sup> Chicago Hansom Cab Co. v. Yerkes, 141 Ill. 320; s. c. 33 Am. St. Rep. 315; 30 N. E. Rep. 667; 11 Rail. & Corp. L. J. 265.

§ 6550. **When Such Transactions Fraudulent and when not.**—On a principle already stated,<sup>1</sup> the mere fact that the *directors* sell the property of the corporation to a new corporation, of which they are directors and stockholders, will not make the sale absolutely void.<sup>2</sup> A sale of all the property of a corporation, which has taken place under a resolution appointing the president and secretary a committee to dispose of it, will be set aside in equity at the suit of a dissenting stockholder, where the sale is made to one who purchased it under an agreement, previously made with the secretary, for their joint acquisition of the property. The reason is that the power conferred on the president and secretary requires their *joint action*, and that the secretary is disqualified from acting by reason of his personal interest.<sup>3</sup>

§ 6551. **Receiver's Sales: Circumstances under Which Purchasing Company at Void Receiver's Sale Entitled to Subrogation to Rights of Old Company.**—Where a corporation has become insolvent, and ceased business largely in debt, and its property is sold under a proceeding to dissolve it, and a deed is made by the receiver which is adjudged void, and a new company, claiming title under such deed, has advanced, for the purchase of the property, a sum sufficient to pay all creditors in full, and which is so used,—such new company will be entitled to be *subrogated* to the rights of the creditors of the old company, and may enforce the trust for its own benefit as *cestui que trust*, to the extent to which the purchase-money discharged the debts of the old corporation. In such a case, in the absence of *objections* on the part of the *stockholders* of the old company, or where circumstances of *estoppel* exist against them, the court decreeing the subrogation will have the power to direct the old company to convey

<sup>1</sup> *Ante*, § 6542.

<sup>2</sup> *Manufacturers' Sav. Bank v. Big Muddy Iron Co.*, 97 Mo. 38; *ante*, § 4079, *et seq.*

<sup>3</sup> *Chicago Hansom Cab Co. v. Yerkes*, 141 Ill. 320; *s. c.* 33 Am. St. Rep. 315; 30 N. E. Rep. 667; 11 Rail. & Corp. L. J. 265.

the property to the new company, on the ground that the new company is the *cestui que trust* for whose benefit the legal title is held by the old company; and a resale of the property is not necessary.<sup>1</sup>

<sup>1</sup> St. Louis &c. Co. v. Sandoval &c. Co., 116 Ill. 170. Compare Kinney v. Knoebel, 51 Ill. 112.

## CHAPTER CXLIX.

## CREDITORS' SUITS.

## SECTION

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§ 6555. **Jurisdiction of Equity to Distribute the Assets of Insolvent Corporations.**—As elsewhere seen, when a corporation becomes dissolved, either *de jure* or *de facto*, in any mode known to the law, so that the ordinary legal remedies of creditors against it are unavailable, a court of equity will lay hold of its assets by its *receiver* and convert them into money and distribute them among those beneficially entitled thereto,—that is to say, to the creditors first and to the stockholders last.<sup>1</sup> This results from a doctrine already much considered,<sup>2</sup> that the assets of a corporation are deemed, in

<sup>1</sup> *Ante*, § 2956, *et seq.*; *Hill v. Fogg*, 41 Mo. 563, 569; *Life Association v. Fassett*, 102 Ill. 315; *St. Louis &c. Co. v. Sandoval &c. Co.*, 116 Ill. 170, 174; *Hastings v. Drew*, 50 How. Pr. (N. Y.)

254; *Marr v. Bank of West Tennessee*, 4 Coldw. (Tenn.) 471; *Irons v. Manufacturers' Nat. Bank*, 6 Biss. (U. S.) 301.

<sup>2</sup> *Ante*, §§ 1569, 2951.

equity, to be a *trust fund* for the payment of its creditors;<sup>1</sup> which doctrine is sometimes differently expressed by saying that the creditors of a dissolved and insolvent corporation have an *equitable lien* upon its assets.<sup>2</sup> When, therefore, the corporation becomes dissolved, its liabilities are not extinguished, but its creditors may enforce their claims against any property belonging to it which has not passed into the hands of *bona fide* purchasers for value: until then the property remains affected with a trust in their favor.<sup>3</sup> It has been broadly stated that equity will follow them into the hands of anyone, whether he obtained them fairly, or by force or fraud, unless he has acquired a better equity in respect of them than the creditor.<sup>4</sup> So, it has been reasoned that, upon general principles, the *bona fide* and just creditor of a corporation which has been dissolved under a judicial sentence for a breach in its charter, has a claim upon the corporate property for the satisfaction of his debt, apart from any reservation in the act of legislature which directed the prosecution; that the *members* or *stockholders* of the corporation have a similar right, as against the parties who claim to hold the corporate property; and that a court of equity will aid the parties to release the property belonging to the corporation, and compel its application to the satisfaction of these demands.<sup>5</sup> The *stockholders* are said to be the *equitable owners* of the franchises, property, and assets of the company which remain after its debts and liabilities are discharged.<sup>6</sup>

<sup>1</sup> Curran v. State, 15 How. (U. S.) 304. See also Wood v. Drummer, 3 Mason, 308; Nathan v. Whitlock, 9 Paige (N. Y.), 152; Mumma v. Poto-mac Co., 8 Pet. (U. S.) 281; Wright v. Petrie, 1 Smedes & M. Ch. (Miss.) 319; Nevitt v. Bank of Port Gibson, 6 Smedes & M. (Miss.) 282, 513; Hightower v. Thornton, 8 Ga. 486; s. c. 52 Am. Dec. 412; Fort Edward &c. Plank Road Co. v. Payne, 17 Barb. (N. Y.) 567; Gillet v. Moody, 3 N. Y. 479; Life Association v. Fassett, 102 Ill. 315; St. Louis &c. Co. v. Sandoval

&c. Co., 116 Ill. 170; Marr v. Bank of West Tennessee, 4 Coldw. (Tenn.) 471.

<sup>2</sup> Tinkham v. Borst, 31 Barb. (N. Y.) 407.

<sup>3</sup> Hastings v. Drew, 50 How. Pr. (N. Y.) 254.

<sup>4</sup> Tinkham v. Borst, 31 Barb. (N. Y.) 407.

<sup>5</sup> Bacon v. Robertson, 18 How. (U. S.) 480.

<sup>6</sup> Chetlain v. Republic Life Ins. Co., 86 Ill. 220.

§ 6556. **Further of This Subject.**—While, as elsewhere seen,<sup>1</sup> a court of equity has no inherent jurisdiction to dissolve a corporation, it may exercise its power of impounding and distributing its assets, when the corporation has been dissolved by such circumstances as amount to a tacit or implied surrender of its franchises, and which have been elsewhere referred to in this work as producing a *de facto* dissolution.<sup>2</sup> And where a corporation has been judicially dissolved, and the statute under which the dissolution has taken place merely directs that the trustees appointed thereupon shall collect the assets and apply them as thereafter directed by law, no subsequent legislation can divert the assets from the creditors of the corporation, and if the legislature subsequently fails to direct the mode of distributing them among the creditors, a court of equity will execute the trust.<sup>3</sup> Moreover, statutes exist in several of the States conferring upon courts possessed of equity powers, the jurisdiction, in the exercise of such powers, of winding up insolvent corporations. Such a statute, existing in New York, has been elsewhere referred to.<sup>4</sup> Such a statute, relating to insolvent *insurance* companies, exists in Wisconsin.<sup>5</sup> In England, the jurisdiction of winding up companies is generally exercised in the Chancery Division of the High Court of Justice, and is understood to be entirely statutory.<sup>6</sup>

§ 6557. **Venue of Actions Brought for This Purpose.**—The question of the venue of such actions will, in most cases, be a question of local procedure, and one which does not relate

<sup>1</sup> *Ante*, § 4538; *post*, §§ 6697, 6703.

<sup>2</sup> *Ante*, §§ 3345, 4545, 4546; *post*, § 6651.

<sup>3</sup> *Nevitt v. Bank of Port Gibson*, 6 Smedes & M. (Miss.) 513.

<sup>4</sup> *Ante*, §§ 4541, 4542; *post*, § 6692.

<sup>5</sup> *Rev. Stat. Wis.*, §§ 3218, 3219. This statute has been held to refer to *mutual*, as well as to other incorporated insurance companies. *Re Oshkosh Mutual Fire Ins. Co.*, 77 Wis. 366; *s. c.* 46 N. W. Rep. 441; 9 L. R.

A. 273; 4 Baltimore Underwriter, 206.

<sup>6</sup> The winding-up of a company cannot be transferred to a court which has been excluded by the Lord Chancellor from such jurisdiction under the provisions of the English Companies (Winding-up) Act 1890, empowering him to exclude the county court from jurisdiction under the act. *Re Real Estates Co.* [1893], 1 Ch. 398.

specially to the law of corporations. In Texas, an equitable action, in behalf of all the creditors of an insolvent corporation, for an accounting and to compel the stockholders to contribute to the payment of its debts in proportion to their unpaid subscriptions, may be brought in any county where any of the stockholders reside.<sup>1</sup> In Kentucky, a court is not deprived of jurisdiction to sell the land of an insolvent partnership or corporation, in proceedings for a settlement of the business, by the circumstance that the land is situated in another county, notwithstanding the provisions of a statute<sup>2</sup> that actions relating to real property and to obtain the sale of land under incumbrances, must be brought in the county where the land lies.<sup>3</sup>

§ 6558. **Whether Such Action by Bill or Petition.**—It was held by Chancellor Walworth that, in a proceeding in equity by a creditor against an insolvent corporation, although the word “petition” only was used in the thirty-sixth section of the article of the Revised Statutes of New York, which related to proceedings against corporations in equity, yet such a suit might properly be commenced by *bill* as well as by petition; and that the proceeding by bill was the most proper mode of commencing the suit where the complainant intended to proceed against the directors or stockholders of the corporation to charge them personally in case the corporate property and effects should be found insufficient to pay all of the debts and liabilities of the corporation. Every bill in chancery was said to be in fact a petition to the court for relief.<sup>4</sup> Moreover, the forty-fifth section of the same article of the Revised

<sup>1</sup> *Mathis v. Pridham*, 1 Tex. Civ. App. 58; *s. c.* 20 S. W. Rep. 1015; construing Rev. Stat. Tex., art. 1098.

<sup>2</sup> Ky. Civ. Code, § 62.

<sup>3</sup> *Mechanics' Trust Co. v. Cobb*, 14 Ky. L. Rep. 444; *s. c.* 20 S. W. Rep. 391 (not to be officially reported).

<sup>4</sup> See to this point, *Van Pelt v. United States &c. Co.*, 13 Abb. Pr. (N. S.) (N. Y.) 325, 331; *s. c.* 3 Jones

& S. (N. Y.) 117, where the same doctrine is laid down, citing this case. Undoubtedly there was in the English chancery practice a clear distinction between a *bill* and a *petition*, and between cases in which a party might proceed by petition and those in which he was obliged to exhibit a bill.

Statutes expressly recognized the filing of a bill against the directors or stockholders, as well as against the corporation, whenever the creditor, whose execution had been returned unsatisfied, sought to charge such directors or stockholders on account of any liability created by law.<sup>1</sup>

**§ 6559. Creditor Bringing the Bill must be a Judgment Creditor.**—In the respect under consideration the jurisdiction of courts of equity is *auxiliary* to that of courts of law; and therefore, in order to have a standing in equity, the complainant must have exhausted his remedy at law. He must, therefore, as a general rule, have prosecuted his demand against the corporation to a judgment at law, and must have sued out an execution which has been returned *nulla bona*. There are reasons in support of this rule of procedure, and reasons against it, which need not be gone into. One reason in support of it is, that in the case of a contested demand, the corporation is entitled to a *trial by jury*. The reader can imagine cases where this reason would have no just influence, as in the case where the complaining creditor is a holder of the *circulating notes* of an insolvent banking corporation; and in several jurisdictions the courts hold, chiefly with reference to the provisions of statutes, that it is not necessary for the creditor to have prosecuted his demand to judgment, before proceeding against the stockholders.<sup>2</sup> The general rule, nevertheless, is that only those creditors can bring creditor's bills against insolvent corporations, who are *judgment creditors*.<sup>3</sup>

<sup>1</sup> Morgan v. New York &c. R. Co., 10 Paige (N. Y.), 290; s. c. 40 Am. Dec. 244; Judson v. Rossie Galena Co., 9 Paige (N. Y.) 598; s. c. 38 Am. Dec. 569.

<sup>2</sup> McDonnell v. Alabama Gold Life Ins. Co., 85 Ala. 401; s. c. 5 South. Rep. 120; Bird v. Calvert, 22 S. C. 292; Hodges v. Silver Hill Min. Co., 9 Or. 200; Cleveland v. Marine Bank, 17 Wis. 545. Compare Olney v. Conanicut Land Co., 16 R. I. 597; s. c.

27 Am. St. Rep. 767; 18 Atl. Rep. 181.

<sup>3</sup> Swan Land & Cattle Co. v. Frank, 39 Fed. Rep. 456; Consolidated Tank Line Co. v. Kansas City Varnish Co., 45 Fed. Rep. 7; Berford v. New York Iron Mine, 21 N. Y. St. Rep. 439; s. c. 4 N. Y. Supp. 836; Jones v. Green, 1 Wall. (U. S.) 330; Van Weel v. Winston, 115 U. S. 228, 245. Compare Melten v. Moline Malleable Iron Works, 31 U. S. 352; ante, § 3351, et seq.



§ 6560. So where He Proceeds against Stockholders.— There is an analogous rule that a creditor cannot maintain a bill in equity *against stockholders* of a corporation who are not officers of it, to compel the payment of his claim, until he has recovered a judgment thereon in an action at law against the corporation,—and this, although the corporation is joined as a party to the bill.<sup>1</sup> We have already had occasion to note the principle that, as a general rule, a creditor of a corporation cannot proceed against its *stockholders* in any manner, whether by an action at law, a bill in equity, a motion under a statute, or otherwise, in the absence of statutory provisions to the contrary, until he has *exhausted his remedy against the corporation*, by prosecuting his demand to a *judgment at law* and suing out an execution which has been returned *nulla bona*.<sup>2</sup>

§ 6561. Exceptions to the Rule Which Requires a Judgment at Law.— Circumstances exist which create *exceptions* to this rule. If, for instance, the corporation has been *judicially dissolved*, so that no judgment at law can be recovered against it, the creditor is not, for that reason, to be deprived of his relief in equity.<sup>3</sup> And the same effect has been ascribed to the *appointment of a receiver*, under a statutory system, where some of the debts due the particular creditor had not matured at the time of the appointment.<sup>4</sup> In another case

<sup>1</sup> Cambridge Water Works v. Somerville &c. Co., 4 Allen (Mass.), 239 (under a statute); Remington v. Samana Bay Co., 140 Mass. 494.

<sup>2</sup> *Ante*, § 3351, *et seq.*; Grose v. Hilt, 36 Me. 22; Peele v. Phillips, 8 Allen (Mass.), 86; Handy v. Draper, 89 N. Y. 334; reversing s. c. 23 Hun (N. Y.), 256; Payne v. Bullard, 23 Miss. 88; s. c. 55 Am. Dec. 74; Richards v. Coe, 19 Abb. N. Cas. (N. Y.) 79; Young v. Brice, 9 N. Y. St. Rep. 532; Drinkwater v. Portland Marine Railway, 18 Me. 35; Judson v. Rossie Galena Co., 9 Paige (N. Y.), 598, *per*

Walworth, C.; s. c. 38 Am. Dec. 569. That a *judgment* against a corporation is merely a step to fix the liability of stockholders, and does not merge it or stand in the way of any discovery or relief which would otherwise be proper to enforce that liability,—see Newberry v. Robinson, 41 Fed. Rep. 458.

<sup>3</sup> Judson v. Rossie Galena Co., 9 Paige (N. Y.), 598; s. c. 38 Am. Dec. 569.

<sup>4</sup> Ouykendall v. Douglas, 19 Hun (N. Y.), 577.

the appointment of a receiver has been held to be sufficient evidence that corporate property could not be found to levy upon, as required by a statute, before allowing the creditor to proceed against the individual stockholders.<sup>1</sup> It must be borne in mind, however, that the rule which requires the creditor to exhaust his remedy against the corporation before proceeding against the stockholder, does not rest upon the same principle as the rule which requires him to exhaust his legal remedy against his insolvent debtor before being allowed to invoke the aid of equity; but it rather rests upon the principle that the *liability of the stockholder is secondary*, in the nature of a *superadded guaranty*.<sup>2</sup> Notwithstanding this difference, there is a close analogy between the two subjects, in respect of the question what circumstances will excuse the creditor, in either case, from prosecuting his demand to a judgment at law. The law does not, of course, require the creditor to do a vain thing; nor does it require of him impossibilities; and therefore, where the complainant was the holder of the circulating notes of a *foreign* banking corporation, he was allowed to maintain a bill in equity to reach and subject its equitable assets, without having obtained a judgment at law.<sup>3</sup> Nor is this rule a rule of *jurisdiction* in such a sense that the decree in the creditor's suit will be subject to *collateral attack* on the ground that, previous to bringing his suit, he had not recovered a judgment at law.<sup>4</sup>

**§ 6562. Such Judgment at Law must be a Domestic Judgment.**— Indeed, a judgment at law obtained in the foreign jurisdiction would not, according to the weight of judicial authority, have supported a proceeding in equity in the domestic forum, if it were possible to obtain such a judgment in that forum; although the rule, when applied to the judgments of the courts of sister States of the American Union, seems opposed to reason and justice. It is undoubtedly the

<sup>1</sup> *Paine v. Stewart*, 33 Conn. 516.

<sup>2</sup> *Bank of St. Mary's v. St. John*,

<sup>3</sup> *Ante*, § 3087, *et seq.*

25 Ala. 566.

<sup>4</sup> *Mellen v. Moline Malleable Iron Works*, 131 U. S. 352.

rule generally acted upon by courts of equity, that the judgment at law, which is necessary to support a bill in equity to reach and subject equitable assets, must be a *domestic judgment*;<sup>1</sup> and the same has been held of a judgment required by a statute to be recovered against a corporation before proceeding against its stockholders.<sup>2</sup>

**§ 6563. And His Execution must have been Returned Nulla Bona.**—The mere recovery of a judgment, without any attempt to enforce its satisfaction by execution, obviously does not amount to an exhaustion of the remedy of the plaintiff at law. Accordingly, the general rule is, that a bill in equity will not lie in behalf of a judgment creditor to reach and subject equitable assets of the judgment debtor, until a fruitless attempt has been made to enforce the judgment by execution at law.<sup>3</sup> When, therefore, the judgment creditors of an insolvent corporation bring a bill in equity, seeking to have funds belonging to it, which are in the hands of natural persons, who are made co-defendants with it, applied to the payment of their judgments, their bill will be fatally defective, unless there is an averment that executions have been issued on their judgments, which have proved fruitless.<sup>4</sup>

**§ 6564. Bill by Creditor having a Lien upon the Assets.**—Creditors having a *lien* upon the assets of an insolvent corpo-

<sup>1</sup> *Ante*, § 3571.

<sup>2</sup> Thus, under the provisions of the general manufacturing act of New York (Laws N. Y., ch. 40, § 24), requiring, as a condition precedent to the bringing of an action against a stockholder to enforce his liability to a creditor of the corporation, imposed under section 10 of the act, that judgment shall be recovered against the corporation and execution issued thereon and returned unsatisfied, — a *judgment in a proceeding in rem*, affecting only the property of the corporation attached, and an execution against that property, is not a com-

pliance with the condition; nor is a judgment obtained, and execution issued thereon, *in another State*; but the statute requires a judgment and an execution issued out of a court of the State of New York. *Rocky Mountain &c. Bank v. Bliss*, 89 N. Y. 338. That a *domestic judgment* is required by the same statute, see *Dean v. Mace*, 19 Hun (N. Y.), 391.

<sup>3</sup> *Jones v. Green*, 1 Wall. (U. S.) 330, where this was the sole point under consideration. Compare *Sturges v. Vanderbilt*, 73 N. Y. 384.

<sup>4</sup> *Suydam v. Northwestern Ins. Co.*, 51 Pa. St. 394.

ration may likewise invoke the relief of equity to enforce the same,<sup>1</sup> and of course without recovering a judgment at law, unless legal remedies, which are plainly adequate, are open to them. For instance, in the case of an ordinary *chattel mortgage*, the mortgagee would have the right to take possession upon condition broken, and might bring replevin therefor; hence it may be assumed that he would not be entitled to relief in equity, except upon a showing that his legal remedy was in some way obstructed. But in the usual railway mortgage deeds of trust, which are in existence in the United States, although the trustee is empowered to take possession upon default of payment of interest or principal of the bonds secured thereby, yet it is the constant practice to go into a court of equity, with a bill to foreclose the mortgage, and for a receiver *pendente lite*.<sup>2</sup>

**§ 6565. Bill by a General Creditor to Remove an Invalid Lien.**—“The removal of alleged liens or incumbrances upon property, the closing up of affairs of insolvent corporations, and the administration and distribution of trust funds, are subjects over which courts of equity have general jurisdiction.”<sup>3</sup> While it may be assumed that the creditor suing for this relief must be a *judgment creditor*,<sup>4</sup> yet, this being a *question for decision* in the case in which the action to obtain the relief is brought, an objection on this ground cannot be raised in a *collateral proceeding*.<sup>5</sup> A suit against an insolvent corporation, to subject its property to the payment of a debt due the plaintiff and to remove a lien thereon, created by a deed of trust and chattel mortgage alleged to be invalid, is within the act of Congress,<sup>6</sup> authorizing an *order of publication* against an absent defendant in a suit to “remove any incumbrance or lien or cloud upon the title to” property.<sup>7</sup>

<sup>1</sup> *McLean v. Eastman*, 21 Hun (N. Y.), 312.

<sup>2</sup> *Ibid.* Compare *ante*, § 6208, *et seq.*

<sup>3</sup> *Mellen v. Moline Malleable Iron Works*, 131 U. S. 352, 367, opinion by Harlan, J.

<sup>4</sup> *Ante*, § 6559.

<sup>5</sup> *Mellen v. Moline Malleable Iron Works*, 131 U. S. 352.

<sup>6</sup> Act Cong. Mar. 3, 1875; 18 U. S. Stat. at Large, 472, ch. 137, § 8; Rev. Stat. U. S., § 738.

<sup>7</sup> *Mellen v. Moline Malleable Iron Works*, *supra*.

§ 6566. **Creditors' Bill where the Trustee Fails to Execute the Trust.** — If the property of the insolvent corporation has passed into the hands of a voluntary assignee of the corporation for the benefit of its creditors, or into the hands of a statutory trustee, and such assignee or trustee is either neglecting or maladministering his trust, — the creditors are not, for that reason, remediless, but may maintain a suit in equity to secure a proper administration of the trust, and compel the trustee to make distribution, where he has assets to distribute.<sup>1</sup> Statutory trustees, appointed to close up the affairs of an insolvent corporation, are not in the enjoyment of a *franchise*, in such a sense that the proper remedy, in case of the usurpation of such an office, is by *quo warranto*, but the proper remedy is by a bill in equity to control the administration of the trust;<sup>2</sup> and, on well-understood grounds, the court of equity will remove the person usurping the functions of trustee and appoint a suitable person to administer the trust. So, a fraudulent combination and collusion between the assignee and debtors of an insolvent corporation, to injure and defeat the creditors of the corporation, warrant the interposition of a court of equity in behalf of the creditors.<sup>3</sup>

§ 6567. **Parties Plaintiff: Whether Bill Filed on Behalf of All Creditors.** — Such a creditors' bill should not only be filed in behalf of the moving creditor, but in behalf of all other creditors who may desire to come in and make themselves parties and share with him the expense of the litigation;<sup>4</sup> though the principles of equity do not exclude the right of a particular creditor to proceed in his own behalf to set aside a fraudulent conveyance, or otherwise to subject particular assets, which have been placed by the managers of the corporation beyond the reach of legal process.<sup>5</sup> Where a bill does not purport to be filed in behalf of other creditors, this will be no substantial objection to it; since, under the princi-

<sup>1</sup> Bacon v. Robertson, 18 How. (U. S.) 480.

<sup>2</sup> Stocks v. Van Leonard, 8 Ga. 511.

<sup>3</sup> People v. Ridgley, 21 Ill. 65.

<sup>4</sup> Ante, § 3481.

<sup>5</sup> Ante, §§ 3481, 3482, 3486.

ples of equity, it necessarily stands in behalf of any creditors who may choose to come in; and they will be allowed to *intervene* and be added as parties complainant, upon their own motion; but if they do not choose to come in voluntarily and share the burden and expense of the litigation, the creditor instituting the suit will be entitled to the fruits of his victory.<sup>1</sup> Therefore, if the creditor originally brings his bill alone, a subsequent *amendment* by which his bill is so framed as to proceed on behalf of himself and all other creditors who may become parties, does not set up a different cause of action from the original bill.<sup>2</sup> This being so, it followed that a final decree which was obtained upon a bill filed by a judgment creditor of a corporation, under the thirty-ninth section of the article of the Revised Statutes of New York, which related to proceedings against corporations in equity, was a decree not only for the benefit of the complainant in the suit, but also for the benefit of all other creditors of the corporation who might come in and prove their claims under such decree, or under an order of the court made previous to such decree, as authorized by the fifty-sixth section of the same title.<sup>3</sup> It was therefore erroneous, upon such a bill, to appoint a *receiver* of so much of the corporate property only as should be necessary to satisfy the plaintiff's judgment, but the order should extend the receivership to all the effects of the corporation. Such error, however, would not be ground for reversing the decree,

<sup>1</sup> *Williams v. Jackson County Patrons*, 23 Mo. App. 132. That a creditor may, in a proceeding against an insolvent corporation, under Gen. Stat. Minn., ch. 76, to wind up its affairs and distribute its assets, be allowed, in the discretion of the court, upon a proper showing, to come in and be made a party after the expiration of the time previously limited for that purpose, see *Spooner v. Bay St. Louis Syndicate*, 48 Minn. 313; *s. c.* 51 N. W. Rep. 377. In making distribution of the proceeds of a sheriff's

sale of the personal property of a corporation, it was agreed that the fund should be distributed by a master, as if a bill in equity had been filed by one of the claimants against the rest. The report of the master was filed, and it was again referred to him for correction. Other creditors then asked to be made parties to the supposed bill, and the court allowed the amendment. This was no error. *Hopkins's Appeal*, 90 Pa. St. 69.

<sup>2</sup> *Richmond v. Irons*, 121 U. S. 27.

<sup>3</sup> 2 Rev. Stats. New York, 466.

where it did not appear that the corporation owed any debts except that of the complainant.<sup>1</sup>

§ 6568. **Parties Defendant to Such Bills.**—Where the object of such bills is to compel a *contribution from shareholders*, under principles already considered,<sup>2</sup> there is a difference of theory and practice as to *whether the shareholders must be made parties*, or as to whether they are represented in the proceeding by the corporation, in such a sense that the court can determine the amount to be raised and direct its receiver to apportion it against them, and authorize him to enforce the payment, by appropriate actions at law or otherwise, against the stockholders distributively.<sup>3</sup> In Texas, an equitable action in behalf of all the creditors of an insolvent corporation, for an accounting and to compel a contribution by the stockholders to pay its debts, in proportion to their unpaid subscriptions, must be brought against *all the delinquent subscribers*, so far as known, who are solvent and within the jurisdiction of the court.<sup>4</sup> In Virginia, all the shareholders should be made parties;<sup>5</sup> though, in the celebrated Glenn cases, which arose upon an assignment made in that State, it was held by various courts, Federal and State, that non-resident stockholders of the Virginia corporation were *bound by representation* through the corporation, which had been made a defendant to the proceeding, so that the trustee appointed by the court might maintain actions against them.<sup>6</sup> In Georgia, where two persons organized a corporation without subscribing the minimum capital stock or paying in the amount required by the charter, and contracted debts, and then made a *fraudulent assignment* of the assets,—it was held that the

<sup>1</sup> Morgan v. New York &c. R. Co., 10 Paige (N. Y.), 290; s. c. 40 Am. Dec. 244.

<sup>2</sup> Ante, § 3816, et seq.

<sup>3</sup> That stockholders are bound by a decree winding up the corporation, though not parties to the suit,—see Great Western Tel. Co. v. Gray, 122 Ill. 630; ante, § 3499. That it is not

essential to the determination of a suit in chancery to dissolve a *joint-stock company*, that all its members should be made parties,—see Von Schmidt v. Huntington, 1 Cal. 55.

<sup>4</sup> Mathis v. Pridham, 1 Tex. Civ. App. 58; s. c. 20 S. W. Rep. 1015.

<sup>5</sup> Cason v. Seldner, 77 Va. 293.

<sup>6</sup> Ante, §§ 3499, 3567, 3568.

creditors might proceed in equity against all the parties concerned in the transaction, making *the corporation and the corporators* parties, to set aside the assignment and to charge the corporators with liability for the fraud.<sup>1</sup> Whatever may be the practice with regard to making the stockholders parties, the rule seems to be universal that, in any proceeding in equity, whether instituted under a statute<sup>2</sup> or otherwise, to wind up the affairs of a corporation, *the corporation itself must be made a party*.<sup>3</sup>

§ 6569. **Cross-bill by Assignee.**—Where the corporation has made a voluntary assignment for the benefit of its creditors, and a judgment creditor has brought a creditors' bill against a stockholder, making the corporation and the assignee parties defendant thereto, the *assignee cannot*, it has been held, *file a cross-bill*, alleging breaches of trust by the defendant stockholder and other members of the company, and praying that they be charged with liability to the company therefor, and that they pay to him the full amounts found against them to be distributed among the creditors of the company.<sup>4</sup> The reason is, that the voluntary assignee stands in the shoes of the assignor, and cannot impeach or set aside fraudulent transfers of his property made by him.<sup>5</sup> It should be observed, however, that this principle is not acceded to in all jurisdictions, even in regard to voluntary assignees, especially where there are statutes regulating the administration of their trusts; nor, according to the best opinion, does it

<sup>1</sup> Burns v. Beck, 83 Ga. 471; s. c. 10 S. E. Rep. 121.

<sup>2</sup> The corporation is a necessary party to a proceeding instituted under a statute in West Virginia by stockholders to secure its dissolution. Hurst v. Coe, 30 W. Va. 158.

<sup>3</sup> Ante, §§ 3509, 4578; Ferris v. Strong, 3 Edw. Ch. (N. Y.) 127.

<sup>4</sup> Bouton v. Dement, 123 Ill. 142; s. c. 14 N. E. Rep. 62; 11 West. Rep. 437.

<sup>5</sup> Ibid. Upon this principle, the court cite the following authorities: Brownell v. Curtis, 10 Paige (N. Y.), 210; Leach v. Kelsey, 7 Barb. (N. Y.) 466; Vandyke v. Christ, 7 Watts & S. (Pa.) 373; Estabrook v. Messersmith, 18 Wis. 545; Jones v. Yates, 9 Barn. & C. 532; Maiders v. Culver, 1 Duvall (Ky.), 164; Flower v. Cornish, 25 Minn. 473.



apply to *receivers* appointed by a court of equity, or to *receivers* who are statutory trustees.<sup>1</sup>

§ 6570. **Kinds of Relief Administered.**<sup>2</sup>—The principal species of relief which is granted in such cases is the *impounding of the assets*, at the outset of the proceeding, by the *appointment of a receiver*. The circumstances under which receivers will be appointed have been reserved for separate consideration;<sup>3</sup> but it may be stated generally, that if insolvency and the probability of a waste of assets are shown, a receiver is properly appointed before final decree.<sup>4</sup> Another leading species of relief, which is usually granted in such cases, is an *injunction* restraining the corporation from the further prosecution of its business, and from further dealing with its assets; and this relief, in many cases, extends to the restraining of the prosecution of suits at law, — depending upon the terms of the governing statute, if there is one, or upon the scope and purpose of the proceeding. This species of relief is reserved for separate consideration.<sup>5</sup> A creditors' bill to wind up an insolvent corporation has been described as a proceeding to enforce the equitable obligation of stockholders to pay the unpaid portions of the capital stock due by them, in order that all the debts of the corporation may be paid, to the extent of such unpaid capital. "It is not a statutory obligation at all, but an obligation in equity arising out of the consideration that the capital stock of a corporation is a *trust fund* for the payment of its debts. Only so much of the unpaid capital as is necessary for the payment of the debts can be called in, and this can only be done when all the other assets are exhausted. It is manifest, therefore, that, in a case of this kind, *there must be an account taken* of the amount of debts, assets, and unpaid capital, and a decree for an assess-

<sup>1</sup> *Post*, ch. 161.

<sup>2</sup> See also *ante*, § 3536, *et seq.*

<sup>3</sup> *Post*, ch. 158, *et seq.* See also *ante*, §§ 4545, 4546.

<sup>4</sup> *Turnbull v. Prentiss Lumber Co.*, 55 Mich. 387. That *mere insolvency* will not, under the statutes of New

Jersey, authorize the appointment of a receiver, — see *Atlantic Trust Co. v. Consolidated Electric Storage Co.*, 49 N. J. Eq. 402; s. c. 23 Atl. Rep. 934; *post*, § 6826.

<sup>5</sup> *Post*, §§ 6706, 6897.

ment of the amount due by each stockholder.”<sup>1</sup> Where the corporation which has become insolvent was organized for the performance of duties of a *public nature*, such as the maintaining of a *railway* or *turnpike* road, public policy will not allow its property to be seized under executions at law, so as to disable it from the performance of those duties; and in such a case, the extent of the relief which may be afforded to corporations by a court of equity consists in the *sequestration of the earnings* of the corporation and the application of the same in satisfaction of their judgments; and the court will retain jurisdiction of the cause until this is accomplished.<sup>2</sup> In Virginia, a commissioner appointed under a creditors’ bill against an insolvent railroad company, has been required to *lease the railroad* for such a term as would yield, in rents, a sum far exceeding the amount of the judgments, in case it could not be leased for a shorter term,—the court taking the view that, rather than defeat the right of the judgment creditors to the satisfaction of their judgments, a long lease is justified.<sup>3</sup> But relief against such corporations has not always been confined to a sequestration of their earnings. It has been held, in Georgia, that where sundry judgments have been recovered at law against an insolvent railroad company, and executions sued out thereon, and the judgment creditors are threatening to levy upon the road and its equipment and sell the same under their executions,—equity will take jurisdiction, directing a sale for all concerned, and distributing the funds to such as shall show themselves entitled thereto, according to the usual course of courts of equity in marshaling assets. In such a proceeding, anyone who has a claim upon the fund, but who is not a party to the suit, may become a party, by presenting his claim before the master, or under the decree, before it becomes final. But if he neglects to do so, equity will not aid him in setting it aside.<sup>4</sup>

<sup>1</sup> Bell’s Appeal, 115 Pa. St. 88; *s. c.* 2 Am. St. Rep. 532. Compare Lane’s Appeal, 105 Pa. St. 49; *s. c.* 51 Am. Dec. 166; *ante*, §§ 2961, 3537.

<sup>2</sup> Winchester &c. Turnp. Co. v. Vimont, 5 B. Mon. (Ky.) 1.

<sup>3</sup> Winchester &c. R. Co. v. Colfelt, 27 Gratt. (Va.) 777.

<sup>4</sup> Macon &c. R. Co. v. Parker, 9 Ga. 377.

§ 6571. **Statutory Proceedings for Sequestration of Earnings.** — Statutes have been enacted providing for the sequestration of earnings of such companies, and to that end, for the appointment of a species of receiver, analogous to receivers of rents and profits, called *sequestrators*. Such a statute was enacted in Pennsylvania in 1836.<sup>1</sup> By its terms, it excepted from its operation a “county, township, or other public corporate body.” It was held that a turnpike company, in which the State was a stockholder, was not, for that reason, a public corporate body within the meaning of the exception.<sup>2</sup> The operation of the statute was such that the court in which the judgment against the corporation was obtained, acquired jurisdiction over all its property and estate, although part of it might be situated in other counties of the State.<sup>3</sup> The statute was exclusive of all other remedies, and, since its enactment, relief could not be had by the ordinary creditors’ bill in equity.<sup>4</sup> A sequestrator might, by using the name of the corporation, maintain an action to avoid a *fraudulent grant*.<sup>5</sup>

<sup>1</sup> Pa. Act June 16, 1836. It was early decided in Pennsylvania that the statute of 1836, which was a statute relating to *executions*, did not authorize what is called in that State an *attachment-execution*,—which seems to be the ordinary writ of *garnishment*,—against a corporation to attach debts due to it. *Monongahela Land Co. v. Ledlei*, 3 Pa. L. Jour. 179; *Ridge Turnp. Co. v. Peddle*, 4 Pa. St. 490. A bill for the discovery of assets lies under the statute, but it could only be filed by a sequestrator appointed under its provisions. *Bevans v. Dingman’s Choice Turnpike*, 10 Pa. St. 174. By a subsequent statute, enacted in 1858, the power of the sequestrator to take possession, control, and management of the property of the insolvent corporation, was refused as to an *unfinished railroad*. It was the design of this amendment to give the

sequestrator, as the representative of creditors, the earnings of the *completed portion* of the road, but to preserve the uncompleted portion within the possession, management, and control of the corporate officers. *Muncy Creek R. Co. v. Hill*, 84 Pa. St. 459. See also *post*, § 6837.

<sup>2</sup> *Turnpike Co. v. Wallace*, 8 Watts (Pa.), 316.

<sup>3</sup> *Ibid.* An action for tolls under the statute was required to be brought *in the name of the company*, and not in the name of the sequestrator. *Beeler v. Turnpike Co.*, 14 Pa. St. 162. This is in accordance with the rule in regard to actions by receivers, where the common rules of pleading prevail, as elsewhere stated. *Ante*, § 3570.

<sup>4</sup> *Suydam v. North Western Ins. Co.*, 51 Pa. St. 394.

<sup>5</sup> *Ibid.*

## **TITLE SIXTEEN.**

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**DISSOLUTION AND WINDING UP.**



# TITLE SIXTEEN.

## DISSOLUTION AND WINDING UP.

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### CHAPTER CL.

#### IN WHAT MANNER CORPORATIONS DISSOLVED.

##### SECTION

- 6577. Four ways in which a corporation may become dissolved.
- 6578. When a corporation is deemed dissolved for all purposes.
- 6579. Dissolution by legislative repeal of the charter.
- 6580. Legislature the judge whether condition on which right of repeal is predicated has happened.
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##### SECTION

- 6587. Doctrine that a corporation ceases to exist *ipso facto*, on failure to perform the prescribed conditions.
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- 6592. Other decisions of the same kind.
- 6593. Still other such decisions.
- 6594. A corporation cannot prolong its existence by leasing its franchise to another corporation which complies with the conditions for its own benefit.

§ 6577. **Four Ways in Which a Corporation may Become Dissolved.**—It has been frequently laid down that private corporations may lose their legal existence in four ways: 1. By the act of the legislature. 2. By the death of all the members. 3. By a forfeiture of their franchises. 4. By a sur-

render of their charters.<sup>1</sup> More explicitly stated, it has been said that such dissolution can take place only: 1. By an act of the legislature, where power is reserved for that purpose. 2. By a surrender, which is accepted, of the charter. 3. By a loss of all its members, or of an integral part, so that the exercise of corporate functions cannot be restored. 4. By a forfeiture, which must be declared by the judgment of a court.<sup>2</sup>

**§ 6578. When a Corporation is Deemed Dissolved for All Purposes.** — We shall see, as we advance in this discussion,

<sup>1</sup> 2 Kyd Corp. 447; 1 Bla. Com. 485; 2 Kent's Com. 245; Ang. & Ames Corp. 501; Oakes v. Hill, 14 Pick. (Mass.) 442; Boston Glass Manufactory v. Langdon, 24 Pick. (Mass.) 49; s. c. 35 Am. Dec. 292.

<sup>2</sup> Penobscot Boom Co. v. Lamson, 16 Me. 224; s. c. 33 Am. Dec. 656. Observations, more or less similar to the above, as to the mode in which a private corporation may become dissolved, will be found in the following cases: Boston Glass Manufactory v. Langdon, 24 Pick. (Mass.) 49; s. c. 35 Am. Dec. 292; Chesapeake Canal Co. v. Ohio R. Co., 4 Gill & J. (Md.) 1; Hodsdon v. Copeland, 16 Me. 314; Slee v. Bloom, 5 Johns. Ch. (N. Y.) 367; Vernon Society v. Hills, 6 Cow. (N. Y.) 23; s. c. 16 Am. Dec. 429; Bank of Niagara v. Johnson, 8 Wend. (N. Y.) 645; Wilde v. Jenkins, 4 Paige (N. Y.), 481; Russell v. M'Lellan, 14 Pick. (Mass.) 63; Revere v. Boston Copper Co., 15 Pick. (Mass.) 351; Peter v. Kendal, 6 Barn. & C. 703; 2 Kent's Com. 312. Sometimes the first mode above stated is omitted by the courts in cataloguing the grounds of dissolution, evidently under the theory that a dissolution by an act of the legislature is inadmissible under the rule of the Dartmouth College Case. *Ante*, § 5381. Thus,

we find it stated, in an early case in Ohio, that a private corporation in this country may be dissolved: 1. By the death of its members. 2. By the surrender of its franchises. 3. By a judgment of forfeiture for non-user or abuse. McIntire Poor School v. Zanesville Canal & Man. Co., 9 Ohio, 203; s. c. 34 Am. Dec. 436. But we shall see that this catalogue is imperfect by reason of the omission of all reference to a legislative dissolution. According to Sir Wm. Blackstone, a corporation may be dissolved: "1. By act of Parliament, which is boundless in its operations. 2. By the natural death of all its members in case of an aggregate corporation. 3. By surrender of its franchises into the hands of the King, which is a kind of suicide. 4. By forfeiture of its charter through negligence or abuse of its franchises, in which case the law judges that the body politic has broken the condition upon which it was incorporated, and thereupon the incorporation is void; and the regular course is to bring an information in the nature of a writ of *quo warranto*, to inquire by what warrant the members now exercise their corporate power, having forfeited it by such and such proceedings." 1 Bla. Com. 485.

that corporations are often deemed to be existent for some purposes, and to be dissolved for others. The *test* by which to determine whether a corporation is dissolved *for all purposes* has been said to be to consider whether it has *lost its capacity to sustain itself by a new election of officers*.<sup>1</sup> If the corporation have the power in itself to supply the deficiency in its body, its rights are not extinguished, but only dormant. If, however, that power is gone, and it cannot act until the deficiency is supplied, the corporation is dissolved. This is not a forfeiture for non-user, but is a consequence of law.<sup>2</sup>

### § 6579. Dissolution by Legislative Repeal of the Charter.

Under the decision of the Supreme Court of the United States in *Dartmouth College v. Woodward*,<sup>3</sup> the charter of a corporation, whether embodied in a special statute or in a general statute permitting the organization of corporations under prescribed conditions, is deemed to be a *contract* between the State and the co-adventurers who accept the conditions tendered, within the meaning of that clause of the constitution of the United States, which is to the effect that no State shall pass any law impairing the obligation of contracts;<sup>4</sup> and therefore, such charters are protected from legislative alteration or repeal, unless the power to alter or repeal has been reserved by the legislature in making the grant of the franchises, either in the particular act in which the grant is embodied, or in some general law applicable to the subject.<sup>5</sup> In the latter case, a statute dissolving a corporation and annulling its charter is not unconstitutional.<sup>6</sup> Where this reservation has been made, a corporation may be dissolved by an act of the legislature repealing its charter. Where the legislature has reserved to itself the power to repeal, and exercises it, the courts will not presume that the power has been

<sup>1</sup> *Iba v. Hannibal &c. R. Co.*, 45 Mo. 469, 473; *post*, § 6658.

<sup>2</sup> *Philips v. Wickham*, 1 Paige (N. Y.), 590.

<sup>3</sup> 4 Wheat. (U. S.) 518.

<sup>4</sup> Const. U. S., art. 1, § 10.

<sup>5</sup> *Ante*, §§ 92, 347, 3034, 5408, *et seq.*

<sup>6</sup> *People v. O'Brien*, 45 Hun (N. Y.), 519; *Erie &c. R. Co. v. Casey*, 26 Pa. St. 287, 301; *McLaren v. Pennington*, 1 Paige (N. Y.), 102.



improperly or unconscientiously exercised.<sup>1</sup> So, where the legislature reserves the unqualified right of repeal upon the happening of a certain *condition*, it is, in the theory of many of the State courts, exclusively within the power of the legislature to determine whether the condition has happened, and a previous judicial determination of that fact is not necessary;<sup>2</sup> and this is the only tenable theory.<sup>3</sup>

**§ 6580. Legislature the Judge whether Condition on Which Right of Repeal is Predicated has Happened.**—This principle has been carried to the extent of holding that where the legislature reserves the right of repeal in case the corporation *misuses* or *abuses* its *franchises*, it is for the legislature, and not for the courts, to determine the fact of misuse or abuse, and that such determination, when made by the legislature, is conclusive upon the courts.<sup>4</sup> This is a branch of the principle of constitutional law that, in determining whether an act of the legislature is constitutional or not, every intendment will be made in its favor, and every matter of doubt will be resolved in support of the propriety of the action of the legislature; and that where the propriety of the action of the legislature depends upon the existence of a particular *fact*, it will be presumed, in support of the statute, that the legislature ascertained the existence of the fact, unless

<sup>1</sup> *State v. Curran*, 12 Ark. 321; *McLaren v. Pennington*, 1 Paige (N. Y.), 102.

<sup>2</sup> *Myrick v. Brawley*, 33 Minn. 377; *Erie & C. R. Co. v. Casey*, 26 Pa. St. 287, 302; *Crease v. Babcock*, 23 Pick. (Mass.) 334; *s. c.* 34 Am. Dec. 61; *Miners' Bank v. United States*, 1 G. Greene (Iowa), 553; *s. c.* *Morris* (Iowa), 482; 43 Am. Dec. 115. Under a general statute, reserving to the legislature the right to amend or repeal all charters thereafter to be granted, with a proviso that it will not repeal a certain class of charters

unless for some violation or other default, the legislative inquiry to ascertain whether there has been a violation or other default is not a "*judicial act*," within the meaning of the clause of the bill of rights of Massachusetts, which forbids the legislature from exercising judicial acts: *Crease v. Babcock*, 23 Pick. (Mass.) 334; *s. c.* 34 Am. Dec. 61.

<sup>3</sup> *Ante*, § 5420.

<sup>4</sup> *Miners' Bank v. United States*, 1 G. Greene (Iowa), 553; *Erie & C. R. Co. v. Casey*, 26 Pa. St. 287; *ante*, § 5419. Compare *post*, § 6586.

the presumption is *impossible*: that is, a *violent* presumption will not overturn the statute.<sup>1</sup>

§ 6581. **Further of This Subject.**—It has been held that where a charter is granted, with a reservation of the right of repeal in case the franchises therein conferred should be abused or misused, and the abuse or misuse have, in point of fact, occurred,—the corporators, after such abuse or misuse, hold the franchise as mere *tenants at the will* of the legislature, and it possesses as full power to repeal the charter as if the reservation of the right of repeal had been unconditional.<sup>2</sup> The reasoning of the court was that, after the interest of the corporators had been thus cut down, by their own misconduct, to something analogous to an *estate at will*, the legislature alone could enlarge their charter so as to make it an irrevocable grant, or so as to put them upon another term of probation.<sup>3</sup> Nor did judicial proceedings, instituted by the State against the corporation to restrain and enjoin the acts complained of as abuse or misuse, disarm the legislature of its right of repeal, nor enlarge the estate of the corporators in their franchises, nor change the terms of the original grant; since neither the judicial nor executive branch of the government had the power to bring about such results.<sup>4</sup> Moreover, it should be observed that while, as hereafter stated,<sup>5</sup> a repeal by the legislature of the charter of a corporation, necessarily has the effect of abating all pending actions against the corporation, unless there is a saving clause in the particular statute

<sup>1</sup> This is illustrated by the early case of *Cooper v. Telfair*, 4 Dall. (U. S.) 14, where the legislature of Georgia passed an act punishing a citizen and confiscating his property for treason. The constitution of Georgia required all treasons to be tried *in the county where committed*. The law was, therefore, void if the offense charged upon the party was committed *in any county*. The court, for the purpose of sustaining the law, resorted to the violent presumption

that the offense, though committed within the State, was not committed within the body of any county. It should be observed, however, that this was in the early days, before the Federal tribunals became used to the now every-day business of setting aside acts of the State legislatures.

<sup>2</sup> *Erie &c. R. Co. v. Casey*, 26 Pa. St. 287.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Post*, § 6722.

or in some other governing statute, — yet, it does not follow that such a repeal in any way infringes the rights of creditors of the corporation, even of those whose actions are pending at the time. It is competent for the legislature to enact laws which merely change the remedy, so that the change does not involve a substantial deprivation of all remedy;<sup>1</sup> and the legislative repeal of a charter does not put an end to the remedy of creditors against its assets, but it merely *changes the remedy*. Those assets are still available to each creditor, to the extent that he is entitled, on a final administration and distribution, to a ratable share of them, under principles elsewhere considered;<sup>2</sup> and, although the effect of such a repeal may, in cases which may be supposed, operate to prevent a particular creditor from prosecuting his demand to a judgment at law, and thereby obtaining an advantage in the distribution of the assets over other creditors, — yet it is not a deprivation of any rights secured to him by any constitutional provision, and he has no standing to object to the validity of the repeal.<sup>3</sup> If a corporation, which has forfeited its charter, accepts an act of the legislature restoring the charter on new conditions, the old charter is thereby repealed; and the corporation is estopped to deny the validity of the law to which it has thus assented.<sup>4</sup>

**§ 6582. Where the Statute, in Terms, Prescribes that the Franchises shall Revert to the State.** — The question is placed beyond all doubt where the statute, in terms, provides that if the franchise granted is not exercised within a given time, it *shall revert to the State*.<sup>5</sup> In such a case, the reverter takes place *ipso facto*, upon the expiration of the time without the performance of the condition, and it is immaterial that the State does not proceed by *quo warranto* to oust the corporators of the franchises thus conditionally conferred upon them.<sup>6</sup> It

<sup>1</sup> *Ante*, §§ 3035, 3036, 3037.

<sup>4</sup> *Erie &c. R. Co. v. Casey*, 26 Pa.

<sup>2</sup> *Ante*, § 2951, *et seq.*

St. 287.

<sup>3</sup> *Read v. Frankfort Bank*, 23 Me. 318.

<sup>5</sup> *Com. v. Lykens Water Co.*, 110 Pa. St. 391.

<sup>6</sup> *Ibid.*

was so held where a statute provided that, if a company incorporated under a certain act, should fail to carry on its works and construct the necessary buildings, etc., within two years from the granting of letters-patent, then the rights and privileges granted should revert to the Commonwealth. Here, upon the failure of the company to comply with the conditions, its rights and privileges reverted to the Commonwealth, without any judicial action or further legislation; and it was competent for the Commonwealth to grant those privileges to another company, to be formed for that purpose.<sup>1</sup>

**§ 6583. When Legislative Prohibition against Dissolution does not Conclude the Courts.**—It has been held that a clause in the charter of a bank, that the corporation shall not be dissolved before the time specified in the charter, unless all debts are paid, does not protect the corporation from dissolution by *quo warranto*, for a violation of the charter. The court took the view that the clause in the statute referred to was merely intended to prevent the corporation from *dissolving itself* before the expiration of the charter, without paying its debts.<sup>2</sup>

**§ 6584. When Legislature cannot Enact a Forfeiture of Corporate Franchises.**—Except where the power to repeal the charter of a corporation, or to revoke the franchises which it has conferred upon the co-adventurers, is expressly reserved, as already stated,<sup>3</sup> it is not, in general, competent for the legislature of a State to dissolve a corporation, or to declare a forfeiture of any of its franchises. The reason is, that such an act is an exercise of *judicial power*, which, by all American constitutions, is vested in a separate body; which, consequently, is denied by implication to the legislature; and which, in some States, is denied to it in express terms.<sup>4</sup> The fran-

<sup>1</sup> *Com. v. Lykens Water Co.*, 110 Pa. St. 391.

<sup>2</sup> *Bank v. State*, 1 Blackf. (Ind.) 267; *s. c.* 12 Am. Dec. 234.

<sup>3</sup> *Ante*, §§ 92, 347, 3034, 5408, *et seq.*

<sup>4</sup> *State v. Noyes*, 47 Me. 189; *Bruffett v. Great Western R. Co.*, 25 Ill. 353; *Regents v. Williams*, 9 Gill & J. (Md.) 365; *s. c.* 31 Am. Dec. 72.

chises of a corporation are *property*; and, in view of this fact, there is no room for doubt upon the proposition, that an act of the legislature annulling the franchises of a corporation, where the power to do so has not been reserved so as to become a part of the contract embodied in the grant itself, would be a deprivation of property without *due process of law*, within the inhibition of the fourteenth amendment to the constitution of the United States. But where the power to repeal has been thus reserved, the legislature may declare a corporation dissolved without taking any of the usual steps which are necessary to what is called due process of law,—that is to say, without giving *notice* to any one, other than to the receiver whose appointment is provided for in the act of dissolution.<sup>1</sup>

§ 6585. **Legislature may Appoint Trustee to Wind up.**—But, as elsewhere pointed out,<sup>2</sup> whenever a corporation does become dissolved in any mode known to the law, it is undoubtedly competent for the legislature, as a mere *administrative measure*, in the absence of any constitutional restraint, having reference to special legislation or otherwise, to appoint a trustee, to take its assets and administer them, in conformity with the general rules which it has prescribed, or with the rules of a court of equity, if no statutory provisions have been enacted. But if no trustee is appointed by the legislature, a court of equity, which never allows a trust to fail for the want of a trustee, would see to the execution of the trust, although, by the dissolution of the corporation, the legal title to its property may have been changed.<sup>3</sup>

— § 6586. **Forfeiture for Non-performance of Conditions Subsequent.**—Upon the question whether, in case the legislature grants certain franchises to a corporation, upon condition that they shall be exercised within a given time, or that within a given time, the corporation shall do a certain act,—

<sup>1</sup> *People v. O'Brien*, 45 Hun (N.Y.), 519.

<sup>2</sup> *Ante*, § 5392.

<sup>3</sup> *Lothrop v. Stedman*, 13 Blatchf. (U. S.) 134; s. c. 15 Am. Law Reg. 346.

such franchises are, *ipso facto*, forfeited, in case they are not exercised, or in case the given act is not done within the prescribed time, — there is a regrettable conflict of judicial opinion. One class of decisions holds that, if the franchises are not exercised within the prescribed time, or if the prescribed act is not performed within that time, the franchises are, *ipso facto*, forfeited, and that no act of the State, judicial or otherwise, is necessary to complete the forfeiture.<sup>1</sup> Another class of cases holds that the grant vests in the grantees, and takes effect *in præsentî*; that the condition of the grant is a *condition subsequent*, the non-performance of which will operate to defeat the grant, but that it is for the State to say, by some affirmative action, legislative or judicial, and generally the latter, that it will insist upon the performance of the condition.<sup>2</sup> Distinctions and refinements are involved in the decisions on this question; but a careful examination of them will make it appear that while, in the construction of legislative grants to corporate adventurers, the courts *profess* to proceed upon the principle that the grant is to be *strictly construed* in favor of the State and against the grantees, yet they violate this principle in a profound degree, by holding that the adventurers can enjoy the franchises while repudiating the conditions upon which they have been conferred, unless

<sup>1</sup> *Elizabethtown Gaslight Co. v. Green*, 46 N. J. Eq. 118; *s. c.* 18 Atl. Rep. 844; *Com. v. Lykens Water Co.*, 110 Pa. St. 391; *Atchison Street R. Co. v. Nave*, 38 Kan. 744; *s. c.* 5 Am. St. Rep. 800; *Galveston &c. R. Co. v. Galveston &c. R. Co.*, 63 Tex. 529; *Oakland R. Co. v. Oakland, Brooklyn &c. R. Co.*, 45 Cal. 365; *s. c.* 13 Am. Rep. 181; *New York &c. R. Co. v. Boston &c. R. Co.*, 36 Conn. 196; *Re Brooklyn &c. R. Co.*, 72 N. Y. 245; *s. c.* 75 N. Y. 335; 81 N. Y. 69; *Re Kings County Elevated R. Co.*, 41 Hun (N. Y.), 426; *Brooklyn Steam Transit Co. v. Brooklyn*, 78 N. Y. 524, 529; *Green v. Green*, 34 Ill. 320 (by analogy); *Kennedy v. Strong*, 14

*Johns. (N. Y.)* 128, 129. Compare *Omnibus R. Co. v. Baldwin*, 57 Cal. 160; *Toledo &c. R. Co. v. Johnson*, 49 Mich. 148; *Peavey v. Calais R. Co.*, 30 Me. 498.

<sup>2</sup> *Day v. Ogdensburgh &c. R. Co.*, 107 N. Y. 129; *La Grange &c. R. Co. v. Rainey*, 7 Coldw. (Tenn.) 420; *Hovelman v. Kansas City Horse R. Co.*, 79 Mo. 632; *People v. Manhattan Co.*, 9 Wend. (N. Y.) 351; *Atchafalaya Bank v. Dawson*, 13 La. 497; *Chicago v. Chicago &c. R. Co.*, 105 Ill. 73; *Brooklyn Cent. R. Co. v. Brooklyn City R. Co.*, 32 Barb. (N. Y.) 358; *Davis v. Gray*, 16 Wall. (U. S.) 203; *Chicago &c. R. Co. v. People*, 73 Ill. 541.

the State is worried into a judicial proceeding to oust them therefrom. And when it is considered that the grant of franchises to such adventurers is a mere contract within the protection of the constitution of the United States, these decisions of the courts become still more inexcusable; since they leave the co-adventurers in the enjoyment of the benefits of the grant, and allow them to repudiate the conditions on which the grant was made, until the State puts itself to the burden and expense of a proceeding to annul a contract which it has never made.

**§ 6587. Doctrine that a Corporation Ceases to Exist *Ipso Facto*, on Failure to Perform the Prescribed Conditions.** — The sound doctrine is that, where a statute creating a corporation declares that, unless the corporation performs certain acts within a prescribed time, its corporate existence and powers shall cease, or its powers and franchises shall terminate, *the statute executes itself*; so that, if the prescribed acts are not done within the prescribed time, the corporation, *ipso facto*, ceases to exist, without the necessity of any further action by the State, either by a legislative declaration of forfeiture, or by a judgment of forfeiture in a judicial proceeding.<sup>1</sup> In such a case, whether the corporation has lost its existence is a fact *in pais*, which may be ascertained in any judicial proceeding, whether the question arises *directly* or *collaterally*, whenever its ascertainment becomes necessary for the protection of rights or the redress of wrongs.<sup>2</sup> The ground which supports the decisions of the courts so holding, and the mistakes which have been made by those courts which have repudiated the doctrine, are disclosed in the following quota-

<sup>1</sup> *Elizabethtown Gaslight Co. v. Green*, 46 N. J. Eq. 118; *s. c.* 18 Atl. Rep. 844; *Peavey v. Calais R. Co.*, 30 Me. 498; *Brooklyn Steam Transit Co. v. Brooklyn*, 78 N. Y. 524; *Atchison Street R. Co. v. Nave*, 38 Kan. 744; *s. c.* 5 Am. St. Rep. 800 (by analogy); *Oakland R. Co. v. Oakland, Brooklyn*

*&c. R. Co.*, 45 Cal. 365; *s. c.* 13 Am. Rep. 181.

<sup>2</sup> *Elizabethtown Gaslight Co. v. Green*, 46 N. J. Eq. 118; *s. c.* 18 Atl. Rep. 844; *Re Brooklyn &c. R. Co.*, 72 N. Y. 245; *Atchison Street R. Co. v. Nave*, 38 Kan. 744; *s. c.* 5 Am. St. Rep. 800 (by analogy).

tion from one of the early opinions of Chief Justice Marshall: "It has been proved that in all forfeitures accruing at common law, nothing vests in the government until some legal step shall be taken for the assertion of its right, after which, for many purposes, the doctrine of relation carries back the title to the commission of the offense; but the distinction, taken by counsel for the United States, between forfeitures at common law and those accruing under a statute, is certainly a sound one. When a forfeiture is given by a statute, the rules of the common law may be dispensed with and the thing forfeited may either vest immediately, or on the performance of some particular act, as shall be the will of the legislature. This must depend upon the construction of the statute."<sup>1</sup> The reason why a forfeiture created by a statute is self-executing, while one raised by the common law is not, is that the legislature says so and intends so; and that it is competent for the legislature to change the rules of the common law, and that much of the work of legislatures, in fact, consists in making such changes.<sup>2</sup>

**§ 6588. Further of This Subject: Different Principles in Construing Public and Private Grants.**—A leading ground of difference between public grants embodied in statutes, and private grants, in respect of the question under consideration, grows out of the fact that different principles apply in the interpretation of such grants. In the case of a private grant, the principles of interpretation are those applicable to private contracts, and the effort of the judge is to ascertain, from the

<sup>1</sup> *United States v. Grundy*, 3 Cranch (U. S.), 337, 351.

<sup>2</sup> In *Kennedy v. Strong*, 14 Johns. (N. Y.) 128, 129, it is said by Thompson, C. J.: "The forfeiture takes place on the commission of the act prohibited, and, by the forfeiture, the property is immediately divested out of the owner before any seizure or suit." The following cases, arising in relations different from those under

consideration, are cited in the learned opinion by Belcher, J., in *Oakland R. Co. v. Oakland, Brooklyn &c. R. Co.*, 45 Cal. 365, 374; s. c. 13 Am. Rep. 181, *et seq.*:—*Wilkins v. Despard*, 5 T. R. 112; *Fontaine v. Phoenix Ins. Co.*, 11 Johns. (N. Y.) 293; *Bennett v. American Art Union*, 5 Sandf. (N. Y.) 614; *Borland v. Lewis*, 43 Cal. 569.



instrument, the understanding of *both* contracting parties; for the rights of one of them are not to be prejudiced by what the other may have understood or thought. But, in the case of a public grant, embodied in a public statute, the sole question is, what the grantor, — that is to say, the legislature, — intended, and the grantee is conclusively presumed to have accepted what the legislature intended to give, and nothing more. Another leading difference in the construction between public and private grants, in respect of the principles on which they are construed, is that, in the case of a public grant, which is generally gratuitous, the grant is *strictly construed* in favor of the public and against the grantee, and all doubtful words or expressions are resolved against him.<sup>1</sup> But, in the construction of private grants, no such principle prevails. If we attend to this rule of construction, or even if we lay it out of view, we cannot escape the conclusion that, in nearly every one of the cases considered in this chapter, in which the courts have held that the conditions of grants of franchises were conditions subsequent, so that the grantee might cling to the franchises until the State resorted to an expensive proceeding to oust him therefrom, the courts have done violence, — and it is believed that the judges have done it consciously, — to the intent, not only of the legislature or municipal assembly making the grant, but also to the understanding of the parties receiving it. Such decisions illustrate the notorious habit which judges have, in construing public statutes, of disregarding and ignoring the plain intention of the authors of the statute, and of proceeding upon technical and fantastic canons of interpretation, which lead them away from what the legislature intended, and generally to the prejudice of public right. Opposed to this is the disposition of courts not to resort to such principles of interpretation as will work a *forfeiture* of rights already vested. But, in the case where a grant of franchises is made upon the condition that a certain thing shall be done by the grantees within a certain time, the true theory is, that the franchise *never vests* until

<sup>1</sup> *Ante*, §§ 5335, 5659.

that thing is done; and consequently, there can be no forfeiture, for there is nothing to forfeit.

§ 6589. **Illustrations of This Principle.** — A railroad corporation, organized under the general railroad act of New York, failed to comply with the condition of another act,<sup>1</sup> requiring every such corporation to begin the construction of its road and expend thereon ten per cent of its capital within five years after its articles should be filed and recorded, and declaring that in case of the non-performance of this condition, "its corporate existence and powers shall cease." After the expiration of the time so fixed for beginning the work of construction, another act was passed,<sup>2</sup> reviving the corporation and extending the time within which it should be required to finish its road and put it in operation, for three years from the passage of the act. Nevertheless, the corporation did not, within such three years, finish or even begin its road; but it *subsequently* undertook to enter upon the work of constructing its road, and instituted proceedings to *condemn land* for that purpose, and the land-owner successfully challenged its right so to do, on the ground that its franchises had become, *ipso facto*, forfeited.<sup>3</sup> On like grounds, another court has held that, after the time has expired within which a railroad company is, by its charter, required to complete its road, it has *no power to take additional lands* for the extension of its road, except with the consent of the owner.<sup>4</sup> A street railway company was incorporated, by a special statute, which contained a provision to the effect that, unless it should be organized and should lay at least one mile of its road within three years, then "this act and all the powers, rights, and franchises herein and hereby granted, shall be deemed forfeited and terminated."<sup>5</sup> By a supplementary act amending this charter, the time for completing the one mile of road was extended to July 4, 1876.<sup>6</sup> The corporation was organized under this charter, within the time limited; it transacted business, made by-laws, and procured surveys and plans for an elevated railroad; but it did not build any portion of its road until June, 1878, when it laid a mile of track outside of the city of Brooklyn. About the same time, it commenced to lay foundations for its road in the

<sup>1</sup> N. Y. Laws 1867, ch. 775, § 1.

<sup>2</sup> N. Y. Laws 1874, ch. 575.

<sup>3</sup> *Re Brooklyn &c. Co.*, 72 N. Y. 245.

<sup>4</sup> *Peavey v. Calais R. Co.*, 30 Me. 498.

<sup>5</sup> Laws N. Y. 1871, ch. 940, § 17.

<sup>6</sup> N. Y. Laws 1873, ch. 61, § 4.

streets of said city, when the city interfered and prevented it from proceeding further with the occupation of its streets. Thereupon it brought an action to restrain the city from such interference, and it was held that, by the failure to comply with the requirements of its charter above recited, it had lost its right to construct its road in the streets of the city, and that the interference of the city was justified.<sup>1</sup> Where a statute provided that, in case any railroad company should not, within twelve months after the acceptance of its route by the commissioners, procure and pay for the right of way over all land covered by the location, such acceptance by the commissioner should be void and of no effect, — it was held that its failure to procure and pay for the right of way was not in the nature of a forfeiture, to be taken advantage of only by the State in a direct proceeding against the company, but that the whole proceeding became of no effect after the expiration of twelve months,<sup>2</sup> — and it was void simply because the statute said so.

**§ 6590. Franchise for Building Railroads in Streets Limited to a Given Time.** — The same doctrine has been held to apply where the legislature of the State, or the governing body of a municipal corporation, grants to a railway corporation the franchise or privilege of laying a railway upon the streets of the city, provided the privilege is availed of within a prescribed time. Here, according to one theory, which seems entirely sound, — the grant is regarded as a mere *license*, so that, until it is availed of, no contractual obligation or relation arises which requires a judicial declaration of forfeiture; and so that, after the expiration of the time limited for the exercise of the privilege, if the corporation attempts its exercise, a land-owner, damaged by the occupation of the street, is entitled to an *injunction* to restrain the same;<sup>3</sup> and a municipal corporation, in the exercise of its general power of preventing *nuisances* in its streets, will have the power forcibly to arrest the same.<sup>4</sup>

<sup>1</sup> Brooklyn Steam Transit Co. v. Brooklyn, 78 N. Y. 524.

<sup>2</sup> New York &c. R. Co. v. Boston &c. R. Co., 36 Conn. 196.

<sup>3</sup> Atchison Street R. Co. v. Nave, 38 Kan. 744; s. c. 5 Am. St. Rep. 800.

<sup>4</sup> Brooklyn Steam Transit Co. v. Brooklyn, 78 N. Y. 524. As to the distinction between legislative *contracts* and *licenses*, see *ante*, § 5435.

§ 6591. **Decisions Construing Such Limitations as Conditions Subsequent.** — A great many decisions are found, construing such limitations in grants as *conditions subsequent*; but, on examination, it will be found that they have mostly grown out of an inadvertent confusion of the rule in relation to private grants at common law, with the principle which governs statutory public grants. In both cases, the courts agree that *the question is one depending upon the true construction of the grant*, and yet, in both cases, they proceed deliberately to violate the plain intent of the parties. Let us take, for example, a case where a city granted a license to a railway company to construct its road across certain streets, upon an express condition that the tracks authorized should be constructed within one year from the time of the grant. Here, the company, having been prevented by various causes, partly by the intervention of the police officers of the city and by injunctions, from completing its road within the period named in the grant, — it was held that its right under the grant was not lost, and that the city might be enjoined from interfering with the laying of the track after the expiration of the year, it being apparent that the same would have been completed within the time limited, had it not been prevented by operation of law and the acts of the city authorities. The court proceeded upon the well-known rule in regard to *private grants* containing conditions subsequent, that where the condition is possible at the time of making the grant, but afterwards becomes impossible by the act of God, the act of the law, or the act of the grantor, the estate, having once become vested, is not thereby divested, but becomes absolute.<sup>1</sup> If the city pre-

<sup>1</sup> *Chicago v. Chicago &c. R. Co.*, 105 Ill. 73. The first case cited by the court is *Nicoll v. New York &c. R. Co.*, 12 N. Y. 121. This was the case of a *deed* of land to a railroad company by a *private person*, upon condition that the company should construct its road thereon within a limited time. Here it was held, and against the plain intention of the par-

ties, that the failure to perform the condition did not divest the title, but that there must be an entry, or what is made by statute equivalent thereto, by the grantor or his heirs, for breach of the condition, to forfeit the estate; and that the right of entry was not a reversion or an estate in land, and would not pass by assignment or by the conveyance of the premises held

vented the railroad from executing the condition within the time prescribed, then, on the most obvious and just principles, it would not have any standing in court to insist that the conditions of the grant had not been complied with; but, in so far as the conditions are treated as *conditions subsequent*, the decision is palpably erroneous, and it is apparent, from the cases cited, that the error grew largely out of the fact that the court confused the distinction between conditions subsequent in private grants and limitations contained in public grants. A decision of one of the departments of the Supreme Court of New York is to the effect that where a city grants to a street railway company a franchise to occupy its street with its road within a stated period, the grant is a *condition subsequent*, the omission to perform which within the prescribed time will not, *ipso facto*, determine the estate, but will merely expose it to be determined at the election of the grantor; and that nothing short of a *judicial decision* upon the question can deprive the grantee of the franchise or impair its rights of property therein.<sup>1</sup> But, it is to be observed in this case, that, the railroad company having proceeded to construct its track, but at a later period than that limited by the grant of the franchise, the question for decision was whether *another* such company could, thereafter, under a license from the city, treat its franchise as *ipso facto* determined, in such a sense as to treat its railroad as a part of the public highway, which it was at liberty to use with its horses and cars, under a license which the city had assumed to give; and it was held that it was not, and the conclusion is obviously sound and just. But it is sound and just, not for the reasons stated by the court, but for another reason, which is, that it was competent for the city to *waive* the condition of the grant, and that, when

subject to the condition. The decision abounds in ancient technicality, and the conclusion defeats the intention of the parties, and makes a contract for them which they never made for themselves, and is palpably unjust.

<sup>1</sup> Brooklyn Central R. Co. v. Brooklyn City R. Co., 32 Barb. (N. Y.) 358, 371. The court in this case, in like manner, proceeded upon the doctrine of Davis v. New York, 14 N. Y. 506, which related to a *private grant*.

the city allowed the grantee to proceed with the execution of the condition at a date subsequent to the date named in the grant, it waived the time thus fixed, and consented to a subsequent date,—just as the State may, by a legislative recognition of the existence of a corporation, waive an *ipso facto* forfeiture of its franchises. In other words, after standing by and allowing the corporation to complete its road at a period subsequent to that named in the grant, thus waiving the time limited for the performance of the condition named in the grant, the city was estopped from taking the position that the grant had been forfeited, and from attempting to grant to another street railway company the license of using the tracks thus laid down by the former company.

§ 6592. **Other Decisions of the Same Kind.**—The Supreme Court of the United States proceeded upon the same grounds, in a decision often cited, where the legislature of Texas had granted to a railroad company certain lands, upon the condition of building its road within a prescribed time, and had made a subsequent extension of the grant, but had, by a constitutional amendment adopted in 1869, declared that “all lands granted to railway companies which have not been alienated by said companies, in conformity with the terms of their charter, respectively, and the laws of the State under which the grants were made, are hereby declared forfeited to the State for the benefit of the school fund.” A court, in an action by a receiver of the railroad company appointed by a court of the United States, against the Governor of the State and the Commissioner of the General Land Office of Texas, the object of which was to restrain them from granting such lands to other persons, among other things, held that the condition annexed to the grant as to the time within which the road should be completed was a *condition subsequent*; that, under the rule of law that if a condition subsequent be possible at the time of making it, but becomes afterwards impossible to be complied with by the act of God, or of the law, or of the grantor, the estate, having once vested, is not thereby

divested, but becomes absolute,<sup>1</sup>—the State of Texas had, by plunging into the Civil War and prosecuting it, rendered it impossible for the company to fulfill the grant during the continuance of the war, for which reason the grant had not become *ipso facto* extinguished during that period; and the court decreed that the conditions of the grant might be complied with, within such reasonable time as would put the parties in the same situation, as nearly as might be, as if no breach of condition had occurred. In other words, the case was one where it was in substance held that the Circuit Court of the United States, in which the action was brought by the receiver, could, in the exercise of its equity powers, relieve against a forfeiture.<sup>2</sup> The respect, which would otherwise be due to this decision, is diminished, in view of the obvious fact that the court had *no jurisdiction of the case* at all, it being, in substance and fact, an action against the State of Texas; for, although the State was not impleaded in its corporate character, yet the very object of the act was to prevent the State from exercising its sovereign and proprietary rights over lands within its own borders, through two of its departmental officers, its Governor and the Commissioner of its General Land Office; and it was upon the ground of this want of jurisdiction that Mr. Chief Justice Chase and Mr. Justice Davis dissented. The case appealed strongly to equitable considerations; and if the court had had jurisdiction to decide anything, its decision could probably be sustained on other grounds disclosed in the statement of facts and in the opinion. The opinion blends and confuses all distinction between private and public grants. But it is to be observed that, in respect of the principle that a grant made by a state, or by a municipal corporation, cannot be defeated by the act of the grantor in preventing the performance of the condition upon which the grant is made, there is probably no just ground for distinction between a public and a private grant.

<sup>1</sup> Citing Co. Litt. 206 a, 206 b; 2 Black. Com. 156; 1 Kent's Com. 130.

<sup>2</sup> Davis v. Gray, 16 Wall. (U.S.) 203.

§ 6593. **Still Other Such Decisions.**—Another court has held that, where a franchise is granted to a corporation to build a public improvement, such as a street railway, upon a condition that, unless the work is begun, or is completed, or is pushed to a certain stage of completion, by a date named, the franchise shall become forfeited,—a forfeiture cannot be declared at the suit of a private individual, but that it rests with the power which has granted the franchise, to proceed to have it forfeited. Thus, the common council of Kansas City granted to a horse railway company a right of way over certain streets, providing in the ordinance that the road should be completed within twelve months from the acceptance of the grant by the company, and that, in case of a failure so to complete it, the council of the city *might take away the franchise by a two-thirds vote*. It was held, and on the obvious meaning of the ordinance, that this provision was a *condition subsequent*, and that the right of way, when accepted by the company, vests at once, subject to be defeated, at the election of the city, for a breach of the condition, but that a private citizen could not take advantage of such a breach.<sup>1</sup> The Legislature of Vermont passed an act creating a corporation to build a railroad between designated points, and the act declared that “if said corporation shall not, within ten years from the approval of this act, commence the construction of said railroad, then said corporation *shall be dissolved*.” The construction of the road was not commenced within the ten years thus prescribed and limited, but it was thereafter built under an agreement between the corporation and another railroad corporation and other parties, and was leased to such other corporation. In an action against the latter corporation by the holders of certain bonds, issued by it, to restrain it from carrying out the provisions of the lease, it was contended • that the lessor company had, by its omission to commence the construction of the road within the time prescribed, lost its power to do a corporate act, and that its existence had become terminated *ipso facto*. But the court held that the

<sup>1</sup> Hovelman v. Kansas City Horse R. Co., 79 Mo. 632.



non-compliance with the statutory requirement did not, of itself, work its dissolution.<sup>1</sup>

**§ 6594. A Corporation cannot Prolong its Existence by Leasing its Franchise to Another Corporation Which Complies with the Conditions for its Own Benefit.**—Where a corporation is organized under a general statute, and has acquired the franchise to build a railroad on certain streets of a city, which statute declares that if any corporation organized under it shall not, within five years after its articles of association are filed and recorded, begin the construction of its road, and expend at least ten per cent of its capital stock thereon, “its corporate existence and powers shall cease,”—it cannot prolong its existence and franchises by leasing to another corporation, not for its own benefit but for the exclusive benefit of such other corporation, the right so acquired by it so to lay the tracks; since this is not such a *user* of its franchises as is contemplated by the statute embodying the grant; nor is any expenditure made by the lessee corporation an expenditure of ten per cent of the capital stock of the corporation receiving the grant of the franchise, such as is likewise contemplated by the statute embodying the grant.<sup>2</sup>

<sup>1</sup> *Day v. Ogdensburgh &c. R. Co.*, 107 N. Y. 129. The court undertook to “distinguish” certain previous decisions of its own (*Re Brooklyn &c. R. Co.*, 72 N. Y. 245; *s. c.* 75 N. Y. 335; *Brooklyn Steam Transit Co. v. Brooklyn*, 78 N. Y. 524), where it held the contrary, under a statute, using the language “its corporate existence and powers shall cease”; but it is plain that those decisions cannot be distinguished on any differences in the language of the governing statute. The court, however, followed a decision of the Supreme Court of Vermont upon the precise question, which was governing authority for the court, as the question for decision was an

interpretation of a statute of Vermont. *Vermont &c. R. Co. v. Vermont Cent. R. Co.*, 34 Vt. 2. The theory of both courts was that the Legislature of Vermont did not, by the language used, undertake to declare a forfeiture, but only to prescribe the consequences which should flow from certain future acts and omissions on the part of the company. The question, therefore, whether a forfeiture of the charter of the company had occurred, could only be determined in the proper judicial proceeding brought in behalf of the public for the purpose of testing the question.

<sup>2</sup> *Re Brooklyn &c. R. Co.*, 81 N. Y. 69.

## CHAPTER CLI

### DOCTRINE THAT FORFEITURES CAN ONLY BE EFFECTED BY THE STATE.

#### SECTION

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§ 6598. **General Rule that the Question whether a Corporation has Forfeited its Franchises can be Raised only by the State.**— We have already had occasion to note, in other relations, the general principle that the question whether a corporation has forfeited its franchises and ceased to exist, cannot, in general, be raised in a collateral proceeding, but can be raised only by the State, whose privilege alone it is to question the right of the corporators to exercise the franchises which they do exercise; so that, in the absence of a statute otherwise providing, so long as the State does not interfere, the rightful existence of the corporation is presumed, for the purposes of every collateral proceeding.<sup>1</sup> The doctrine is of

<sup>1</sup> *Toledo &c. R. Co. v. Johnson*, 49 Mich. 148; *Montgomery v. Merrill*, 18 Mich. 338, 343; *Vermont &c. R. Co. v. Vermont Cent. R. Co.*, 34 Vt. 1, 2; *Day v. Ogdensburgh &c. R. Co.*, 107 N. Y. 129, 139; *La Grange &c. R. Co. v. Rainey*, 7 Coldw. (Tenn.) 420, 423; *People v. Manhattan Co.*, 9

*Wend. (N. Y.)* 351; *Atlanta v. Gate City Gas Light Co.*, 71 Ga. 106; *San Antonio v. Jones*, 28 Tex. 19; *Boston Glass Manufactory v. Langdon*, 24 Pick. (Mass.) 49; *s. c.* 35 Am. Dec. 292; *Colchester v. Seaber*, 3 Burr. 1866; *Smiths' Case*, 4 Mod. 53; *Rex v. Amery*, 2 T. R. 515, 545; *Staunton*

still stronger force where the action is in a court of *equity*, because it is a well-settled doctrine that courts of chancery

*Copper Min. Co. v. Thurmond*, 7 Mo. App. 587; *Ormsby v. Vermont Min. Co.*, 65 Barb. (N. Y.) 360; *Hudgins v. State*, 46 Ala. 208; *State v. Fagan*, 22 La. An. 545; *Re Arden*, 4 N. Y. Supp. 177; *Com. v. Alleghany Bridge Co.*, 20 Pa. St. 185; *Baker v. Backus*, 32 Ill. 79; *Brookville &c. Co. v. McCarty*, 8 Ind. 392; *s. c.* 65 Am. Dec. 768; *Taggart v. Western Maryland R. Co.*, 24 Md. 563; *s. c.* 89 Am. Dec. 760; *Hammett v. Little Rock &c. R. Co.*, 20 Ark. 204; *Atchafalaya Bank v. Dawson*, 13 La. 497; *Com. v. Burrell*, 7 Pa. St. 34; *Com. v. Farmers' Bank*, 2 Grant Cas. (Pa.) 392; *Lehigh Bridge Co. v. Lehigh Coal &c. Co.*, 4 Rawle (Pa.), 9; *s. c.* 26 Am. Dec. 111; *All Saints' Church v. Lovett*, 1 Hall (N. Y.), 198; *State v. Fourth N. H. Turnp.*, 15 N. H. 162; *s. c.* 41 Am. Dec. 690; *Selma &c. R. Co. v. Tipton*, 5 Ala. 787; *s. c.* 39 Am. Dec. 344; *Duke v. Cahawba Nav. Co.*, 16 Ala. 372; *Mississippi &c. R. Co. v. Cross*, 20 Ark. 443; *Spring Valley Water Works v. San Francisco*, 22 Cal. 434; *Spencer v. Champion*, 9 Conn. 536; *Kellogg v. Union Co.*, 12 Conn. 7; *Pearce v. Olney*, 20 Conn. 544; *Young v. Harrison*, 6 Ga. 130; *Union Branch R. Co. v. East Tennessee &c. R. Co.*, 14 Ga. 327; *Wilmans v. Bank of Illinois*, 1 Gilm. (Ill.) 667; *John v. Farmers' &c. Bank*, 2 Blackf. (Ind.) 367; *s. c.* 20 Am. Dec. 119; *Bank of Gallipolis v. Trimble*, 6 B. Mon. (Ky.) 599; *Day v. Stetson*, 8 Me. 365, 372; *Chesapeake &c. Canal Co. v. Railroad Co.*, 4 Gill & J. (Md.) 1; *University of Maryland v. Williams*, 9 Gill & J. (Md.) 365; *s. c.* 31 Am. Dec. 72; *Planters' Bank v. Bank of Alexandria*, 10 Gill & J. (Md.) 346; *Hamilton v. Annapolis &c. R. Co.*, 1 Md. Ch. Dec. 107; *Com. v. Union*

*Fire &c. Ins. Co.*, 5 Mass. 230; *s. c.* 4 Am. Dec. 50; *Bayless v. Orne*, Freem. Ch. (Miss.) 161, 173; *Grand Gulf Bank v. Archer*, 8 Smedes & M. (Miss.) 151; *Bank v. Merchants' Bank of Baltimore*, 10 Mo. 123; *State v. Carr*, 5 N. H. 367; *Peirce v. Somersworth*, 10 N. H. 369; *Sewall's Falls Bridge v. Fisk*, 23 N. H. 171; *Buffalo &c. R. Co. v. Cary*, 26 N. Y. 75; *Vernon Society v. Hills*, 6 Cow. (N. Y.) 23; *s. c.* 16 Am. Dec. 429; *Thompson v. New York &c. R. Co.*, 3 Sandf. Ch. (N. Y.) 625, 652; *Mechanics' Build. Asso. v. Stevens*, 5 Duer (N. Y.), 676; *Webb v. Moler*, 8 Ohio, 548; *Bank of Circleville v. Renick*, 15 Ohio, 322; *Johnson v. Bentley*, 16 Ohio, 97; *Kishacoquillas &c. Turnp. Co. v. M'Conaby*, 16 Serg. & R. (Pa.) 140; *s. c.* 1 Penr. & W. (Pa.) 426; *Irvine v. Lumbermen's Bank*, 2 Watts & S. (Pa.) 190; *Connecticut &c. R. Co. v. Bailey*, 24 Vt. 465; *s. c.* 58 Am. Dec. 181; *Banks v. Poitiaux*, 3 Rand. (Va.) 136; *s. c.* 15 Am. Dec. 706; *Crump v. United States Min. Co.*, 7 Gratt. (Va.) 352; *s. c.* 56 Am. Dec. 116; *Harris v. Nesbit*, 24 Ala. 398; *Eaton v. Aspinwall*, 19 N. Y. 119; *Bohannon v. Binns*, 31 Miss. 355; *Boise City Canal Co. v. Pinkham*, 1 Idaho (n. s.), 790; *Baltimore &c. R. Co. v. Marshall County*, 3 W. Va. 319; *Wood v. Coosa &c. R. Co.*, 32 Ga. 273; *West v. Carolina &c. Ins. Co.*, 31 Ark. 476; *New Jersey &c. R. Co. v. Long Branch Comm'rs*, 39 N. J. L. 28; *Importing &c. Co. of Georgia v. Locke*, 50 Ala. 332; *Moore v. Schoppert*, 22 W. Va. 282; *Bank of Missouri v. Snelling*, 35 Mo. 190; *Mackall v. Chesapeake &c. Canal Co.*, 94 U. S. 308; *Lumber Co. v. Ward*, 30 W. Va. 43.

have no power, except where it is given by statute, to decree the dissolution of the corporation.<sup>1</sup>

§ 6599. **Illustrations of This Principle.** — An action was prosecuted by a railroad company upon a promissory note of the following tenor: "For the purpose of promoting and aiding the construction of the Toledo, Ann Arbor, and Northern Railroad, and in consideration of the benefits to be derived therefrom, I do hereby pledge and agree to pay, to the order of the Toledo, Ann Arbor, and Northern Railroad Company, the sum of one hundred dollars, payable in six months after the first cars run over the road from Ann Arbor to Toledo, payable on or before the above time specified, without interest." In an action upon this note, the court instructed the jury thus: "The Toledo, Ann Arbor, and Northern Railroad Company, by the law under which it was organized, was required to have its road completed and running in full operation within seven years from its incorporation. This was not done; and the jury are, therefore, instructed to find for the defendant." This was held error, since the question whether there had been a forfeiture for this reason might involve disputed questions of fact which could not be determined collaterally, but could only be determined in a direct proceeding instituted for the purpose of determining that question, to which proceeding the state must be a party.<sup>2</sup> In an action by a navigation company for tolls, the defendant cannot set up that the *charter* was *procured by fraud*, and evidence to that effect will not be admitted.<sup>3</sup> So, the failure on the part of a corporation, created under the Missouri Act of 1849, to perform its corporate duties as to the *payment of cash capital*, did not destroy its corporate existence *ipso facto*, and such failure could not be shown by a defendant for the purpose of disputing the right of the corporation to sue.<sup>4</sup> So, where a *criminal prosecution* is brought by the State for selling liquor within a prescribed distance from an incorporated academy, contrary to the terms of a statute, — it cannot be shown in defense that the academy has forfeited its charter, except by exhibiting the judicial record of a judgment of forfeiture.<sup>5</sup>

<sup>1</sup> *Ante*, § 4538, *et seq.*; *Society v. Morris Canal &c. Co.*, 1 N. J. Eq. 157; *s. c.* 21 Am. Dec. 41.

<sup>2</sup> *Toledo &c. R. Co. v. Johnson*, 49 Mich. 148.

<sup>3</sup> *Duke v. Cahawba Nav. Co.*, 16 Ala. 372.

<sup>4</sup> *Staunton Copper Min. Co. v. Thurmond*, 7 Mo. App. 587.

<sup>5</sup> *Hudgins v. State*, 46 Ala. 208.

So, where a corporation brings a proceeding in equity to *restrain third persons from interfering with its franchises*, they cannot show, in defense, that it has forfeited its franchises by reason of not completing its works within the time specified by the governing statute.<sup>1</sup> So, in an action by a corporation, an *answer* setting up that the plaintiff has forfeited its charter by non-user, but which does not aver that a forfeiture has been declared by judicial proceedings instituted for that purpose, is *bad on demurrer*.<sup>2</sup> So, the question whether a corporation has forfeited its charter and lost its legal existence, cannot be raised in *proceedings to contest a will* in which the corporation is a legatee, in any manner short of showing that the corporation has been judicially dissolved.<sup>3</sup> So, as already seen, when considering the subject of *de facto* corporations,<sup>4</sup> a private party cannot take advantage of a forfeiture resulting from *irregularities* or departures from the charter, in the *organization of the company*. That is a question for the sovereign power, which may waive it or enforce it, at its pleasure. The courts are bound to regard it as a corporation, so far as third persons are concerned, until it is dissolved by a judicial proceeding on behalf of the government that created it.<sup>5</sup>

**§ 6600. Further Illustrations.** — So, although, *in every action brought by a corporation*, the corporate existence of the plaintiff must be averred and proved, yet, where its incorporation has been *prima facie* proved in any of the modes elsewhere considered,<sup>6</sup> its corporate existence cannot be contested by the defendant, by any evidence short of that which is properly admissible as showing that it has been judicially dissolved;<sup>7</sup> and, as already seen,<sup>8</sup> this rule ap-

<sup>1</sup> State v. Fagan, 22 La. An. 545.

<sup>2</sup> West v. Carolina &c. Ins. Co., 31 Ark. 476.

<sup>3</sup> Re Arden, 4 N. Y. Supp. 177.

<sup>4</sup> Ante, § 501, et seq.

<sup>5</sup> Frost v. Frostburg Coal Co., 24 How. (U. S.) 278; Vermont v. Society for the Propagation of the Gospel, 1 Paine (U. S.), 652; United States v Williams, 5 Cranch (U. S.), 62; Persse & Brook's Paper Works v. Willett, 19 Abb. Pr. (N. Y.) 416; Doyle v. Peerless Petroleum Co., 44 Barb. (N. Y.) 239.

<sup>6</sup> Ante, § 521, et seq.; § 1846 et seq.; post, ch. 184, art. 3.

<sup>7</sup> Grand Gulf Bank v. Archer, 8 Smedes & M. (Miss.) 151; Coil v. Pittsburgh &c. College, 40 Pa. St. 439; Penobscot Boom Corp. v. Lamson, 16 Me. 224; s. c. 33 Am. Dec. 656; Vernon Society v Hills, 6 Cow. (N. Y.) 23; s. c. 16 Am. Dec. 429; John v. Farmers' &c. Bank, 2 Blackf. (Ind.) 367; s. c. 20 Am. Dec. 119; Cahill v. Kalamazoo Mut. Ins. Co., 2 Dougl. (Mich.) 124, 139; s. c. 43 Am. Dec. 457; Boise City Canal Co. v. Pinkham, 1 Idaho (N. S.), 790.

<sup>8</sup> Ante, § 1846, et seq.

plies in actions brought by corporations against subscribers to their shares to recover assessments laid thereon;<sup>1</sup> and it equally applies in actions brought by corporations to recover debts due to them from individuals,<sup>2</sup> and in an action brought by a building association to foreclose a mortgage given for a building loan.<sup>3</sup> Nor does the fact that a corporation has forfeited its charter, unless the forfeiture has been judicially adjudged, afford any defense to an *indictment* against it for the *neglect of a public duty*.<sup>4</sup> So, one who has granted lands to a corporation cannot maintain an action to recover them, on the ground that, by reason of the neglect to elect trustees, and the acquisition of all the stock in the company by one person, the corporation has been dissolved, and the land has reverted. It must be regarded as having a legal existence until a judgment of forfeiture has been had in a direct proceeding.<sup>5</sup> So, under a statute providing that, if the annual license tax of a corporation is not paid before a certain date, the corporation shall forfeit its charter, and making it the duty of the auditor of the State to publish a list of such corporations,<sup>6</sup> the publication does not, of itself, work a for-

<sup>1</sup> Connecticut &c. R. Co. v. Bailey, 24 Vt. 465; s. c. 58 Am. Dec. 181; Buffalo &c. R. Co. v. Cary, 26 N. Y. 75. See, also, Waterford &c. R. Co. v. Dalbiac, 6 Ex. 443; s. c. 6 Eng. Rail. Cas. 753; 20 Law J. (N. S.) (Ex.) 227; 4 Eng. L. & Eq. 455; Bank of Circleville v. Renick, 15 Ohio, 322; Duke v. Cahawba Nav. Co. 16 Ala. 372; Pearce v. Olney, 20 Conn. 544; Young v. Harrison, 6 Ga. 130; Baker v. Backus, 32 Ill. 79; Canal Co. v. Railroad Co., 4 Gill & J. (Md.) 121; Webb v. Moler, 8 Ohio, 548, 552; Buncomb Turnp. Co. v. McCarson, 1 Dev. & B. L. (N. C.) 306; Com. v. Morris, 1 Phila. (Pa.) 411; Dyer v. Walker, 40 Pa. St. 157; Crump v. United States Min. Co., 7 Gratt. (Va.) 352; s. c. 56 Am. Dec. 116; Williams v. Bank of Illinois, 1 Gilm (Ill.) 667; Irvine v. Lumbermen's Bank, 2 Watts & S. (Pa.) 180; John v. Farmers' &c. Bank, 2 Blackf. (Ind.) 367; s. c. 20 Am. Dec. 119; Brookville &c. Co. v. McCarty, 8 Ind. 392; s. c. 65 Am. Dec.

768; Stoops v. Greensburgh Plank Road Co., 10 Ind. 47; Bank of Gallipolis v. Trimble, 6 B. Mon. (Ky.) 599; Bank v. Merchants' Bank, 10 Mo. 123; Johnson v. Bentley, 16 Ohio, 97; Planters' Bank v. Bank of Alexandria, 10 Gill & J. (Md.) 346; Bayless v. Orne, 1 Freem. Ch. (Miss.) 161; Hamilton v. Annapolis &c. R. Co., 1 Md. Ch. 107; Cahill v. Kalamazoo Mut. Ins. Co., 2 Dougl. (Mich.) 124; s. c. 43 Am. Dec. 457; Sewall's Falls Bridge v. Fisk, 23 N. H. 171; Towar v. Hall, 46 Barb. (N. Y.) 361; McConahy v. Center &c. Turnp. Co., 1 Penr. & W. (Pa.) 426.

<sup>2</sup> Hughes v. Bank of Somerset, 5 Litt. (Ky.) 45; Coil v. Pittsburgh Female College, 40 Pa. St. 439.

<sup>3</sup> Mechanics' Build. Asso. v. Stevens, 5 Duer (N. Y.), 676.

<sup>4</sup> Com. v. Worcester Turnp. Co., 3 Pick. (Mass.) 327.

<sup>5</sup> Bohannon v. Binns, 31 Miss. 355. Compare *post*, § 6655.

<sup>6</sup> West Va. Acts 1885, ch. 20, §8.

feiture of a charter, but the discretionary power to bring an action for such forfeiture still resides in the State.<sup>1</sup>

**§ 6601. Interpretation of Particular Statute Provisions.**—Where a statute provides that a corporation shall be dissolved by a *mortgage sale* of the franchises and property of the corporation, it is scarcely necessary to say that an *illegal and fraudulent sale* does not work a dissolution.<sup>2</sup> A provision in the charter of a *navigation company* declaring that the right to collect tolls shall be suspended upon the report to the Governor, by a commissioner, that the river is not in the condition contemplated by the act, does not operate to divest the company of its corporate character, upon the fact of such report being made, nor of its right to sue for and collect tolls accruing prior to the making thereof.<sup>3</sup>

**§ 6602. When the Existence of the Corporation is Made to Depend upon a Condition Subsequent.**—As elsewhere more fully seen,<sup>4</sup> when the continued life of the corporation is

<sup>1</sup> *Lumber Co. v. Ward*, 30 W. Va. 43; *s. c. sub nom. Green Briar Lumber Co. v. Ward*, 3 S. E. Rep. 227; 2 Rail. & Corp. L. J. 464.

<sup>2</sup> *White Mountains R. Co. v. White Mountains (N. H.) R. Co.*, 50 N. H. 50. Construction of a statute enacting that, if a corporation shall not organize and commence the transaction of its business within one year from the date of its incorporation, its corporate powers shall cease, with reference to the question of the computation of time; and also, with reference to the question whether a mandatory act, though not expressly extending the time, may be deemed to have that effect: *Johnson v. Bush*, 3 Barb. Ch. (N. Y.) 207. That the provision of section 1676 of the code of Georgia that "no corporation created under that article shall commence to exercise the privileges conferred by its charter until ten per cent of its capital stock had been paid in, and that no charter shall have

any force or effect for a longer period than two years, unless the incorporators, within that time, shall, in good faith, commence to exercise the powers granted by the charter," does not apply to a charter granted by the general assembly, but only to those granted by the courts,—see *Atlanta v. Gate City Gaslight Co.*, 71 Ga. 106. That the Indiana statute (Rev. Stat. Ind. 1881, § 3641), providing that a gravel company shall cease to be a body corporate "if, within two years from the time of filing a copy of its articles of association with the county recorder, it shall not have commenced the construction of its road, and . . . if, within four years from such time, such road shall not be completed," does not apply to a company formed to own a road previously constructed,—see *State v. St. Paul & c. Turnp. Co.*, 92 Ind. 42.

<sup>3</sup> *Duke v. Cahawba Nav. Co.*, 16 Ala. 372.

<sup>4</sup> *Ante*, § 6586, *et seq.*

made, by the charter or governing statute, to depend upon the performance of a *condition subsequent*, the non-performance of the condition is not, under some theories, an *ipso facto* forfeiture, but is a mere ground of forfeiture, of which the State can avail itself, or which it can waive, at its pleasure; so that, unless the State takes advantage of the ground of forfeiture, in a proceeding by *quo warranto* or otherwise, to oust the corporators of their franchises, the existence of the corporation cannot, upon such a ground, be collaterally called in question.<sup>1</sup> This rule has been applied even where it was expressly provided in the governing statute that, upon a failure to comply with a condition named, within a time named, the corporation "*shall be dissolved.*" The theory is, that such a statutory declaration is merely intended to indicate the *consequences* which the State is at liberty to insist upon, of the failure to perform the prescribed condition. In such a case a failure to comply with the condition does not work a dissolution, *ipso facto*; but such a failure is merely a *cause of forfeiture*, which the State may take advantage of in a proceeding instituted for that purpose, in which proceeding the failure of the corporation to comply with the condition must be judicially determined.<sup>2</sup> In like manner, it was held in an early case in Louisiana, that a provision in the charter of a bank, that, upon suspension of payment for more than ninety days, the charter shall be, *ipso facto*, forfeited and void, has no greater force than the provision of the Civil Code of that State, that a corporation "becomes extinct" by a violation of the conditions

<sup>1</sup> Charles River Bridge v. Warren Bridge, 7 Pick. (Mass.) 344; Matter of Reformed Presbyterian Church, 7 How. Pr. (N. Y.) 476; and see Caryl v. McElrath, 3 Sandf. (N. Y.) 176; Mickles v. Rochester City Bank, 11 Paige (N. Y.), 118; s. c. 42 Am. Dec. 103; Day v. Ogdensburgh &c. R. Co., 107 N. Y. 129; Stoooper v. Greensburgh &c. Plank Road Co., 10 Ind. 47; Chesapeake &c. Canal Co. v. Ohio &c. Co., 4 Gill & J. (Md.) 1; Re Brooklyn &c.

R. Co., 72 N. Y. 245; Wallamet Falls &c. Co. v. Kittridge, 5 Sawy. (U. S.) 44; La Grange &c. R. Co v. Rainey, 7 Coldw. (Tenn.) 420, 432; Vermont &c. R. Co. v. Vermont Cent. R. Co., 34 Vt. 1, 2.

<sup>2</sup> Lagrange &c. R. Co. v. Rainey, 7 Coldw. (Tenn.) 420, 432; People v. Manhattan Co., 9 Wend. (N. Y.) 351; Day v. Ogdensburgh &c. R. Co., 107 N. Y. 129; Vermont &c. R. Co. v. Vermont Cent. R. Co., 34 Vt. 1, 2.



of the charter; and does not create an exception to the general rule, that the forfeiture is unavailing to defeat a suit by the corporation, until it has been judicially declared.<sup>1</sup> Another court, proceeding, it would seem, in the very face of the legislature, has held that, under a provision in a charter that, on breach of a prescribed condition, "the company should not be entitled to any benefit, privilege, or advantage, under the act, and that all the interest, etc., of the corporation should be *forfeited and cease*," a violation does not work a dissolution of the charter, *ipso facto*, and without judicial proceedings by the State.<sup>2</sup> These, and other like decisions, involve a disingenuous refusal, on the part of the courts, to give effect to acts of the legislature, according to their plain meaning and intent.<sup>3</sup> So, where an incorporated company are required by law, as a condition of a right granted to them to *give bonds for the completion of the work*, their neglect to give bonds is not available to defeat an action by them against other persons, to enjoin the latter from interfering with the work.<sup>4</sup>

**§ 6603. When Courts will not Dissolve Private Unincorporated Voluntary Associations.**—The question of dissolving these societies, except where they are incorporated, stands on altogether a different footing from those which arise in respect of the dissolution of corporations proper. Their constating instruments are mere *contracts*, and do not create *franchises*, which can only be granted by the State. It follows that, whenever a court is appealed to for the purpose of dissolving

<sup>1</sup> Atchafalaya Bank *v.* Dawson, 13 La. 497.

<sup>2</sup> Chesapeake &c. Canal Co. *v.* Ohio R. Co., 4 Gill & J. (Md.) 1.

<sup>3</sup> *Ante*, § 6580, *et seq.* The provision of a railroad charter, requiring a certain section of the road to be completed within a specified time, and providing that, upon its failure, the charter shall be null and void, is said to be, in Texas, *not of the essence of the contract* between the corporation and its stockholders,—the meaning

being that the stockholders cannot avail themselves collaterally of the provision, when it is attempted to enforce their contract of subscription. San Antonio *v.* Jones, 28 Tex. 19; *ante*, § 1853. That § 3641, Rev. Stat. Ind. 1881, has no application to corporations formed for the purpose of owning gravel roads *previously constructed*,—see State *v.* St. Paul &c. Turnp. Co., 92 Ind. 42.

<sup>4</sup> Enfield Toll Bridge Co. *v.* Connecticut River Co., 7 Conn. 28.

them, it determines the question as a mere construction of a private contract;<sup>1</sup> and, on a principle already considered,<sup>2</sup> where the laws of such a society provide a method by which it may be *dissolved*, members who seek its dissolution cannot resort to a court of equity for that purpose, until they have *exhausted the remedies provided by the laws of the society*.<sup>3</sup> So, although the *grand lodge* of such an order is *incorporated*, yet where, under the laws of the order, the *grand lodge* has the power of forfeiting the charters of subordinate lodges, until such a forfeiture has been declared by the *grand lodge*, the subordinate lodge is entitled to the possession of its property, and a bill in equity will not lie against its members to recover such possession, by persons claiming to be recognized by the *grand lodge* as the subordinate lodge, until they have exhausted the remedies prescribed by the constitution of the *grand lodge*.<sup>4</sup>

— § 6604. Evidence Insufficient to Show a Dissolution.—

Where the fact of the dissolution of a corporation is made the ground of an action, such dissolution is not shown by evidence that the discharge of the corporate functions, under its charter, has become impossible by reason of the diminution of the number of corporators, where no forfeiture of the franchises has been adjudged in a proceeding instituted by the State.<sup>5</sup>

§ 6605. Private Persons may Proceed to Forfeit Charters, under Statutory Authority. — But it does not, of course, follow from the foregoing that it is not entirely competent for the legislature to confer upon private persons the authority, in a suitable proceeding, to impeach the rightfulness of the existence of a pretended corporation, and to forfeit its charter. And it has been held that authority for private parties to institute a proceeding by *scire facias* against a corporation for

<sup>1</sup> Grosvenor v. United Society, 118 Mass. 78.

<sup>2</sup> Ante, §§ 912, 4499.

<sup>3</sup> Lafond v. Deems, 81 N. Y. 507.

\* Chamberlain v. Lincoln, 129 Mass. 70.

<sup>5</sup> Bohannon v. Binns, 31 Miss. 355. Compare post, §§ 6652, 6658.

a forfeiture of its charter, may be properly conferred by a general law.<sup>1</sup> A statute of Pennsylvania,<sup>2</sup> authorizes any *private citizen*, by a *bill in equity*, to compel a corporation to show its authority to do a particular act; but it is held that a private citizen cannot, by virtue of this statute, show the mere *non-user* of a franchise, in order to establish a forfeiture of the charter of the corporation.<sup>3</sup> The State can, of course, prescribe in what manner the power of an association, assuming to act as a *banking corporation*, and to *issue notes* to circulate as money, may be called in question.<sup>4</sup>

<sup>1</sup> State v. Consolidation Coal Co., 46 Md. 1; referring to Md. Code, art. 12.

<sup>2</sup> Penn. Act June 19, 1871.

<sup>3</sup> Western Pennsylvania R. Co.'s Appeal, 104 Pa. St. 399. That the revised statutes of Louisiana of 1870,

§ 2593, *et seq.*, do not provide for the forfeiture of the charters of corporations at the instance of private persons, even when they are parties interested,—see State v. Attorney-General, 30 La. An., pt. II, 954.

<sup>4</sup> Williams v. State, 23 Tex. 264.

## CHAPTER CLII.

### GROUNDS OF FORFEITING CHARTERS.

SECTION	SECTION
6608. Disinclination of courts to forfeit charters.	6626. Failing to keep works in repair.
6609. General statement of grounds of forfeiture.	6627. Joining a "trust" to stifle competition.
6610. The public must have an interest in the act done or omitted.	6628. Violating charter provisions intended for the public protection.
6611. For the non-performance of conditions subsequent.	6629. Making usurious loans, shaving notes, etc.
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6619. Suspending ordinary business for one year.	6637. Other violations of duty by banking corporations.
6620. Failing to make, file, or publish statements as required by statute.	6638. Neglecting to pay its debts for more than one year.
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6623. Failure to organize in the mode prescribed by the statute.	6641. Acts for which the legislature has prescribed a specific penalty.
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6625. Discontinuing a part of its route.	6643. Effect of a clause prohibiting dissolution until debts paid.
	6644. Subsequent good behavior.

§ 6608. **Disinclination of Courts to Forfeit Charters.** — A reading of the decisions upon this subject must convince anyone that the judicial courts are extremely reluctant to adjudge

forfeitures of the charters of corporations; and that this is especially so in the case of corporations organized to promote desirable *public works*, which it is public policy to foster and encourage. Thus, it has been said by the Supreme Court of Indiana: "It should be the policy of the State and of its officers of all grades, as it seems to us, to foster and encourage, in all legitimate ways, the organization of *turnpike and gravel-road corporations*, and the construction and maintenance of their roads. The rights, privileges, and franchises of such corporations, we think, should not be declared forfeited, and they should not be ousted and excluded therefrom, except for solid, weighty, and cogent reasons, for the violation of a positive and prohibitory statute, and not of a statute whose provisions are permissive and apparently directory; and never upon merely technical grounds."<sup>1</sup> "The authorities," said Simrall, J., "teach the doctrine that courts proceed with extreme caution in proceedings which have for their object the forfeiture of corporate franchises; nor will it be visited except for a plain abuse of power, by which the corporation fails to fulfill the design and purpose of its organization."<sup>2</sup> The acts of misuser or non-user must be touching matters which are of the essence of the contract between the sovereign and the corporation, and they must be willful and repeated.<sup>3</sup> In order that the courts shall proceed with requisite caution and circumspection, it is required that the information shall state with precision every fact which constitutes the abuse of the franchises complained of."<sup>4</sup> In like manner, it is said: "It is not every failure to perform a duty imposed that will work a forfeiture. It must be something more than accidental negligence; something more than an excess of power; some-

<sup>1</sup> Moore v. State, 71 Ind. 478, 493; repeated in State v. St. Paul &c. Turnp. Co., 92 Ind. 42, 48. In this last case, the court held that, where a gravel-road company is not legally organized, a new corporation may, after the road is made, be organized to own and operate it, and that the State cannot complain that some of

the old corporators have not taken stock in the new company.

<sup>2</sup> Citing High on Extr. Rem., § 649; State v. Commercial Bank, 10 Ohio, 535.

<sup>3</sup> Citing High on Extr. Rem., § 648; Com. v. Commercial Bank, 28 Pa. St. 383.

<sup>4</sup> Harris v. Mississippi Valley &c. R. Co., 51 Miss. 602, 608.

thing more than mere mistake in the mode of executing an acknowledged power; and, though a single act of willful non-feasance may be ground of forfeiture, a specific act of non-feasance, not committed willfully, and not producing or tending to produce mischievous consequences to anyone, and not being contrary to particular requisitions of the charter, will not be."<sup>1</sup>

**§ 6609. General Statement of Grounds of Forfeiture.**— Stated in general terms, the grounds on which the franchises of corporations may be seized by the State and forfeited consist of a willful *non-feasance* or *malfeasance*, otherwise described as a willful *non-user* or *misuser* of their franchises, in matters affecting the interest or right of the public generally.<sup>2</sup>

**— § 6610. The Public must have an Interest in the Act done or Omitted.**— In respect of those acts which will constitute a just ground for adjudging a forfeiture of the franchises of a corporation, a distinction is taken between those provisions of the charter which are intended to apply merely to the *internal government* of the corporation, and those which impose positive conditions, restrictions, and duties, in which the public right or interest is involved. For a violation of the latter, a forfeiture will be adjudged, but not so with regard to the former.<sup>3</sup> "It is not every excess of power, nor every omission of duty, that produces that effect. The public must have an

<sup>1</sup> *State v. Pawtuxet Turnp. Co.*, 8 R. I. 182, 188, *per* Brayton, J. To the same general effect, see *People v. Broadway R. Co.*, 126 N. Y. 29; *s. c.* 26 N. E. Rep. 961; 29 N. Y. St. Rep. 343; 9 N. Y. Supp. 6.

<sup>2</sup> *Terret v. Taylor*, 9 Cranch (U. S.), 43; *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 661; *Paschall v. Whitsett*, 11 Ala. 472; *Washington & C. Road v. State*, 19 Md. 239; *Com. v. Union & C. Ins. Co.*, 5 Mass. 230; *s. c.* 4 Am. Dec. 50; *Com. v. Blue Hill Turnp. Corp.*, 5 Mass. 420, 423; *Mumma v. Po-*

*tomac Co.*, 8 Pet. (U. S.) 281; *People v. North River Sugar Ref. Co.*, 5 L. R. A. 386; 7 N. Y. Supp. 406; *s. c.* affirmed, 121 N. Y. 582; *s. c.* 18 Am. St. Rep. 843; *State v. Council Bluffs & C. Ferry Co.*, 11 Neb. 354; *Com. v. United States Bank*, 2 Ashm. (Penn.) 349. There is a learned note on this subject in 22 Abb. N. Cas. (N. Y.) 210.

<sup>3</sup> *Commercial Bank v. State*, 6 Smedes & M. (Miss.) 617; *Harris v. Mississippi Valley & C. R. Co.*, 51 Miss. 602, 605; *State v. Wood*, 13 Mo. App. 139, 143.

interest in the act done or omitted to be done. If it is confined exclusively to the corporation, and in no wise affects the community, it should not be considered as of those conditions upon which the grant is made."<sup>1</sup> Therefore, in a proceeding by information in the nature of *quo warranto*, to forfeit the franchise of a private *manufacturing corporation*, it was held that the court might consider *evidence* tending to show that one of the corporators procured the institution of the proceeding in bad faith and for his *private purposes*.<sup>2</sup>

**§ 6611. For the Non-performance of Conditions Subsequent.** — When it is determined, as the true interpretation of the charter or governing statute, that a condition annexed to a grant of corporate franchises is not a condition precedent, which must be performed before the grant takes effect, but is a *condition subsequent*, then, in conformity with a doctrine already considered,<sup>3</sup> the non-performance of the condition does not operate, *ipso facto*, to determine the grant, until the State, or the municipal corporation, where that is the granting power, takes the appropriate affirmative action to put an end to the grant for that reason, — and this by analogy to the principle, applicable to conditions subsequent in private grants, that such a condition does not defeat the grant until there is an entry by the grantor.<sup>4</sup> But, where conditions subsequent in a grant of corporate franchises are of such a nature as to affect the public right and interest, in such a manner and to such an extent that it may reasonably be presumed that, without the insertion of the conditions, the grant would not have been made, — if the conditions are not performed, it is good ground for adjudging a forfeiture of the franchises at the suit of the State.<sup>5</sup> And this is true, not only of express conditions in charters and governing statutes, but also of those conditions which the law implies as

<sup>1</sup> *Harris v. Mississippi Valley &c. Co.*, *supra*.

<sup>2</sup> *State v. Wood*, 13 Mo. App. 139.

<sup>3</sup> *Ante* § 6587, *et seq.*

<sup>4</sup> See, to this effect, *People v. Hills-*

*dale Turnp. Co.*, 23 Wend. (N. Y.) 254.

<sup>5</sup> *People v. National Sav. Bank*, 129 Ill. 618; *s. c.* 22 N. E. Rep. 288.

necessarily inhering in the grant. Thus, it was said, in a case in the English King's Bench, that all franchises are granted upon condition that they shall be duly executed according to the charter, and that a corporation cannot be allowed to take a grant and repudiate the conditions on which it is made, but that a breach of the conditions is punished by withdrawing the grant.<sup>1</sup> This doctrine has been affirmed by American courts, and with the additional statement that it is a fundamental doctrine that corporations shall perform the conditions and duties enjoined by the fundamental law of their creation, and that a non-performance of the conditions is, *per se*, such a misuser as will forfeit the grant, at common law.<sup>2</sup> The general doctrine, therefore, is, that the non-performance of the substantial conditions named in the charter, upon which the grant was made, or of those named in the governing statute under which the corporation was permitted to organize, operates *per se* as such a *misuser* as will warrant a judicial forfeiture of the grant.<sup>3</sup>

**§ 6612. Further of This Subject.**—While it is often said that, to warrant a judgment of forfeiture, there must be something wrong arising from *willful abuse* or *improper neglect*,—something more than mere *accidental negligence*, *excess of power*, or *mistake* in the mode of exercising an acknowledged power,—yet it is also held that it is enough to work a forfeiture, that the performance of the condition is neglected, or designedly omitted,—and that the ingredient of a *bad or corrupt motive is not necessary*.<sup>4</sup> It must also be concluded from what

<sup>1</sup> *Wilson v. Vanacker*, 1 Ld. Raym. 498.

<sup>2</sup> *People v. Kingston &c. Turnp. Co.*, 23 Wend. (N. Y.) 193; *s. c.* 35 Am. Dec. 551.

<sup>3</sup> *State v. Pawtuxet Turnp. Corp.*, 8 R. I. 182; *People v. Kingston &c. Turnp. Co.*, 23 Wend. (N. Y.) 193; *s. c.* 35 Am. Dec. 551; *People v. Bristol &c. Turnp. Co.*, 23 Wend. (N. Y.) 222; *People v. Waterford &c. Turnp. Corp.*, 3 Abb. App. Dec. (N. Y.) 580;

*People v. National Sav. Bank*, 129 Ill. 618; *s. c.* 22 N. E. Rep. 288. See also *Quincy Canal v. Newcomb*, 7 Met. (Mass.) 276; *s. c.* 39 Am. Dec. 778; *People v. Royalton &c. Turnp. Co.*, 11 Vt. 431; *Lumbard v. Stearns*, 4 Cush. (Mass.) 60; *Attorney-General v. Petersburg &c. R. Co.*, 6 Ired. L. (N. C.) 456.

<sup>4</sup> *People v. Kingston &c. Turnp. Co.*, 23 Wend. (N. Y.) 193; *s. c.* 35 Am. Dec. 551.



has preceded,<sup>1</sup> that the law does not insist upon a *strained, literal, or technical compliance* with the conditions of such a grant, but that a reasonable and substantial performance of the conditions is all that is necessary to defeat a claim to a forfeiture.<sup>2</sup> Where the charter of a railroad company defined the beginning point and terminus of the road, gave the general direction of the road, and required a survey of the route to be made, and a map of it to be filed in the office of the Secretary of State within twelve months from the grant of the charter, — these provisions were held not material conditions in the charter affecting the public interest, and the conclusion was that a failure to comply with them would not authorize a judicial declaration of the forfeiture of the franchise.<sup>3</sup> But where the charter of a banking corporation contained the provision, “this act shall be void unless said corporation shall organize and proceed to business within two years after the passage of this act,” and another provision was, “the capital stock of said corporation shall be \$50,000, with power to increase the same to \$150,000, and shall be divided into shares,” etc., and only \$10,000 of the capital stock was subscribed and paid in within the two years thus limited, — it was held that the corporation had no authority to proceed to business, and that the State was entitled to a judgment of ouster.<sup>4</sup>

**§ 6613. Making or Procuring Fundamental Changes in the Corporation.** — For a corporation to procure from the legislature an *amendment of its charter*, such as works a fun-

<sup>1</sup> *Ante*, § 6608.

<sup>2</sup> *Thompson v. People*, 23 Wend. (N. Y.) 537; *People v. Kingston &c. Turnp. Co.*, 23 Wend. (N. Y.) 193; *s. c.* 35 Am. Dec. 551. And see *Com. v. Alleghany Bridge Co.*, 20 Pa. St. 185. Section 502 of the Civil Code of California does not declare that a failure to comply with the provision which requires *work to be commenced within one year by a street railroad company*, shall work a forfeiture; but that a failure to comply with that, and

also with the provision which requires the work to be *completed within three years*, shall have that effect. *Omni-bus R. Co. v. Baldwin*, 57 Cal. 160.

<sup>3</sup> *Harris v. Mississippi Valley &c. R. Co.*, 51 Miss. 602.

<sup>4</sup> *People v. National Sav. Bank*, 129 Ill. 618; *s. c.* 22 N. E. Rep. 238. For a statute providing for the dissolution of railway corporations which do not begin the construction of their roads within *five years*, see *Colo. Laws* 1889, p. 95.

damental change in its character, purposes, or organization, will not, of course, be ground of forfeiting its charter; since the State cannot put the corporation or its members in the wrong for procuring that which the legislature has granted; though this may have the effect of releasing dissenting stockholders from their contracts of subscription;<sup>1</sup> and although, under some theories, the minority shareholders may have an *injunction* to prevent the employment of the corporate funds for the promotion of such legislation.<sup>2</sup> It has even been held that, if a domestic corporation procures a charter from a foreign State, under which its members attempt to reorganize,—this is not such a violation of its *allegiance* to the State granting its charter, or *crimen læsæ majestatis*, as will warrant a judicial sentence forfeiting its charter in the domestic State.<sup>3</sup> Nor does the further fact that the corporation, under cover of its foreign charter, has instituted a proceeding in the Circuit Court of the United States within the domestic State, against another corporation created by the domestic State, and also against other persons, praying that an act of the legislature of the domestic State be declared null and void,—warrant such a judicial sentence; for, although a corporation which undertakes to drag its sovereign *ad forinsecus examen*, before the bar of the tribunal of another sovereign, violates its first and paramount duty, and thereby subjects itself to the extreme consequences,—yet, a court of the United States within the domestic State is not a court of another sovereign, because the Federal constitution is the constitution of the State, and the government of the United States forms a part of the government of each State.<sup>4</sup> So, where an incorporated turnpike company attempted, in good faith, to *consolidate* with another such company, and, twelve years afterwards, the consolidation was declared void, and the former company then

<sup>1</sup> *Ante*, §§ 67, 1273.

<sup>2</sup> *Ante*, § 4527.

<sup>3</sup> *Com. v. Pittsburg &c. R. Co.*, 58 Pa. St. 26. Compare *Com. v. Cullen*, 13 Pa. St. 133; *s. c.* 53 Am. Dec. 450,—which seems to have been a statutory

proceeding by *quo warranto* to oust certain officers of a corporation, who had undertaken to accept certain fundamental charter amendments.

<sup>4</sup> *Com. v. Pittsburg &c. R. Co.*, 58 Pa. St. 26.

resumed possession of its property, and for a year continued to exercise its franchises, — it was held that it should not be deemed to have forfeited them by *non-user*, by reason of having failed to keep up its original organization during the period when the consolidation subsisted *de facto*. The court proceeded largely upon the ground of encouraging such enterprises as the company had been organized to promote, — the maintaining of turnpike roads.<sup>1</sup>

§ 6614. **Attempted Violations of Law.** — It was said, *obiter*, by Sharswood, J., in an important case, that “no mere intention or purpose in a corporation to violate its duty can constitute a cause of forfeiture. Its officers and managers have, like individuals, a *locus penitentiae*. They may avail themselves of it. The design, clearly evinced, to do an unlawful act, may justify the interposition of a court of equity, by a process of *injunction*, but it would be unjust, before the act was consummated, to visit the corporate body itself with the extreme penalty of civil death and confiscation.”<sup>2</sup> Upon the same line of thought, it has been held that the “reasonable cause” to decree a dissolution of a corporation, under a statute of Massachusetts,<sup>3</sup> providing for a dissolution upon a petition by a majority in number or interest of *the members*, is something more than a vague apprehension of some future mischief. It was accordingly held no ground for the dissolution of a telegraph company, upon such a petition, that it had leased its line to another company at a less rent than it might have obtained, fraudulently intending to give the benefit of the lease to the second company, in which the majority in interest of the stockholders of the first company were also interested, — it appearing that, after the filing of the petition for dissolution, the lease had been canceled by a vote of the directors of both companies.<sup>4</sup>

<sup>1</sup> *State v. Crawfordsville &c. Turnp. Co.*, 102 Ind. 283.

<sup>2</sup> Gen. Stat. Mass., ch. 68, § 35.

<sup>3</sup> *Com. v. Pittsburg &c. R. Co.*, 58 Pa. St. 26, 45.

<sup>4</sup> *Re Franklin Tel. Co.*, 119 Mass. 447.

**§ 6615. Misprisions of Directors and Officers.** — In a proceeding by the State to forfeit the charter of a corporation for the *misuser* of its franchises, the misprisions of its directors and other principal officers who wield its powers, are, in law, the misprisions of the corporation itself; and if the directors wrongfully delegate their discretionary power to subordinate agents, the misprisions of such subordinate agents will, for such purpose, be deemed the misprisions of the directors, and consequently of the corporation.<sup>1</sup> The same rule applies where a *minority of the stockholders* institute a proceeding to wind up the corporation by the appointment of a receiver; and where the directors of the corporation do any act which may work a forfeiture of the charter of the company, it is such a violation of the law incorporating the company as to authorize a creditor or stockholder of the corporation, under the Revised Statutes of New York, to institute proceedings against it, *in equity*, for the purpose of having a receiver appointed, and to close up its concerns.<sup>2</sup> Where one of the trustees of a corporation entered into an agreement with one A., to the effect that if A. would obtain an appropriation from the legislature to the corporation, he should receive whatever amount might be appropriated in excess of a certain sum; and the board of trustees, with knowledge of the agreement, appropriated, by resolution, the excess over the sum named, to the payment of A., after he had obtained the legislative appropriation; and the money was paid to A. in pursuance of their resolution, — these acts were held to be such an abuse of the powers of the corporation as constituted sufficient ground for a sentence of dissolution.<sup>3</sup> Nor did the fact that, in making the payment to A., the trustees acted upon the *advice of counsel*; nor the fact that, since the passage of the resolution, the

<sup>1</sup> Bank Comm'rs v. Bank of Buffalo, 6 Paige (N. Y.), 497; Bank of Vincennes v. State Bank, 1 Blackf. (Ind.) 267, 276; s. c. 12 Am. Dec. 234. That this is the rule where the question arises between the corporation and *private parties* is unquestionable: *Ante*,

§ 6275, *et seq.*; Life & Fire Ins. Co. v. Mechanic's Fire Ins. Co., 7 Wend. (N. Y.) 31.

<sup>2</sup> Ward v. Sea Ins. Co., 7 Paige (N. Y.), 294.

<sup>3</sup> People v. Dispensary &c. Soc., 7 Lans. (N. Y.) 304.

board of *trustees had been changed* by the election of new members, and that the new members were competent to manage the affairs of the corporation,—constitute any defense to the action to dissolve it for the misconduct above stated.<sup>1</sup> So, where it was found by a jury, in a *quo warranto* proceeding, that a banking corporation had *embezzled* large sums of money deposited with it for safe-keeping by the United States, this was held a violation of the first principles of their charter; and it was no argument that the embezzlement was the act of the directors, and was not to be charged against the stockholders, since the statute evidently contemplated that the corporation should be responsible to the fullest extent for the acts of its governing body. Besides, the whole corporation, by their corporate name, had been charged, and found guilty by the verdict of the jury.<sup>2</sup>

**§ 6616. But not Unauthorized Misprisions and Breaches of Trust.**—But, it must not be concluded from the foregoing that the *unauthorized misprisions* of the *ministerial officers* of corporations will constitute grounds of a judicial sentence forfeiting the franchises of the corporation, and thereby working wrong to the innocent *stockholders*. Thus, it has been held that the cashier of a banking corporation cannot produce a forfeiture of the charter, by a direct and palpable violation of the authority or instructions given him by the directors. It is conceded that, if they give him no instructions against doing the illegal act upon which the right of forfeiture is predicated by the State, and he commits it in the course of his ordinary duties, it becomes their act; but, it is held that, if his act is a direct violation of express instructions from them, as well as a violation of the charter, the corporation is not bound by it, in such a sense that its charter is to be thereby forfeited.<sup>3</sup> Nor must it be concluded that every illegal act or breach of trust on the part of the *directors*

<sup>1</sup> *People v. Dispensary &c. Soc.*, 7 Lans. (N. Y.) 304.

<sup>2</sup> *Bank of Vincennes v. State*, 1 Blackf. (Ind.) 267, 276; s. c. 12 Am. Dec. 234.

<sup>3</sup> *State v. Commercial Bank of Manchester*, 6 Smedes & M. (Miss.) 218, 237; s. c. 45 Am. Dec. 280.

even, of a corporation, will warrant a sentence of forfeiture. Thus, the fact that the trustees of a *mutual benefit association* illegally voted to themselves *back pay* and issued *unauthorized certificates* of membership, was held not a sufficient ground for ousting the corporation of its franchises.<sup>1</sup> The court justly concluded that "to visit the perversion of its objects by a few, upon the heads of the entire membership, must result in irremediable hardship."<sup>2</sup>

**§ 6617. How Far the Question of Forfeiture Rests in Judicial Discretion.**—It must be apparent at a glance that nothing could be more dangerous than the proposition that the right of the State to have a corporation ousted of its franchises, upon any legal ground of forfeiture, or the right of the corporation to be exempt from the extreme penalty, notwithstanding it has incurred it on strict legal grounds, is a right yielding to mere *judicial discretion*; for such a proposition would put the most important and substantial rights to the hazard of mere discretionary action, where there would be no better rule than the rule of the length of the judge's foot. And yet, we find it stated by the Supreme Court of Ohio, in an official syllabus, which follows the language of the opinion, that "whether a corporation, which is shown, upon *quo warranto* proceeding, to have misused or abused its franchises, should be ousted of its corporate franchises, is a question not capable of determination by any fixed rule or test, but rests in the sound discretion of the court, in the light of all the circumstances of the case before it."<sup>3</sup> In an earlier case, the same court, according to its official syllabus, announced precisely the opposite doctrine in the following language: "Where a corporation has been guilty of such negligence as is made, by the terms of its charter, a cause for the forfeiture of its franchises, and the State, on the relation of the attorney-general, demands a judgment of dissolution on account thereof, the court has no discretion to refuse such judgment upon the

<sup>1</sup> *State v. People's Mut. Benefit Asso.*, 42 Ohio St. 579.

<sup>3</sup> *State v. People's Mut. Benefit Asso.*, 42 Ohio St. 579.

<sup>2</sup> *Ibid.* 584.

ground that public or private interest would be better subserved by preserving the existence of the corporation.”<sup>1</sup> The same court, in a subsequent case, referring to this decision, laid down the following proposition: “Where a corporation has been guilty of acts, which, *by statute*, are made a cause of forfeiture of its franchise to be a corporation, *this court has no discretion* to refuse such judgment; but in other cases we are vested with discretion to determine whether judgment of ouster of the franchise to be a corporation shall be rendered, or whether the corporation shall be ousted from the exercise of the powers illegally assumed.” A majority of the court, “with some hesitation,” came to the conclusion that it would be for the interest of the stockholders, as well as the public, that it should not render a judgment of forfeiture. Gilmore, C. J., dissented, on the ground that a judgment of forfeiture ought to be entered. Such flagrant and persistent violations of corporate powers and duties as were shown in the case, in his opinion, called for and required an application of the severest penalties of the law.<sup>2</sup> A study of the judicial decisions must convince one that neither of these propositions is entirely true; and the attentive student must conclude, on the one hand, that rights of this nature cannot be committed to the mere sport of judicial discretion; and, on the other hand, that the courts may, and constantly do, exercise some discretion, but always in the direction of *mitigating* the causes of forfeiture. In other words, they constantly exercise a discretion analogous to the jurisdiction which courts of equity exercise, of *relieving against forfeitures*. Such a discretion has been exercised in a case where the power to dissolve and wind up corporations had been committed by statute to the Court of Chancery of New York, and where the Bank Commissioners, who had instituted the proceeding under a statute, submitted the matter to the discretion of the chancellor. The bank had done acts violative of its act of incorporation, which worked a forfeiture of its franchises; but the court, being satisfied of

<sup>1</sup> State v. Pennsylvania &c. Canal Co., 23 Ohio St. 121.

<sup>2</sup> State v. Oberlin Building &c. Asso., 35 Ohio St. 258, 264.

the integrity of its officers, and that the institution could go on without danger to the creditors or to the public, and that its suspension would cause great public inconvenience, — permitted it to go on under certain prescribed regulations, instead of perpetuating the injunction against it. But Chancellor Walworth did not hold that he had the discretionary power to do this, in case the Bank Commissioners should insist upon the injunction, and he gave them leave to make application for its restoration, upon an affidavit that the regulations prescribed by him had not been complied with.<sup>1</sup>

**§ 6618. Non-user of its Franchises.** — While the *abandonment* and *nonuser* by a corporation, of its franchises, will or will not work an *ipso facto* dissolution, according to the nature of the rights involved in the question, and the manner in which it arises,<sup>2</sup> — yet it is well settled that, whenever a corporation voluntarily and totally abandons the exercise of its franchises, and does or suffers to be done, acts which destroy the end and objects for which it was incorporated, this will authorize a judgment ousting it of its franchises at the suit of the State,<sup>3</sup> or the *appointment of a receiver* by a court of equity to wind up its affairs, under a statutory jurisdiction, on the ground that it has suffered *de facto* dissolution.<sup>4</sup> Some of the

<sup>1</sup> *Bank Comm'rs v. Bank of Buffalo*, 6 Paige (N. Y.), 497. An earlier decision of the Supreme Court of Vermont must be quoted to the effect that, although the corporators of a banking institution, chartered by the State, had, in organizing the bank, defrauded the statute in a shameful degree, by proceeding to business without the capital required, and by withdrawing a large portion of the pretended capital before commencing business, — yet, as the power to vacate its charter rested in *judicial discretion*, and as it was by no means certain that the scamps intended a fraudulent violation of the act, and as the business of the bank appeared to have been managed with skill and

ability, and as no existing danger to the community seemed to require the destruction of the institution, — the court ought not to have awarded a judgment of ouster. *State v. Essex Bank*, 8 Vt. 489.

<sup>2</sup> *Ante*, §§ 3345, 3346; *post*, §§ 6619, 6622, 6623, 6624, 6625.

<sup>3</sup> *People v. Bank of Hudson*, 6 Cow. (N. Y.) 217; *State v. Seneca County Bank*, 5 Ohio St. 171; *St. Louis &c. Co. v. Sandoval &c. Co.*, 116 Ill. 170, 173; *Hart v. Boston &c. R. Co.*, 40 Conn. 524 (under a statute); *People v. Northern R. Co.*, 53 Barb. (N. Y.) 98 (under a statute).

<sup>4</sup> *Ward v. Sea Ins. Co.*, 7 Paige, (N. Y.) 294; *Re Jackson Marine Ins. Co.*, 4 Sandf. Ch. (N. Y.) 559.



cases proceed upon the proposition, announced in a leading case,<sup>1</sup> that the suffering an act to be done which destroys the nature and object for which the corporation was instituted, must be regarded as equivalent to a direct *surrender* of its franchises.<sup>2</sup> Where this is the theory, an action in the nature of *quo warranto*, prosecuted by the State, does not, except in form, oust the corporation of its franchises; for it has already abandoned or surrendered them: it does no more than judicially ascertain the fact of the abandonment and surrender, and put it beyond all future question. When, therefore, in a proceeding in the nature of *quo warranto*, the corporation showed that it had been duly incorporated, and traversed the allegations of usurpation in the information; and the State replied, setting up, in substance, among other things, that, on a day named, the corporation had become wholly insolvent and unable to redeem its bills; that it had discontinued its banking operations, either by the way of discounts or otherwise, and had assigned or transferred so much of its property to trustees, in trust for the payment of its debts, as to render itself incapable of continuing its banking operations according to the intent of the statute of incorporation;—it was held that this constituted a good ground for a judgment of ouster.<sup>3</sup> On the other hand, a railway company does not subject itself to a judicial sentence of forfeiture, when it discontinues its business, in consequence of having conveyed its property to another such company, under the authorization of a special statute, which, by a just construction of its terms, contemplates that the granting company shall continue its corporate existence.<sup>4</sup> Again, it has been adjudged that the *assignment* by a banking corporation of all its assets for the liquidation of its debts, does not, of itself, authorize a judgment ousting it of its franchises, though it is conceded that

<sup>1</sup> *Slee v. Bloom*, 19 Johns. (N. Y.) 456; *s. c.* 10 Am. Dec. 273; *ante*, § 3345.

<sup>2</sup> *People v. Bank of Hudson*, 6 Cow. (N. Y.) 217; *State v. Seneca County Bank*, 5 Ohio St. 171.

<sup>3</sup> *People v. Bank of Hudson*, 6 Cow. (N. Y.) 217. Closely similar to this, on its facts and conclusions, was *State v. Seneca County Bank*, 5 Ohio St. 171.

<sup>4</sup> *State v. St. Paul &c. R. Co.*, 35 Minn. 222.

circumstances may exist under which such an assignment will be tantamount to such a *non-user* of its franchises, as will warrant an ouster.<sup>1</sup>

**§ 6619. Suspending Ordinary Business for One Year.** — Under the Revised Statutes of New York,<sup>2</sup> a corporation which, for one whole year, has remained insolvent or suspended its ordinary business, is deemed to have surrendered its franchises, and shall be adjudged dissolved. This statute is regarded as *cumulative*, and not as creating a substitute for the common-law rule that if a corporation suffer acts which destroy the objects of its existence, this is equivalent to a *surrender* of its franchises; and it therefore does not prevent the presumption of such a surrender by a *non-user* for less than a year. But in order to raise the inference of a surrender from insolvency, suspension of business, etc., for less than a year, the circumstances must be such as to show that the corporation has lost all power to continue or resume its business. It was accordingly held that a manufacturing corporation, which, having become actually insolvent, had suspended its business for less than a year, under a resolution to wind up its affairs, was not thereby dissolved, it appearing that it had buildings, machinery, stock, and assets, by which it *might* have carried on its business.<sup>3</sup> But a *lease* by the stockholders of a manufacturing corporation of *all its property*, to its president,

<sup>1</sup> *State v. Commercial Bank*, 13 Smedes & M. (Miss.) 569; s. c. 53 Am. Dec. 106. This decision is one of a class of decisions rendered by the courts of the western and southern States in the era of "wild cat" and "red dog" banking. It is entitled to little respect. The question arose on a demurrer to the replication of the State, in a *quo warranto* proceeding, the replication alleging that on a day named, the bank, "*with the intention of never again discounting notes, issuing bills for circulation, or otherwise carrying on banking operations*, assigned to certain persons, as trustees, to liquidate and wind up its affairs and business, all its property of every kind and description, in trust," etc. Courts must be taken according to what they

*decide*, and not according to what they say; and it is hard to understand how a bench of judges could, while keeping themselves in an honest frame of mind, hold that, when a banking corporation dispossesses itself of all its assets, with the intent of never again resuming business, it does not commit such an abandonment and *non-user* of its franchises as authorizes the State to demand a judgment ousting it of them. Compare *State v. Commercial Bank*, 33 Miss. 474.

<sup>2</sup> 2 Rev. Stats. N. Y. 463, § 38.

<sup>3</sup> *Bradt v. Benedict*, 17 N. Y. 93. It is to be noted that the question was, whether it was *ipso facto dissolved*, so as to let in a proceeding against a stockholder.

for two years, though the business continues to be carried on as before, has been held a suspension of its ordinary business, for the period of more than one year, such as works an *ipso facto* forfeiture of its franchises, under the above statute.<sup>1</sup> Such a suspension does not require a dissolution in a proceeding *at law*, by *quo warranto* or otherwise; but it gives the court of chancery power to step in and lay hold of its assets, by means of a receiver, and wind up its affairs.<sup>2</sup> The proceeding in chancery was merely a statutory mode of *dissolving* and *winding up* the corporation, since it was characterized by an injunction against the officers of the corporation from the further exercise of the corporate powers. Although the corporation was deemed to have surrendered its charter in consequence of the non-user denounced by its statute, yet it was not actually dissolved until judicial proceedings had been instituted, either at law or in equity, to have its dissolution judicially declared; so that a judgment recovered against it before the institution of such proceedings, and the sale of its property upon execution thereunder, were valid and effectual to transfer title to the purchaser.<sup>3</sup> Whenever the conditions denounced by the statute had taken place, any of its *directors* or *stockholders*, who had an interest in closing up its affairs, might file a bill in chancery against the corporation, to have its dissolution judicially declared, its concerns closed up, and its property distributed under the direction of the court.<sup>4</sup> Until a judgment of dissolution, either at law or in equity, any creditor might proceed to reduce his demand to judgment, and to procure satisfaction of his judgment by execution.<sup>5</sup> If a proceeding at law is commenced by the people to oust a railroad company of its franchises, on the ground that it has suspended its ordinary lawful business, for more than one year, and the fact is made to appear, judgment of ouster must go; for the statute admits of no excuse or explanation.<sup>6</sup>

<sup>1</sup> *Conro v. Gray*, 4 How. Pr. (N. Y.) 166.

<sup>2</sup> *Ward v. Sea Ins. Co.*, 7 Paige (N. Y.), 294; *Re Jackson Marine Ins. Co.*, 4 Sandf. Ch. (N. Y.) 559.

<sup>3</sup> *Mickles v. Rochester City Bank*, 11 Paige (N. Y.), 118; s. c. 42 Am. Dec. 103.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.* Circumstances under which

it was held that a corporation had not incurred a forfeiture by the suspension of its ordinary business, for one year, under this statute: *Kelsey v. Pfadler Process Fermentation Co.*, 45 Hun (N. Y.), 10; s. c. 19 Abb. N. Cas. (N. Y.) 427; 9 N. Y. St. Rep. 563.

<sup>6</sup> *People v. Northern R. Co.*, 53 Barb. (N. Y.) 98.

**§ 6620. Failing to Make, File, or Publish Statements as Required by Statute.**—There is a difference of judicial opinion upon the question whether, in case the governing statute requires a corporation to make and file, in a certain public office, or to publish annually, or at other stated periods, a prescribed statement of its affairs, and it neglects so to do, it thereby subjects itself to a judicial sentence of forfeiture, in case the State proceeds against it on that ground. Many of the statutes, as elsewhere seen,<sup>1</sup> denounce *penalties* against the directors, trustees, and managing officers, and in some cases against the stockholders also, for the failure to make, file, or publish such statements or reports; and where the statute is so framed, the failure would not be ground of visiting on the corporation the extreme penalty of the law, on a principle elsewhere stated,<sup>2</sup> that where the statute denounces a specific *penalty* for an offense committed by the corporation or its managing officers, that penalty will be deemed to have been intended by the legislature to be *exclusive*.<sup>3</sup> Thus, it has been held that the failure of the directors of a *gravel-road company* to file the return with the Secretary of State<sup>4</sup> prescribed by a statute of Indiana, is not a ground on which the State may demand an ouster of its franchises.<sup>5</sup> But where the question arose in regard to a *banking corporation*, and the governing statute required the bank to make and transmit to the Auditor of the State, at stated periods, a statement of its condition,—it was held that, while a mere *negligent* or *inadvertent* failure to comply with the statutory mandate would not be ground upon which the State could demand a forfeiture of its franchises, yet that a *willful* refusal to obey the statute would afford such a ground.<sup>6</sup> It may be collected from two cases in New Hampshire that the failure of a bridge company to make *returns* to the State of its *tolls* for the period of thirty years is not a ground upon which “in equity and good con-

<sup>1</sup> *Ante*, § 4221, *et seq.*

<sup>2</sup> *Ante*, § 3020.

<sup>3</sup> See also *Baker v. Backus*, 32 Ill.

79.

<sup>4</sup> Rev. Stat. Ind. 1881, § 3641.

<sup>5</sup> *State v. Brownstown &c. Gravel Road Co.*, 120 Ind. 337; *s. c.* 22 N. E. Rep. 316.

<sup>6</sup> *State v. Seneca County Bank*, 5 Ohio St. 171.

science, a decree of forfeiture should be made," under the provisions of a statute, where the defendants pray to be permitted to make the returns.<sup>1</sup>

§ 6621. **Making Excessive Loans to Directors.**—Where the governing statute provided that "the stockholders collectively of any independent banking company, should at no time be liable to such company, *either as principal debtors or sureties, or both*, to an amount greater than three-fifths of the amount of capital stock actually paid in, and remaining undiminished by losses or otherwise; nor should the directors be so liable, except to such amount and in such manner as should be prescribed by the by-laws of such company, adopted by its stockholders to regulate such liabilities,"—and, without any such by-laws having been first made by the stockholders, a banking company proceeded to make loans to its directors and to permit them to become liable, as sureties to each other, and for other parties, in a large amount,—it was held that this constituted a ground upon which the State might demand a judgment of ouster of the franchises of the corporation. The court refused to take the view that the statute involved the absurdity of permitting the directors alone, in the absence of any action by the stockholders in the premises, by making the by-law prescribed, to absorb all the liabilities which the statute permitted to the entire body of the stockholders collectively, and to nullify those wholesome restrictions which it was obvious that the legislature intended to impose upon the evil of excessive loans to directors,—a fertile source of abuse and disaster in the management of banking institutions. In the view of the court, the statute had a more obvious reference to the *character* than to the *amount*

<sup>1</sup> State v. Barron, 57 N. H. 498; s. c. 58 N. H. 370. Evidence was held admissible to show how the corporation had been managed, the amount of its receipts from tolls and of its expenditures, and whether the bridge was longer needed to accom-

modate the public travel,—the evident theory being that the answers to these inquiries would enlighten the conscience of the court as to its duty under the statute. State v. Barron, 58 N. H. 370.

of the liability. To answer that the corporators might well have been *ignorant* of this violation, or might have acted under a misapprehension of the law in this respect, and that it was not averred that the corporation or its directors *knowingly* violated the statute,—the court said that the *corporation* must be *presumed to know* the law under which it was organized, by virtue of which alone it had its being, and that ignorance of that law was no more an excuse in the case of a corporation than of a natural person.<sup>1</sup>

**§ 6622. Failure to Build a Branch Railroad.**—The principle already referred to, that the courts proceed with extreme reluctance in adjudging forfeitures of the franchises of corporations, finds an apt illustration in a case where it was held that, where a corporation fails to carry out the *public duties* assumed by it in consideration of the grant of its franchises, by building a branch railroad, its franchises are forfeited *only as to that particular branch*.<sup>2</sup>

**§ 6623. Failure to Organize in the Mode Prescribed by the Statute.**—It may be concluded, by analogy to what has preceded,<sup>3</sup> that where the co-adventurers enter upon the business of the corporation, and hold themselves out as possessing the faculties of a corporation, before they have complied, in the manner of affecting their organization, with the *substantial* requirements of the governing statute, this will be a just ground on which the State may demand a judgment of ouster against them; and, on the other hand, that the failure to comply with an unimportant, subsidiary, or directory provision,

<sup>1</sup> *State v. Seneca County Bank*, 5 Ohio St. 171.

<sup>2</sup> *State v. St. Paul &c. R. Co.*, 35 Minn. 222. It may be remarked that where a corporation fails to carry out the public object for which it was incorporated, such as the construction of a particular line of railroad, and the statutory duty is clear, a *mandamus* will lie to compel it to perform such duty. *State v. Southern Min-*

*nesota R. Co.*, 18 Minn. 40; *People v. Albany &c. R. Co.*, 24 N. Y. 261; s. c. 82 Am. Dec. 295. In this last case it was said that the remedy was not an action in *equity*, which was the particular action brought, but that it was by *mandamus* or *indictment*, or, at the election of the State, by a proceeding to annul the franchises of the corporation.

<sup>3</sup> *Ante*, §§ 6587, *et seq.*, 6611, *et seq.*

will not afford such a ground.<sup>1</sup> But where a statute incorporating a village provided that a meeting of the legal voters of the village should be held, and that if a majority of the legal voters present should vote in favor of accepting the charter, it should be in force, but otherwise should be void; and it was made to appear, in an action of *quo warranto* by the State, that the vote by which the charter was declared accepted, was *fraudulent*, and that in fact a majority of the legal voters, present at the election, voted against the acceptance of the charter,—it was held that the State was entitled to judgment of ouster.<sup>2</sup> So, where a corporation had been authorized by letters-patent in England, but upon condition that, before it should commence business, one-half of its capital stock should be subscribed, and at least £50,000 thereof should be paid up, which fact should be certified to the Board of Trade by three directors, and three directors falsely certified the fact to the Board of Trade, whereupon the corporation commenced business,—it was held that its charter could be vacated by *scire facias*, at the suit of a private prosecutor, without a revocation under the Great Seal or Sign Manual.<sup>3</sup> So, where a general law, permitting the organization of banking corporations, provided that no such corporation should continue the transaction of its business beyond the period of one year from the date of its creation and organization, unless its entire capital should be fully paid up in cash, and the corporation against which the State proceeded had made a general assignment of all its assets for the

<sup>1</sup> *Com. v. Central Passenger Railway*, 52 Pa. St. 506. When, therefore, a company incorporated to supply the city of San Francisco with water, instituted a statutory proceeding to *condemn land* required for its purposes, and the owner of the land contested the application, on the ground that it was not a legal corporation because its articles of association did not show "where the principal place of business of the company is to be located," as re-

quired by the governing statute,—it was held that this was not a proper ground for the dismissal of the petition, since it was a mere *technical error*, and did not avoid the act of incorporation. *Re Spring Valley &c. Works*, 17 Cal. 132.

<sup>2</sup> *State v. Bradford*, 32 Vt. 50.

<sup>3</sup> *Reg. v. Eastern Archipelago Co.*, 1 El. & Bl. 310; s. c. 22 L. J. (Q. B.) 196; 17 Jur. 491; 18 Eng. L. Rep. 167; s. c. affirmed, 23 L. J. (Q. B.) 82; 22 Eng. L. Rep. 328.

benefit of its creditors, without having complied with this statutory provision, — it was held that there was nothing for the court to do except to enter a judgment of ouster.<sup>1</sup> And while, under an original grant of corporate franchises, the grantees must comply strictly with all conditions precedent to the taking effect of the grant, yet where a corporation passes, by a judicial sale, into the hands of purchasers, by virtue of a statute declaring that its franchises shall vest in the purchasers, with all the rights, privileges, and franchises of the original corporation, — the directions of the statute in regard to *reorganization* are not conditions of its being, in such a sense as to entitle the State to oust the purchasers of the franchises thus acquired, on the ground that the reorganized corporation has no existence. It was so held where the statute providing for the reorganization declared that the *franchise* should vest in the purchaser or purchasers, and that he or they should be a body corporate and seised of all the rights, powers, privileges, and franchises of the corporation of whose property they became the purchasers. The statute thus, of its own vigor, made the purchasers a corporation, and endowed them with the franchises of the precedent corporation; and the directions in regard to subsequent reorganization were hence *not conditions precedent* to the coming into existence of the corporation, as possibly they might have been if the purchasers had not taken by succession. In the view of the court, the utmost effect of not following those directions strictly could be no more than to work a forfeiture and enable the Commonwealth to retake the franchise: it could not entitle her to a judgment that the franchise had no existence.<sup>2</sup> In like manner, it has been held that the fact that, in the organization of a corporation, a single subscriber and the appraisers *committed a fraud* upon the corporation, by allowing such subscriber stock on insufficient security, affords no ground for dissolving the company, unless the directors who accepted the security were privy to the fraud.<sup>3</sup>

<sup>1</sup> *People v. City Bank*, 7 Colo. 226.

<sup>2</sup> *Com. v. Central Passenger Railway*, 52 Pa. St. 506, 512.

<sup>3</sup> *King v. Sea Ins. Co.*, 26 Wend. (N. Y.) 62.



§ 6624. **Further of this Subject.** — Again, the failure to comply with such a provision as that, at the time of the subscription to the capital stock, each subscriber shall pay in cash five dollars on each share subscribed,<sup>1</sup> is not sufficient ground for the State to demand a judgment of ouster.<sup>2</sup> Nor is a departure from the directions given in the statute to the agents of the State, in the proceeding to organize the corporation, or the neglect of the directors to sell the stock of a subscriber who has not paid the calls made against it, as they are directed to do by the charter, in themselves, a ground of forfeiture.<sup>3</sup> A weak decision of the Supreme Court of North Carolina denies this principle, and holds, in effect, that the failure of the corporators named in the charter of a banking corporation, to organize in compliance with the charter, and their act of holding themselves out as a corporation, without so organizing, makes them a corporation, even as against the State; and that a judgment cannot be rendered in a proceeding by the State against such co-adventurers, to the effect that they never were a corporation. The court proceed partly upon the ground that an ouster of the franchises of the pretended corporation would work, in some way, injury to innocent third persons.<sup>4</sup>

<sup>1</sup> As to which see *ante*, § 1216, *et seq.*

<sup>2</sup> *Com. v. West Chester R. Co.*, 3 Grant Cas. (Pa.) 200.

<sup>3</sup> *State v. Commercial Bank*, 6 Smedes & M. 218, 237; *s. c.* 45 Am. Dec. 280.

<sup>4</sup> *State v. Simonton*, 78 N. C. 57. In giving the opinion of the court, Rodman, J., says: "What would be the effect of a judicial declaration that a corporation had never had an existence, which is what is demanded in this action, on the rights of those who dealt with it through its supposed officers, it would be difficult to say. We were cited to no precedent of such judicial action." *Ibid.* 61. He further says: "As to those who dealt with it, it did exist. It would

be strange indeed if, after a bank had been held out to the world as a corporation for many years, and through persons calling themselves its officers, has had large and various dealings with the public, and has perhaps acquired large corporate property in money and lands, it should be competent or just for any court to declare that there never was such a corporation, and thus, in some cases, destroy or impair the rights of those who, *bona fide*, dealt with it, upon the ground that it does not appear to have been regularly organized, or its capital stock paid up." These quotations show a lamentable misunderstanding of the first principles of the law on the part of the judges of a court of last resort. The judgment of

Under this decision rascals can incorporate themselves *ad libitum*, by merely calling themselves a corporation, and the State is powerless to interfere. The true doctrine, indicated by many decisions, is that the court does not, in such a case, bring its information against the corporation, for that would recognize that it had acquired a legal existence as such, but it brings it against the *individuals*, who are usurping the franchises; and the judgment of the court ousts *them* of the franchises, which they pretend to exercise.<sup>1</sup> In such a proceeding against individuals, it is not sufficient for them to show an act establishing a corporation, and that they are members of it, in virtue of which they use the franchises mentioned in the information; but they must also show that the corporation is in such a state of organization as to authorize the use of the franchises and privileges which they are charged to have usurped, and that they are empowered by the corporation to do the acts complained of.<sup>2</sup> In conclusion, it should not be overlooked that *constitutional provisions* have been enacted in some of the States, declaring all existing charters *ipso facto* forfeited where a *bona fide organization* has not taken place thereunder,<sup>3</sup> and prohibiting the legislature from remitting the forfeiture of any corporate charter.<sup>4</sup>

**§ 6625. Discontinuing a Part of its Route.** — It has been reasoned in New York that a *railroad company* which has completed its road between the *termini* named in its charter or

ouster would not at all invalidate the acts of the corporation, done while it was a corporation *de facto*; nor would it in any sense prejudice the rights of third persons who may have dealt with the corporation on the faith of its being such.

<sup>1</sup> See, for an illustration, *State v. Brown*, 33 Miss. 500; *post*, § 6782.

<sup>2</sup> *Ibid.*

<sup>3</sup> Such a provision, in the constitution of Missouri, is as follows: "All existing charters, or grants of special or exclusive privileges, under which a *bona fide organization* shall not have

taken place, and business been commenced in good faith, at the adoption of this constitution, shall thereafter have no validity." Mo. Const. 1875, art. 12, § 1.

<sup>4</sup> The following is the provision on that subject in the constitution of Missouri: "The general assembly shall not remit the forfeiture of the charter of any corporation now existing, or alter or amend such forfeited charter, or pass any other general or special laws for the benefit of such corporations." Const. Mo. 1875, art. 12, § 3.

articles of association, forfeits its franchise by abandoning or ceasing to operate a part of the route. It was held that it could not be compelled by a court of *equity*, even where the action was brought by the State, to continue to maintain and operate it. The remedy was by *mandamus*, or *indictment*, or by a proceeding in the nature of *quo warranto*, at the election of the State, to forfeit the franchises of the corporation.<sup>1</sup> It may perhaps be collected, as the result of a few cases, that the failure of a railroad or plank-road company to build a part of its route, will not work a forfeiture of *all* its franchises, but will at most work a forfeiture of the franchise which it possesses of building the *unfinished portion*; so that the State will be warranted in conferring *that* franchise upon another company.<sup>2</sup> In a case in Michigan, where the four judges of the court delivered separate opinions, and one of them dissented, leave to file an information in the nature of *quo warranto* against a railroad company for the purpose of forfeiting its charter, was denied, where it was apparent that the forfeiture of the charter would not redress the grievance complained of, which was that the *lessee* of the railroad company had discontinued a part of its route, and had *side-tracked a village*, which complained of the consequent loss of facilities for transportation.<sup>3</sup> The decision of another court is to the effect that a railroad corporation, which has built a branch railroad under authority from the legislature, which maintains it in good condition for use, uses it regularly and sufficiently for the transportation of freight, and is ready at all times to transport passengers and draw passenger cars over it, whenever any shall be offered to be transported or drawn for a *reasonable toll* or compensation, — does not forfeit its franchise

<sup>1</sup> *People v. Albany &c. R. Co.*, 24 N. Y. 261; *s. c.* 82 Am. Dec. 295. Compare *State v. Western North Carolina R. Co.*, 95 N. C. 602.

<sup>2</sup> *State v. St. Paul &c. R. Co.*, 35 Minn. 222; *s. c.* 28 N. W. Rep. 245; *State v. Brownstown &c. Gravel Road Co.*, 120 Ind. 337; *s. c.* 22 N. E. Rep.

316. In this last case the court so concluded, in obedience to the language of a statute, but the reasoning of the court indicates that its conclusion would have been the same without the statute.

<sup>3</sup> *Attorney-General v. Erie &c. R. Co.*, 55 Mich. 15.

by discontinuing, after public notice, the running of regular passenger trains over the branch railroad, when there is not sufficient passenger business, at any rate of toll or fare, to pay the expenses of running them, by reason of the establishment, under authority of the legislature, of a competing line for the transportation of passengers over a horse railroad.<sup>1</sup>

**§ 6626. Failing to Keep Works in Repair.**—In the case of corporations organized to build toll roads, canals, or other works of public utility, to be used by members of the public distributively on the payment of tolls, there is a reasonable implication, arising from the acceptance of the franchise, that the corporation will keep the works in a reasonable state of repair for the benefit of the public; and moreover, the charters or other governing statutes generally prescribe this in express terms. In either case, a substantial failure to comply with this duty will be ground upon which the State may demand a judgment ousting the corporation of its franchises.<sup>2</sup> For example, a verdict finding that the road of a plank-road company has been, *for more than six years, in a broken and worn-out condition throughout its entire length*, and has been for that length of time and still continues to be, entirely unsafe and in an unsafe condition for vehicles to pass over and upon,—is sufficient to justify a judgment of ouster. Nor is

<sup>1</sup> *Com. v. Fitchburg R. Co.*, 12 Gray (Mass.), 180. The decision might have been rested on the exclusive ground that the legislature had, by granting a franchise to a competing company, rendered it unprofitable for the defendant company to continue the running of its trains; but it was rested on the preferable ground that the governing statute nowhere required, in express terms, that either passenger or freight trains should be run, or run at any given rate of frequency. The court conceded the doctrine that the grant of a franchise to a railroad company, to build and operate a railroad, carries with it, by

implication, an obligation on the part of the company to operate their road so as to satisfy the public needs. Those needs were to be measured by the amount of public business offered, and there was no obligation on the part of the company to operate their road, without regard to the volume of business, at all hazards and at any sacrifice.

<sup>2</sup> *State v. Pasumpsic Turnp. Co.*, 3 Vt. 178; *People v. Royalton &c. Turnp. Co.*, 11 Vt. 431; *People v. Hillsdale &c. Turnp. Co.*, 23 Wend. (N. Y.) 254; *People v. Fishkill &c. Plankroad Co.*, 27 Barb. (N. Y.) 445; *State v. Moore*, 19 Ala. 514.

it a good objection to the sufficiency of such a verdict that it fails to find that the road was in an unsafe condition through the neglect or fault of the company; since negligence in such a case is a legal conclusion, drawn from the finding that the road is unsafe.<sup>1</sup> As elsewhere seen,<sup>2</sup> the State may insist upon or waive the right to a judgment of forfeiture; and where a plank-road company permitted portions of its road to become impassable and dangerous, its subsequent act of surrendering those portions of the road, under the provisions of a general statute, or of repairing them, will not disentitle the State to such a judgment.<sup>3</sup> But here, as elsewhere seen,<sup>4</sup> in proceedings to forfeit the franchises of corporations, the law does not require the performance of conditions subsequent with extreme strictness, nor does it insist upon extreme care, or upon the attainment by the corporation of impracticable results. When, therefore, a charter had been granted for the navigation of a bayou, and the company was required to keep ordinarily, at low tide, a certain *depth of water*, the simple fact that less water was *occasionally found*, in consequence of extremely low stages of the lake into which the bayou emptied, was not sufficient ground for the State to demand a judgment of forfeiture.<sup>5</sup> Nor was a turnpike company required, after *fifty years*, to continue its road in *the same condition* as required by the statute in its original construction, but the law was satisfied with its continuance in a good state of general repair; so that, to warrant a forfeiture for an omission to keep it in repair, it was necessary for the State to allege and prove that the want of repair was such as to render the road *dangerous and inconvenient* to travelers.<sup>6</sup>

§ 6627. Joining a "Trust" to Stifle Competition.—For a corporation to combine with other corporations and form a

<sup>1</sup> People v. Plymouth Plankroad Co., 32 Mich. 248.

<sup>2</sup> *Ante*, § 6598.

<sup>3</sup> People v. Fishkill &c. Plankroad Co., 27 Barb. (N. Y.) 445.

<sup>4</sup> *Ante*, § 6611, *et seq.*

<sup>5</sup> State v. Orleans Nav. Co., 7 La. An. 679.

<sup>6</sup> People v. Williamsburgh Turnp. &c. Co., 47 N. Y. 586. Compare People v. Waterford &c. Turnp. Co., 3 Abb. App. Dec. (N. Y.) 580.

“trust,” the object of which is to limit production, maintain prices, and to stifle competition, is such a *misuser* of its franchises as will entitle the State to demand a judgment ousting it of them, where there is a statute prohibiting corporations from entering into such combinations.<sup>1</sup> *Constitutional provisions* have been established in some of the newer States prohibiting such combinations, of which the following, found in the constitution of Montana, may be cited as an example: “No incorporation, stock company, person, or association of persons in the State of Montana, shall directly or indirectly combine or form what is known as a trust, or make any contract with any person or persons, corporations or stock company, foreign or domestic, through their stockholders, trustees, or in any manner whatever, for the purpose of fixing the price, or regulating the production of any article of commerce, or of the product of the soil, for consumption by the people. The legislative assembly shall pass laws for the enforcement thereof, by adequate penalties, to the extent, if necessary for that purpose, of the forfeiture of their property and franchises, and in case of foreign corporations prohibiting them from carrying on business in the State.”<sup>2</sup>

**§ 6628. Violating Charter Provisions Intended for the Public Protection.** — The constant and willful *violation*, by a corporation, of the *fundamental conditions* upon which its charter was granted, especially of those conditions intended for the protection of the public who deal with it, and more especially of *negative prohibitions*, — furnish ground upon which the State may demand a judgment ousting it of its franchises. The principle is sometimes announced by the statement that,

<sup>1</sup> *People v. American Sugar Refining Co.* (Sup. Ct. San Francisco), 7 Rail. & Corp. L. J. 83; *People v. North River Sugar Refining Co.*, 3 N. Y. Supp. 401; *s. c.* 22 Abb. N. Cas. (N. Y.) 164; 16 Civ. Proc. Rep. (N. Y.) 1; *s. c.* affirmed, 7 N. Y. Supp. 406; 5 L. R. A. 386; *s. c.* affirmed in court of appeals, but on another ground,

121 N. Y. 582; 18 Am. St. Rep. 843. See *ante*, § 6411, *et seq.*; also the recent decision of the Supreme Court of Illinois in *People v. Distilling and Cattle Feeding Co.*, not yet reported.

<sup>2</sup> Const. Mont. 1889, art. XV, § 20. Similarly, see constitution of Idaho, art. XI, § 18.

where there has been a misuser or non-user in regard to matters which are of the *essence of the contract* between the corporation and the State, and the acts or omissions have been *repeated and willful*, they constitute a just ground on which the State may claim a forfeiture.<sup>1</sup>

**§ 6629. Making Usurious Loans, Shaving Notes, etc.—**The deliberate violation by a banking corporation of restrictive provisions in its charter relating to the rate of interest or of discounts upon loans, is a ground upon which the State may demand a forfeiture of its franchises.<sup>2</sup> Thus, where a banking corporation is prohibited by its charter from making loans at a greater rate of discount than one-half of one per centum for thirty days, and from dealing in promissory notes, —if it willfully violates these restrictions, by discounting at a higher rate, or by dealing in promissory notes otherwise than by discounting them at a rate not greater than that prescribed,—such acts constitute good ground of forfeiture.<sup>3</sup>

**§ 6630. Committing Frauds upon Creditors.—**That the commission of frauds upon its creditors, by a corporation, will be a sufficient ground on which the State may proceed to oust it of its franchises, does not seem to have been adjudged in any case; though a court of *equity* possesses ample jurisdiction to remedy such frauds where the creditors have established their right to the interposition of equity, by reducing their demands to judgments at law and executions returned unsatisfied.<sup>4</sup> And if the *State* is a lien creditor, it may have the appropriate remedies of equity, in the form of an injunc-

<sup>1</sup> *Com. v. Commercial Bank of Pennsylvania*, 28 Pa. St. 383; *State v. New Orleans Gas Light &c. Co.*, 2 Rob. (La.) 529; *State v. Commercial Bank*, 33 Miss. 474. The *erection of a building by a bank* was said to be a violation of its charter, such as would entitle the State to forfeit its franchises, in *New Haven v. City Bank*, 31 Conn. 106. But there is no sense in such a conclusion. The building

would be of public benefit and utility, and only the stockholders would have the right to complain.

<sup>2</sup> *State v. Commercial Bank*, 33 Miss. 474.

<sup>3</sup> *Com. v. Commercial Bank*, 28 Pa. St. 383. See also *Bank of Vincennes v. State*, 1 Blackf. (Ind.) 267; *s. c.* 12 Am. Dec. 234.

<sup>4</sup> *Ante*, § 6559.

tion and a receiver, where the circumstances warrant it.<sup>1</sup> Under the Revised Statutes of New York, an injunction will be granted against the corporation and particular creditors, to prevent the corporation from *preferring* them, by *confessing judgments* or otherwise; and it seems that such an injunction is authorized in behalf of any creditor.<sup>2</sup>

**§ 6631. Serving the Public Unequally.**—It stands to reason that corporations having public duties to perform, such as railway companies, turnpike companies, gaslight companies, companies for the distribution of water in cities, and the like,—must serve the public equally under similar conditions, and that if they willfully persist in discriminating in favor of particular individuals and against others, they commit a breach of the conditions of their charters in an essential particular, such as entitles the State to demand a judgment of ouster. It was said, *obiter*, by Chief Justice Shaw, in a case in equity brought to restrain the diversion of water by a water company, that for such a company to refuse to supply all families and persons who should apply for water, on reasonable terms, or to furnish some houses and lots with water and refuse the same to others, thus giving value to some properties and relatively diminishing the value of others,—would be a plain abuse of their franchise, although such acts are not expressly forbidden in their governing statute. And the learned judge said: “By accepting the act of incorporation, they undertake to do all the public duties required by it. When an individual or a corporation is guilty of a breach of public duty, by misfeasance or non-feasance, and the law has provided no other specific punishment for the breach, an *indictment* will lie. Perhaps also, in a suitable case, a process to revoke and annul the franchise might be maintained.”<sup>3</sup>

<sup>1</sup> *State v. Northern Cent. R. Co.*, (N. Y.) 211; 21 How. Pr. (N. Y.) 18 Md. 194. 313.

<sup>2</sup> *Galway v. United States Steam Sugar Refining Co.*, 36 Barb. (N. Y.) 256; affirming *s. c.* 13 Abb. Pr. <sup>3</sup> *Lumbard v. Stearns*, 4 Cush. (Mass.) 60.



§ 6632. **Contracting Debts beyond a Prescribed Amount.** Where the charter of a banking corporation provided that the total amount of debts which the corporation should at any time owe, should not exceed double the amount of moneys actually deposited in the bank for safe-keeping, a violation of this provision was held to be a ground on which the State might demand a judgment of ouster,<sup>1</sup> although the statute provided for making the directors individually liable for the offense.<sup>2</sup>

§ 6633. **Issuing Paper with Intent to Defraud.** — In a proceeding by *quo warranto* against a banking corporation, it was found by the jury that they, with intent to defraud, etc., had issued paper to a vast amount, which, at the time of issuing, they knew that they had not the means of redeeming, and which they did not intend to redeem. It was held that this finding, although it did not disclose a violation of any express provisions of the charter, disclosed what was evidently contrary to the intent and spirit of the grant; and that upon it, the State was entitled to a judgment of ouster, upon the well-known principle of common law, that whenever the managers of a corporation pursue such a course as wholly to frustrate the design of the State in granting its franchise, the reason of its existence ceases, and the State has a right to resume the franchise granted, — a decision in wholesome contrast with many of the wretched decisions in other States which characterized the era of “wild cat” and “red dog” banking.<sup>3</sup>

§ 6634. **Making Dividends while Refusing Specie Payments.** — It has been held that the verdict of a jury, finding that a banking corporation had made large dividends of profits, while they had refused to redeem their notes in specie or anything else, entitled the State to a judgment of ouster of its franchises. “If,” said Holman, J., “they were, at the

• <sup>1</sup> Bank of Vincennes v. State, 1 Blackf. (Ind.) 267, 275; s. c. 12 Am. Dec. 234.

<sup>3</sup> Bank of Vincennes v. State, 1 Blackf. (Ind.) 267, 278; s. c. 12 Am. Dec. 234.

<sup>2</sup> *Ibid.* Compare *ante*, § 4259, *et seq.*

time of those dividends, able to redeem their notes and refused to do so, it manifests a fraudulent intention; if they were then unable to redeem them, their conduct shows a pre-determination to continue so.”<sup>1</sup>

**§ 6635. Embezzling Deposits of the United States.**—Where a jury, in a *quo warranto* proceeding, found that a banking corporation, created by a charter granted by the legislature of Indiana, had embezzled large sums of money deposited for safe-keeping by the United States, this was held “a violation of the first principles of their charter,” such as showed that they could not be safely trusted with their franchises, and such as, consequently, entitled the State to a judgment of ouster. Nor was it a valid argument against this conclusion, that the embezzlement was to be deemed to be *the act of the president and directors*, as contradistinguished from the stockholders, who composed the great body of the corporation, and who might be innocent; since the government of the corporation existed in the select body; and here, as in the case of most other corporations, the act of the select body was to be deemed the act of the corporation, and their acts were obligatory upon the whole body. As the custody of the deposit was within the proper sphere of the duties of the president and directors, the whole corporation was answerable for their misconduct to the extent of an ouster of their franchises. Besides, the jury had found that the corporation, by its corporate name, had been guilty of the act, and this, of course, included all its members.<sup>2</sup>

**§ 6636. Suspension of Specie Payments.**—The general refusal of a bank to redeem, in gold and silver coin of the United States, its circulating notes, was frequently held, during the period of the existence of State banks of issue, to be such a failure to discharge the obligations imposed upon such a bank by its charter, defeating the essential ends for which it was

<sup>1</sup> Bank of Vincennes v. State, 1 Blackf. (Ind.) 267, 276; s. c. 12 Am. Dec. 234.

<sup>2</sup> Bank of Vincennes v. State, 1 Blackf. (Ind.) 267, 276; s. c. 12 Am. Dec. 234.

instituted,—as entitled the State to a judgment ousting it of its franchises.<sup>1</sup> Statutes exist, affirming this principle; and in an era when financial profligacy and debauchery seem to have involved even the integrity of the courts, it is not a matter of surprise that decisions should be met with, frittering away these statutes, under the pretense of construing them strictly. Such a statute, enacted in 1850 by the Legislature of Pennsylvania,<sup>2</sup> required directors of banks, upon refusal to redeem their notes, to execute an *assignment* preparatory to a forfeiture of their charters. It was held that this was technically a penal statute, and hence must be strictly construed; and that to authorize a dissolution under it, it must appear that the financial officer of the bank not only refused to pay its notes or certificates in gold or silver on demand, but that he *also* willfully refused to indorse on them the day and the year when they were presented for payment, or refuse to give a certificate for money deposited in the bank.<sup>3</sup> So, it was held by Chancellor Walworth that, to subject a banking corporation to the forfeiture of its charter under the New York Act of 1840, for allowing its circulating notes to remain

<sup>1</sup> Commercial Bank v. State, 6 Smedes & M. (Miss.) 599; Planters' Bank v. State, 7 Smedes & M. (Miss.) 163; State v. Bank of South Carolina, 1 Spears (S. C.), 433, 443; State v. Bank of Charleston, 2 McMull. (S. C.) 439: s. c. 39 Am. Dec. 135; Bank of Vincennes v. State, 1 Blackf. (Ind.) 267; s. c. 12 Am. Dec. 234; Townsends v. Bank of Racine, 7 Wis. 185. In this last case it was held that the refusal of a bank to redeem its bills on presentation was, *prima facie*, a failure of the bank. On the contrary, it was held by the Supreme Court of Ohio, in 1841, in a decision not entitled to much respect, that an incorporated bank did not incur the penalty of a forfeiture of its franchises, by the mere fact of suspending specie payments, where the governing statute gave a *penalty* of twelve per cent dam-

ages to the holder of the notes,—though the court admitted that a suspension of specie payments by a bank might be carried so far as to be evidence of an entire misuser of its powers, such as ought to extinguish its chartered privileges. State v. Commercial Bank, 10 Ohio, 535. The court took the view that the fact that the legislature had provided the *penalty* indicated a view on the part of the lawmakers that it was better to secure the holders of the notes by this means than to produce the inconvenience and derangement involved in a liquidation and closing of the business of such institutions. *Ibid.*

<sup>2</sup> Pa. Laws 1850, ch. 488.

<sup>3</sup> Com. v. Bank of Commerce, 9 Am. L. Reg. 379.

unpaid for twenty days after presentation at an agency of the bank, the notes must be allowed to *remain* with the agent until the expiration of the twenty days, or else must be *presented a second time* after the expiration of that time.<sup>1</sup>

**§ 6637. Other Violations of Duty by Banking Corporations.** — A decision of the Supreme Court of Ohio, which does not seem entitled to much respect, is to the effect that not the suspension of specie payment, nor the taking of usurious interest, nor expansions and contractions of circulation, nor disproportionate loans to its own officers, will entitle the State to a judgment of ouster against one of its incorporated banks.<sup>2</sup> On the other hand, where a banking corporation, in violation of the statute law, *received from another bank the bills*

<sup>1</sup> Bank Comm'rs *v.* James Bank, 9 Paige (N. Y.), 457. But the court said that, to enable the holder of the circulating bills of a banking association to apply to the Comptroller for payment, or to subject the association to a forfeiture for non-payment for twenty days after demand of payment at the agency, it was not necessary that the holder should present, the second time, such bills for payment, *at the last moment of the business hours* on the twentieth day after they were presented, or even on that day, as in the case of a *tender* at common law; but that an association which had once made default in paying its bills at the agency must, at its peril, provide its agent with funds to redeem those bills, whenever they should be again presented for payment, at or after the end of the twenty days from the time of their presentment. Where a note-holder of a bank presented a petition for a *mandamus* against the State Auditor, requiring him to proceed against the bank to forfeit its franchises for refusing to redeem its circulating notes in specie, and his petition showed that, on a

day named, he had presented two bills of the bank of the denomination of five dollars each, to the cashier of the bank, and demanded gold coin therefor, and that the cashier had refused to redeem them in gold coin, or in any other manner than in *quarter dollars* of United States coinage, which the petitioner refused to receive, whereupon he caused the bills to be protested by a notary public, etc., — it was held, on an examination of the statutes of the United States relating to the legal tender quality of its fractional silver currency, that, in order to put the bank in default, the petition should aver that the specie tendered in payment of its bills, if greater in amount than five dollars of the denomination of quarters, was of the coinage authorized by the act of Congress of 1853; since gold and silver of United States coinage prior to that time, was legal tender for all debts in any sums whatever. *People v. Du-bois*, 18 Ill. 333.

<sup>2</sup> *State v. Commercial Bank*, 10 Ohio, 535. Contrast *Bank of Vincennes v. State*, 1 Blackf. (Ind.) 267; *s. c.* 12 Am. Dec. 234.

of that institution in exchange for its own bills, with the purpose of paying out the bills so received instead of specie, — it was held that this was a sufficient ground on which the bank commissioners might proceed against it, for a perpetual injunction against the exercise of its franchises and for the appointment of a receiver.<sup>1</sup> It was held that an application, under the Revised Statutes of Rhode Island, by the bank commissioners of that State, for an injunction restraining a bank from exercising its franchises, and to wind up its affairs through a receiver, on the ground that the bank was “so managing its concerns that the public or those having funds in its custody are in danger of being defrauded thereby,” — could not be sustained, upon evidence of a *past mismanagement*, although the same had been violative of the charter, or had been followed by insolvency, where there had been, with the approbation of the bank commissioners, a readjustment and a change in the board of directors, and where the new board were endeavoring, on lines marked out by the bank commissioners, to retrieve the condition of the bank produced by the previous mismanagement.<sup>2</sup>

§ 6638. **Neglecting to Pay its Debts for More than One Year.** — This is a ground of dissolution under the statutes of New York.<sup>3</sup>

<sup>1</sup> Bank Comm'rs v. Bank of Buffalo, 6 Paige, (N. Y.), 497, 508.

<sup>2</sup> Bank Comm'rs v. Rhode Island Cent. Bank, 5 R. I. 12. In the opinion of the court, Ames, C. J., said: “Certainly this court would not exercise its powers in such mode as to enable the accredited State visitors of a bank to practice a fraud upon those whom they had invited, at great outlay and risk, to its management; or, except in a plain case of complicity or of gross ignorance or dereliction of duty on the part of the commissioners, hold, under the circumstances supposed, that to be present misman-

agement which such commission had directed or approved as the means of remedying former mismanagement.” *Ibid.* 19.

<sup>3</sup> *Ante*, § 6619; N. Y. Code Civ. Proc., § 1785. See Kittredge v. Kellogg Bridge Co., 8 Abb. N. Cas. (N. Y.) 168. The following case arose under a different statute: — Ward v. Sea Ins. Co., 7 Paige (N. Y.), 234. Compare Mickles v. Rochester City Bank, 11 Paige (N. Y.), 118; s. c. 42 Am. Dec. 103; Wilmersdoerffer v. Mahopac Improvement Co., 18 Hun (N. Y.), 387; Medbury v. Rochester Frear Stone Co., 19 Hun (N. Y.), 498.

**§ 6639. Omission to Elect Officers.**—As elsewhere seen,<sup>1</sup> the mere omission to elect trustees, directors, or other officers of a corporation, does not *ipso facto* work a dissolution, provided the means remain, under the charter or governing statute, of perpetuating its existence; and similarly, it has been held that the omission to *elect trustees for a number of years* is not a statutory ground of dissolution,<sup>2</sup> since the old board hold over, and their acts are valid until their successors are elected.<sup>3</sup>

**§ 6640. Changing the Corporate Name.**—The attempt of a corporation to change its name, in a manner not authorized by its charter, does not *ipso facto* work an avoidance of its charter.<sup>4</sup> Nor does the use of an *abbreviated name* by the officers of a corporation, organized under a particular name, constitute such a usurpation as will support a proceeding by *quo warranto* to oust the corporation of its franchises.<sup>5</sup>

**§ 6641. Acts for which the Legislature has Prescribed a Specific Penalty.**—There is some authority to the effect that acts of omission, for which the legislature has prescribed a specific penalty, do not, in general, constitute a ground on which the State may demand, in a judicial court, a forfeiture of the franchises of a corporation; since the legislature, in prescribing the penalty, is deemed to have intended that that should be exclusive.<sup>6</sup> But this principle cannot be stated with any degree of confidence. A penalty is often given as a *remedy* to private individuals, rather than as a *punishment* to the corporation; and if the act be one which, from its very nature, defeats the end for which the corporation was created, the mere fact that a penalty is given to a private individual,

<sup>1</sup> *Post*, § 6655.

<sup>2</sup> Under New York Laws, 1848, ch. 40, § 4.

<sup>3</sup> *Kelsey v. Pfaudler Process Fermentation Co.*, 45 Hun (N. Y.), 10.

<sup>4</sup> *O'Donnell v. Johns*, 76 Tex. 362; s. c. 13 S. W. Rep. 376.

<sup>5</sup> *People v. Bogart*, 45 Cal. 73.

Compare *People v. Sierra Buttes &c. Min. Co.*, 39 Cal. 511, 514. And see, as to names of corporations, *ante*, § 284, *et seq.*

<sup>6</sup> *State v. Commercial Bank*, 10 Ohio, 535; *Com. v. Breed*, 4 Pick. (Mass.) 460. See *ante*, § 3020.

damnified by the act, ought not to operate to oust the State of its right to demand a forfeiture of its franchises. Thus, it is elsewhere seen<sup>1</sup> that the *suspension of specie payments* by banks of issue has generally been held a ground on which the State may demand an ouster of their franchises; and yet, it is believed that an examination of all the early banking charters where this was held, will disclose the fact that they contained provisions giving a penalty to note-holders, generally of twelve per cent per annum, for the refusal of the bank to pay its circulating notes in specie. The early Supreme Court of Ohio, in an opinion not entitled to much respect, discovered in this provision a purpose on the part of the legislature to make that the exclusive remedy, except in cases of long-continued suspension; and, whitewashing many other corporate acts of misfeasance, declined to forfeit the charter of a bank.<sup>2</sup> It is obvious that the inquiry must center upon the consideration of the *nature of the act* which is forbidden, and for which the penalty is given. Where the charter of a corporation, created to erect and maintain a *bridge across a navigable stream*, imposed upon the proprietors of the bridge a penalty for unreasonably neglecting to *raise the draw*, — it was justly held that such a neglect would not operate as a forfeiture of their franchise;<sup>3</sup> and it might have been so held for the reason that the legislature could not be deemed to have intended so severe a result from such an act, for which it had given a specific penalty.

§ 6642. **Mere Insolvency.** — Mere insolvency does not, as elsewhere stated,<sup>4</sup> work an *ipso facto* dissolution of a corporation; nor is it ordinarily a ground on which the State may demand a judgment of ouster.<sup>5</sup> But it may be, and often is, regarded as a *de facto* dissolution, for the purpose of letting in the remedies of its creditors against its stockholders.<sup>6</sup> So, under statutes of New York, authorizing proceedings in equity

<sup>1</sup> *Ante*, § 6636.

<sup>2</sup> *State v. Commercial Bank, supra*.

<sup>3</sup> *Com. v. Breed*, 4 Pick. (Mass.)

<sup>4</sup> *Post*, § 6666.

<sup>5</sup> *State v. Bailey*, 16 Ind. 46; *s. c.*

79 Am. Dec. 405.

<sup>6</sup> *Ante*, §§ 3345, 3347.

to wind up insolvent moneyed corporations, the mere failure of a bank to pay a debt on demand would not support such a proceeding.<sup>1</sup>

**§ 6643. Effect of a Clause Prohibiting Dissolution until Debts Paid.**—A clause in the charter of a bank to the effect that the corporation shall not be dissolved before the expiration of its charter until its debts are paid, has been held not to protect the corporation from a dissolution in a proceeding by *quo warranto* for violation of its charter,—the court taking the view that the clause was intended merely to prevent the corporation from *dissolving itself*, before the expiration of its charter, without paying its debts.<sup>2</sup>

**§ 6644. Subsequent Good Behavior.**—Where a corporation has done acts which, as mere matter of law, operate as a forfeiture of its franchises, and entitle the State to demand a judgment of ouster, its mere subsequent good behavior will not disable the State from demanding such judgment. Nothing but a *waiver* by the State will release the corporation from the

<sup>1</sup> The following cases are cited in support of the text, without any attempt to analyze them, since they depend upon local statutes which may not be in existence at the present time:—Case of Mechanics' Bank, 5 Abb. Pr. (N. Y.) 374; Livingston v. Bank of New York, 5 Abb. Pr. (N. Y.) 338; *s. c.* 26 Barb. (N. Y.) 304. That the mere refusal to pay a note or other evidence of debt, issued by a banking corporation, when the officers of the corporation had reasonable cause for believing that the debt was *not due*, would not work a forfeiture of its charter,—see Bank Comm'rs v. Bank of Buffalo, 6 Paige (N. Y.), 497. Again, that neither discontinuance of business, reputed insolvency and inability to pay their debts, having large amounts of notes outstanding and unpaid, suffering their circulation

notes to be returned to the comptroller for redemption, non-payment of rent for the premises occupied by the association, nor having on hand less than twelve and a half per cent of specie, nor the issue of post-notes, were grounds warranting a dissolution of a New York banking association to be ordered, see Parmly v. Tenth Ward Bank, 3 Edw. Ch. (N. Y.) 395. That a creditor *at large* cannot maintain an action to have a corporation dissolved on the ground of its insolvency, and to compel the officers to make good the losses from their mismanagement,—see Cole v. Knickerbocker Life Ins. Co., 23 Hun (N. Y.), 255.

<sup>2</sup> Bank of Vincennes v. State, 1 Blackf. (Ind.) 267, 270; *s. c.* 12 Am. Dec. 234.



consequences of its acts.<sup>1</sup> In such a case, it has been reasoned that the corporation, after the doing or suffering of the guilty act which incurs the penalty of forfeiture, holds its franchises as a *mere tenant at will* of the State.<sup>2</sup>

<sup>1</sup> People v. Fishkill &c. Plankroad Co., 27 Barb. (N. Y.) 445. St. 287. Compare Re Franklin Tel. Co., 119 Mass. 447.

<sup>2</sup> Erie &c. R. Co. v. Casey, 26 Pa.

## CHAPTER CLIII.

### IPSO FACTO FORFEITURES OF CHARTERS AND DE FACTO DISSOLUTIONS.

#### SECTION

- 6650. Scope of this chapter.
- 6651. By the expiration of its charter.
- 6652. By the loss of all its members.
- 6653. Where all the shares pass into the hands of one owner.
- 6654. Private agreements among the sole stockholders.
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#### SECTION

- 6663. Sale or disposal of all its property.
- 6664. Cessation of active business.
- 6665. Attempting to change name.
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- 6667. Breaches of conditions subsequent in their charters.
- 6668. Consolidation of two corporations.
- 6669. Dissolution for the purpose of taxation.
- 6670. When deemed dissolved for the purpose of effectuating the rights of its creditors.
- 6671. When an injunction against a corporation is made perpetual.
- 6672. Dissolution, how pleaded.
- 6673. Failure to keep alphabetical list of stockholders.

§ 6650. **Scope of This Chapter.**—In a former chapter we have had occasion to note three modes in which a corporation may become dissolved, other than by the direct act of the State through its legislature or through its judicial courts: 1. By the *expiration* of the period named in its *charter*. 2. By the *loss* of all its *members*. 3. By a *surrender* of its *franchise*, which is accepted by the State. It is proposed in the present chapter to consider under what circumstances a corporation may become dissolved other than by the direct intervention of the State; and the discussion will have more or less reference to one or the other of these three modes of *de facto dissolution*.

§ 6651. **By the Expiration of its Charter.**—If the charter or governing statute of the corporation fixes a definite period of time at which its corporate life shall expire, when that period is reached, the corporation is *ipso facto* dissolved,<sup>1</sup> without any direct action to that end, either on the part of the State or of its members; and no powers created by the charter or governing statute can thereafter be exercised, except such as are continued, by force of the statute law, for the purpose of winding up its affairs. For instance, a corporation which has the franchise of *demanding tolls* upon a wagon road cannot demand such tolls after the expiration of the period named in its charter.<sup>2</sup> A corporation, which is invested by its charter with the faculty of “*perpetual succession*,” without any restriction, in other provisions of the instrument, upon the meaning of this expression, has the *right to exist forever*, although the *general law* of the State limits the duration of corporations, when not otherwise provided, to the period of *twenty years*.<sup>3</sup> As we shall see hereafter, the general rule, in the absence of saving statutes, is that all *actions* by or against a corporation *abate* upon the expiration of the period of existence limited in its charter or governing statute; so that whatever remedies thereafter exist in respect to its assets, for the purpose of calling them in and of distributing them among those entitled thereto, must be supplied either by the statute law or by the remedial principles of equity.<sup>4</sup>

<sup>1</sup> *People v. Anderson &c. Valley Road Co.*, 76 Cal. 190; *La Grange &c. R. Co. v. Rainey*, 7 Coldw. (Tenn.) 420, 432; *Scanlan v. Crawshaw*, 5 Mo. App. 337.

<sup>2</sup> *People v. Anderson &c. R. Co.*, *supra*.

<sup>3</sup> *Fairchild v. Masonic Hall Asso.*, 71 Mo. 526; overruling on that point, *Scanlan v. Crawshaw*, 5 Mo. App. 337. The first section of the general corporation law of Missouri (Rev. Stat. Mo. 1845, ch. 231) limiting the duration of corporations to a period of twenty years, unless otherwise

provided in their charters, has no application to purely *charitable* corporations. *State v. Ladies of the Sacred Heart*, 99 Mo. 533. Nor was this conclusion changed by the provisions of the revision of 1855 (Rev. Stat. Mo. 1855, pp. 369, 370). *Ibid*.

<sup>4</sup> It was held, in an early case in Missouri, that legal proceedings regularly commenced against a corporation were not affected by the expiration of its charter before the determination of such proceedings (*Lindell v. Benton*, 6 Mo. 361); but the question was not well considered, and no reasons

§ 6652. **By the Loss of All its Members.**—It cannot be stated, as a general proposition, as we find the statement laid down by some of the text-writers and judicial decisions,<sup>1</sup> that a corporation may become dissolved by the *death* of all its members. This statement is no doubt applicable to *municipal corporations*, and indeed to most corporations except those having a joint stock; but it has no application whatever to joint-stock corporations. In these last-named corporations, membership exists by virtue of the *ownership of the shares*, and where a shareholder dies, his shares being personal property, the legal title to them immediately vests in his executors or administrators, or, under some statutory conditions, in his widow or next of kin, without administration. There is only a theoretical *hiatus*, which exists between the date of the death of the shareholder and the qualification of his executor, or the appointment and qualification of his administrator; and the title of the executor or administrator is understood to vest and take effect *by relation*, at the time of the death of the testator or intestate. A true statement of doctrine under this head is, that a corporation may become dissolved by the *loss* of all its members, and this statement is applicable to any species of corporation which is capable of sustaining such a loss.<sup>2</sup> While it is clear that a dissolution, for this reason, could happen to municipal and charitable corporations, and generally to corporations which have no joint stock the shares of which are transferable from person to person,—yet it is pointed out that this mode of dissolution cannot take place in respect of pecuniary or business corporations which have a transferable joint stock, for the reason that their shares, being personal property, pass by assignment, bequest, or descent, and must always remain the property of some person or persons, who must, of necessity, be a member or members of the corpora-

were given for the conclusion, which might possibly have had reference to some provision of the statute law.

<sup>1</sup> *Ante*, § 6567.

<sup>2</sup> *Russell v. M'Lellan*, 14 Pick. (Mass.) 63; *Boston Glass Manufactory v. Langdon*, 24 Pick. (Mass.) 49; *s. c.* 35 Am. Dec. 292.

tion as long as it exists.<sup>1</sup> As already pointed out,<sup>2</sup> the legal title to its property remains in the ideal body or corporation, no matter how much its individual members may change. If every member of a joint-stock corporation should die at the same moment, its shares would be distributed under the statute of distribution, or according to the testaments of the deceased shareholders, and the legal representatives of the deceased members would have authority, by law, to manage the corporation; and no dissolution would, in such a case, take place.<sup>3</sup> It is a very common thing to change, in one transaction, the entire *personnel* of a corporation, by the concurrent act of all its members, in selling all their shares to third persons, who may thereupon elect a new board of directors. The assignees of the shares thus proceeding to reorganize the corporation, perpetuate its legal existence, and the title of the ideal body to its real and personal property remains as before.<sup>4</sup>

§ 6653. **Where All the Shares Pass into the Hands of One Owner.** — Another question is, whether, in case the charter or other governing statute limits the number of members which the corporation must have to a prescribed *minimum*, and the shares are so sold as to pass into the hands of a less number, this fact, *ipso facto*, dissolves the corporation. The decisions seem to be unanimous to the effect that it does not. They rest upon the principle that a corporation is not dissolved by the destruction of an integral portion of its membership, so long as the remaining portion has the power to restore or renew the defective part.<sup>5</sup> Thus, in the case of a charita-

<sup>1</sup> Boston Glass Manufactory v. Langdon, 24 Pick. (Mass.) 49; *s. c.* 35 Am. Dec. 292.

<sup>2</sup> *Ante*, §§ 1071, 1073.

<sup>3</sup> Russell v. M'Lellan, 14 Pick. (Mass.) 63.

<sup>4</sup> Wilde v. Jenkins, 4 Paige (N. Y.), 481. That a *charter* will not be judicially *approved*, in Pennsylvania, for a beneficial society, which provides that the corporation shall not be dissolved

while *nine members* remain, such provision not being authorized by law, — see United Daughters of Cornish, 35 Pa. St. 80.

<sup>5</sup> Smith v. Smith, 3 Desaus. (S. C.) 557; State v. Vincennes University, 5 Ind. 77. This decision was *not* reversed by the decision of the Supreme Court of the United States in 14 Howard, but the latter decision preceded the former. See 5 Ind. 80.

ble corporation, no loss of members destroys the corporation, so long as a sufficient number remain to continue the succession and fill up the vacancies.<sup>1</sup> Contrary to early opinion,<sup>2</sup> it is now generally held that the fact that all the shares in a joint-stock corporation have passed into the hands of *two members*,<sup>3</sup> or even into the hands of *a single person*,<sup>4</sup> does not, *ipso facto*, work a dissolution of the corporation; since such *sole owner* may so dispose of the shares, as, by the election of the necessary directors and officers, to continue the corporate existence. If, therefore, such a sole owner continues the business under the corporate name, without giving notice to the public of a dissolution or of his individual ownership, he is still liable to be sued as a corporation.<sup>5</sup> Such sole owner does not become the *legal owner* of the *property* of the corporation, but he owns merely the *shares*,<sup>6</sup> though he would probably be regarded as the *equitable owner*.<sup>7</sup> And, in general, the dissolution of a corporation, which is made the ground of an action, is not shown by *evidence* that the discharge of the corporate functions under the charter has become impossible by reason of the diminution of the number of corporators, where a forfeiture of the franchise has not been declared by a court, in a proper proceeding.<sup>8</sup>

§ 6654. **Private Agreements among the Sole Stockholders.**—A corporation is not dissolved in consequence of any private agreement among its sole stockholders, unless the necessary effect of such an agreement is a *surrender* of its charter. Thus, where a corporation came lawfully into existence with but *two* stockholders, an agreement between them that each was to contribute half of the expense in carrying on the work for which the corporation was organized, that the profits of the venture were to be divided equally between them, but

<sup>1</sup> State v. Vincennes University, 5 Ind. 77.

<sup>2</sup> Bellona Company's Case, 3 Md. 446.

<sup>3</sup> Russell v. M'Lellan, 14 Pick. (Mass.) 63.

<sup>4</sup> Newton Man. Co. v. White, 42

Ga. 148; Bohannon v. Binns, 31 Miss. 355.

<sup>5</sup> Newton Man. Co. v. White, *supra*.

<sup>6</sup> Button v. Hoffman, 61 Wis. 20; s. c. 50 Am. Rep. 131.

<sup>7</sup> Compare *ante*, §§ 18, 1073, 5096.

<sup>8</sup> Bohannon v. Binns, 31 Miss. 355.

that no debts to strangers were to be contracted without the consent of both of them, the subsequent refusal of one of the corporators to be any longer bound by the agreement did not, upon any conceivable theory, work a dissolution of the corporation.<sup>1</sup>

§ 6655. **Omission to Elect Directors.** — Similarly, the mere omission to elect directors, trustees, or other corporate officers, does not, of itself, work a dissolution of the corporation, even in the case of *eleemosynary* and similar corporations, where the directors or trustees are, in law, the persons who are incorporated and hence the corporation, — so long as the possibility of restoring the governing body, by an election or otherwise, remains in the members; and especially in view of the general rule of law that the existing directors, trustees and officers *hold over* until their successors are lawfully chosen.<sup>2</sup> The highest American court has declared this principle with regard to an *eleemosynary* corporation,<sup>3</sup> and the reasons are stronger for so holding in the case of a joint-stock corporation. In the latter case, the board of directors, or other managers or officers, do not form an *integral part* of the corporation; and therefore the omission to elect them will operate merely to suspend the powers of the corporation for the time being, since it cannot act without them, but a subsequent election

<sup>1</sup> McKay v. Beard, 20 S. C. 156.

<sup>2</sup> All Saints' Church v. Lovett, 1 Hall (N. Y.), 191; Lehigh Bridge Co. v. Lehigh Coal & Co., 4 Rawle (Pa.), 9; s. c. 26 Am. Dec. 111; Com. v. Cullen, 13 Pa. St. 133; s. c. 53 Am. Dec. 450; Evarts v. Killingworth Man. Co., 20 Conn. 447; Harris v. Mississippi Valley & C. R. Co., 51 Miss. 602; Vincennes University v. State, 14 How. (U. S.) 268, 273; Boston Glass Manufactory v. Langdon, 24 Pick. (Mass.) 49; s. c. 35 Am. Dec. 292, 295; Baker v. Backus, 32 Ill. 79; Cahill v. Kalamazoo Mut. Ins. Co., 2 Dougl. (Mich.) 124; s. c. 43 Am. Dec.

457; Knowlton v. Ackley, 8 Cush. (Mass.) 93; Smith v. Natchez Steamboat Co., 1 How. (Miss.) 479; Allen v. New Jersey Southern R. Co., 49 How. Pr. (N. Y.) 14; St. Louis & Loan Asso. v. Augustin, 2 Mo. App. 123; Hoboken & C. Asso. v. Martin, 13 N. J. Eq. 427; Rose v. Turnpike Co., 3 Watts (Pa.), 46; Blake v. Hinkle, 10 Yerg. (Tenn.) 218; People v. Runkle, 9 Johns. (N. Y.) 147. Compare Ward v. Sea Ins. Co., 7 Paige (N. Y.), 294. Compare *ante*, § 6639.

<sup>3</sup> Vincennes University v. State, 14 How. (U. S.) 268, 273.

will restore its functions.<sup>1</sup> The conclusion is unavoidable, where the *charter expressly provides* that, in case of the failure to elect directors at the prescribed time, the old directors shall continue in the offices until their successors are elected;<sup>2</sup> but it is not at all necessary to the conclusion that there should be such a charter provision.<sup>3</sup> It is scarcely necessary to add that a dissolution of a corporation does not arise from a *failure to re-elect* officers at the proper periods, when the corporate offices are in fact filled, and their functions exercised, by *officers de facto*; for in such a case it is clear that a new election may be had.<sup>4</sup> Where there is a statute providing that, in case of a suit against a corporation which has failed to elect directors, *service* may be had on the late proper officers, such a failure will not, of course, prevent the recovery of a judgment against the corporation.<sup>5</sup>

**§ 6656. Resignation of the Corporate Officers.**—For stronger reasons, it must be apparent that the mere *resignation* of all the officers of a corporation does not work a dissolution of the corporation; so long as the possibility remains of again filling the offices, by an election or otherwise.<sup>6</sup>

**§ 6657. When Election will not Prevent Dissolution.**—On the other hand, where it is necessary, in order to give

<sup>1</sup> *Rose v. Turnpike Co.*, 3 Watts (Pa.), 46; *Boston Glass Manufactory v. Langdon*, 24 Pick. (Mass.) 49; *s. c.* 35 Am. Dec. 292, 295. See *Corporation of Colchester v. Seaber*, 3 Burr. 1866, 1870.

<sup>2</sup> *Cahill v. Kalamazoo Mut. Ins. Co.*, 2 Dougl. (Mich.) 124; *s. c.* 43 Am. Dec. 457, 463; *Slee v. Bloom*, 5 Johns. Ch. (N. Y.) 366.

<sup>3</sup> *Cahill v. Kalamazoo Mut. Ins. Co.*, 2 Dougl. (Mich.) 124; *s. c.* 43 Am. Dec. 457, 464; citing *Ang. & Ames Corp.* 77; 2 Kent's Com. 295; *People v. Runkle*, 9 Johns. (N. Y.) 147.

<sup>4</sup> *Lehigh Bridge Co. v. Lehigh Coal*

*&c. Co.*, 4 Rawle (Pa.), 9; *s. c.* 26 Am. Dec. 111; *Philips v. Wickham*, 1 Paige (N. Y.), 59; *Slee v. Bloom*, 5 Johns. Ch. (N. Y.) 366; *Vernon Society v. Hills*, 6 Cow. (N. Y.) 23.

<sup>5</sup> *Blake v. Hinkle*, 10 Yerg. (Tenn.) 218. That the omission of a corporation to *elect a clerk* during the year previous to incurring the debt sued on, will not be a good defense by a stockholder in a proceeding to make him personally liable for a debt of the corporation,—see *Knowlton v. Ackley*, 8 Cush. (Mass.) 93.

<sup>6</sup> *Muscantine Turn Verein v. Funck*, 18 Iowa, 469.



effect to the *rights of creditors against shareholders*, to treat the corporation as dissolved, under a principle already stated,<sup>1</sup> it is held that the mere election of trustees for the purpose of keeping the corporation in its existence will not be deemed to have prevented such a dissolution.<sup>2</sup>

**§ 6658. Circumstances under Which the Incapacity to Revive Exists.**—Chancellor Walworth, in a learned opinion, has said: “The incapacity to revive or resuscitate the powers of a corporation may arise from three causes: 1. The absence of the necessary officers who are required to be present when the deficiency is supplied, or their incapacity or neglect to do some act which is requisite to the validity of the appointment. 2. The want of the necessary corporators who are required to unite in the appointment. 3. The want of the proper persons from whom the appointment is to be made.”<sup>3</sup>

**§ 6659. Mere Non-user of Corporate Powers.**—A corporation is not *ipso facto* dissolved for all purposes, by merely neglecting to exercise its corporate powers, so long as the pos-

<sup>1</sup> *Ante*, § 3345. See also *post*, § 6670.

<sup>2</sup> *Briggs v. Penniman*, 8 Cow. (N. Y.) 387; *s. c.* 18 Am. Dec. 454; affirming *s. c. sub nom. Penniman v. Briggs*, 1 Hopk. Ch. (N. Y.) 300.

<sup>3</sup> *Philips v. Wickham*, 1 Paige (N. Y.), 590, 596. In support of this text he added the following: “The case of *The Corporation of Banbury*, before referred to [10 Mod. 346], appears to be one of the first description. And the case cited from Rolle, and that put by Chief Baron Comyn, as well as *The King v. Pasmore* (3 T. R. 199), and *The Corporation of Maidstone*, and *The Borough of Teverton*, referred to in that case, all appear to belong to the two last classes of cases. The statute 11 Geo. I., ch. 4 (15 Stat. at Large, 178), has provided for the first class of cases;

but the sixth section of the act expressly excludes the second class, and no provision is made for cases of the third class. The result of an examination of all the cases on this subject is the principle so ably and successfully contended for by Serjeant East, in *The King v. Pasmore*, that if the corporators have the power in themselves to supply the deficiency in their body, their rights are not extinguished, but only dormant. If, however, that power is gone, and they cannot act until the deficiency is supplied, the corporation is dissolved. In the language of Lord Mansfield, this is not a forfeiture for non-user, but is a consequence of law. ‘The corporation is dead, and not barely asleep.’” *Philips v. Wickham*, 1 Paige (N. Y.), 590, 596.

sibility remains of resuming them.<sup>1</sup> An *abandonment* or *surrender* by the corporators of their franchises is a question both of *fact* and *intent*, and undoubtedly such an abandonment may be proved by *acts* as well as by *words*.<sup>2</sup> Nevertheless, it has been held that a *non-user*, even for *twenty years*, is not, *per se*, *conclusive evidence* of an abandonment, although it is a *relevant fact* in determining the question.<sup>3</sup> On the other hand, where a chapter of Free Masons disposed of all their real and personal property, consisting of their hall, their furniture and equipments, pursuant to a vote of the society, and for *twenty-three years* held no meetings, elected no officers, performed no acts required by its laws and rules, and ceased to have any visible organization,—it was held that the legal existence of the chapter was destroyed, and that it was beyond the power of the State chapter to restore it to life, so as to preserve for it a continued existence from the time of its disorganization. Nor did a rule of the association that officers elected should hold their offices until others were elected, operate to preserve its legal existence.<sup>4</sup>

§ 6660. **Assignment of All its Property.**—It follows from the foregoing that the mere fact that a corporation *ceases its business and makes an assignment* of all its property to a trustee for the payment of its debts,<sup>5</sup> and thereafter discontinues, for several years, to hold annual meetings and to choose directors,<sup>6</sup> does not work a dissolution so as to disable it from

<sup>1</sup> Brandon Iron Co. v. Gleason, 24 Vt. 228; Baptist Meeting House v. Webb, 66 Me. 398; Rollins v. Clay, 33 Me. 132; Attorney-General v. Bank of Niagara, Hopk. Ch. (N. Y.) 354; Russell v. M'Lellan, 14 Pick. (Mass.) 63; University of Maryland v. Williams, 9 Gill & J. (Md.) 365; Moseby v. Burrow, 52 Tex. 396.

<sup>2</sup> *Post*, § 6683, *et seq.* Compare *ante*, § 60, *et seq.*

<sup>3</sup> Raritan Water Power Co. v. Veghte, 21 N. J. Eq. 463.

<sup>4</sup> Strickland v. Prichard, 37 Vt. 324.

<sup>5</sup> De Camp v. Alward, 52 Ind. 468; Boston Glass Manufactory v. Langdon, 24 Pick. (Mass.) 49; s. c. 35 Am. Dec. 292.

<sup>6</sup> Boston Glass Manufactory v. Langdon, *supra*. In this case it does not quite clearly appear how the corporation could have had any *title* to maintain an action upon the note which was the subject of the suit, after it had transferred *all* its assets to trustees for the payment of its debts. To the same effect as the text, see Brandon Iron Co. v. Gleason, 24 Vt. 228.

maintaining an action on an evidence of indebtedness due to it. This position is, of course, more clear where the deed of assignment contains clauses which contemplate the future existence of the corporation, as where it covenants that the corporation will make any further conveyance and assurance which may become necessary, and will do and perform any other and further act which may be required, to enable the assignees fully to execute their trust.<sup>1</sup> But this may be a *de facto* dissolution for the purpose of letting in the remedies of its creditors against its stockholders.<sup>2</sup>

### § 6661. Resolution of Directors to Wind up as Trustees.

— It has been held that the fact that the directors of a corporation resolved to notify the stockholders that the affairs of the corporation should be at once wound up by the directors acting as trustees under the statute, and that a meeting should be called to ratify the action of the directors, is not *evidence* that the corporation was dissolved, nor did it show that a *subsequent call* upon stock by the directors was invalid.<sup>3</sup>

### § 6662. Sale of All the Corporate Property to Foreclose

a Lien.— It has been held that, when *the State* becomes the purchaser of a railroad under a lien which it has reserved to secure bonds which it has issued to aid in the construction of the railroad, both the lien and the railroad corporation are extinguished, and the indebtedness is extinguished with the company.<sup>4</sup> In other words, such a purchase was held to work a dissolution of the corporation, because it totally destroyed the end and object for which it was created.<sup>5</sup> But these holdings are certainly contrary to the general current of authority and the general understanding of the profession. A *sale* under a decree to *foreclose a mortgage*, of the property and *franchises* of a corporation, does not, *ipso facto*, work its

<sup>1</sup> Boston Glass Manufactory v. Langdon, *supra*.

<sup>2</sup> *Ante*, § 3345; *post*, § 6670.

<sup>3</sup> Lucas Market Sav. Bank v. Goldsoll, 8 Mo. App. 596.

<sup>4</sup> Opinion of the judges, 37 Mo. 131, 134.

<sup>5</sup> Moore v. Whitcomb, 48 Mo. 543, 548.

dissolution.<sup>1</sup> One reason for this conclusion is, that such a sale does not pass the *primary franchise* of a corporation, — that is, its franchise to be a corporation; but it merely passes its *secondary franchises*, — that is to say, whatever right it has to operate the particular railroad or the particular property which has been the subject of the mortgage.<sup>2</sup>

§ 6663. **Sale or Disposal of All its Property.** — The sale or disposal by a corporation of all of its property does not, of itself, work such a dissolution of the corporation as disables it from thereafter exercising its corporate powers, though it may have the effect of substantially destroying the object for which the corporation was created.<sup>3</sup> But, in this connection, we may find an apt illustration of what the courts frequently hold, that a corporation may be regarded as dissolved for the purpose of letting in the rights of creditors, and yet as being existent when it is necessary to exercise its right to sue for a proper purpose and in a proper case. For the purpose of enabling a creditor of a corporation to proceed directly against its stockholders for the collection of his debt, it has often been held that a virtual *surrender* of its franchises and a *de facto dissolution* will be presumed from the circumstance that it

<sup>1</sup> *Smith v. Gower*, 2 Duvall (Ky.), 17; *ante*, § 5370.

<sup>2</sup> *Ante*, §§ 5353, 6236.

<sup>3</sup> *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439; *Hill v. Fogg*, 41 Mo. 563, 569; *Powell v. North Missouri R. Co.*, 42 Mo. 63; *Kansas City Hotel Co. v. Sauer*, 65 Mo. 279; *State v. Bank of Maryland*, 6 Gill & J. (Md.) 205; *s. c.* 26 Am. Dec. 561; *New Jersey Zinc Co. v. Boston Franklinite Co.*, 13 N. J. Eq. 322; *Barclay v. Talman*, 4 Edw. Ch. (N. Y.) 123; *Russell v. M'Lellan*, 14 Pick. (Mass.) 63; *Brinckerhoff v. Brown*, 7 Johns. Ch. (N. Y.) 217; *Smith v. Gower*, 2 Duvall (Ky.), 17. That a corporation has no power to transfer all its property in exchange for stock in a foreign corpora-

tion carrying on the same business in another State, — see *Kelsey v. Pfau-ler Process Fermentation Co.*, 54 Hun (N. Y.), 10. That the *dissolution* of a corporation, a sale of its property, and a division of its assets, may be *enjoined*, where the provisions in its constitution have impressed the society with the character of a *charity*. — see *Mayer v. Society for the Visitation of the Sick, &c.*, 2 Brews. (Pa.) 385. That a stockholder participating in a scheme by which a corporation transfers all its assets to another may be thereby *estopped* from asserting any rights as a stockholder in the old company, — see *St. Louis & C. Co. v. Sandoval & C. Co.*, 116 Ill. 170, 178.

has transferred all its assets, and from other circumstances that would not ordinarily work a dissolution *per se*.<sup>1</sup> On the other hand, there are holdings to the effect that the mere fact of the sale of all the visible property of a corporation, and a temporary suspension of its manufacturing business, is not a sufficient ground for considering it dissolved, so as to render the stockholders individually responsible, so long as, by a regular election of trustees, there has been kept up a continued succession, and the company has been kept in operation, and has capacity to resume its business.<sup>2</sup>

§ 6664. **Cessation of Active Business.** — For stronger reasons, the dissolution of a corporation is not necessarily implied from its mere cessation of active business.<sup>3</sup>

§ 6665. **Attempting to Change Name.** — An attempt by a corporation to change its corporate name in a manner not authorized by law, does not, of itself, have the effect of avoiding its charter, or operate as a dissolution.<sup>4</sup> It follows that, where a corporation has *assumed to change its name without authority of law*, an action begun by it in its lawful name and prosecuted to judgment under its changed name, results in a good judgment, and one which will not even be reversed in a direct proceeding. In such a case it was said: "If the

<sup>1</sup> *Ante*, § 3345, *et seq.*; *post*, § 6670; *Kehlor v. Lademann*, 11 Mo. App. 550; *Slee v. Bloom*, 19 Johns. (N. Y.) 456; *s. c.* 10 Am. Dec. 273; *McDonnell v. Alabama Gold Life Ins. Co.*, 85 Ala. 401; *s. c.* 5 South. Rep. 120.

<sup>2</sup> *Brinckerhoff v. Brown*, 7 Johns. Ch. (N. Y.) 217; *Bradt v. Benedict*, 17 N. Y. 93. In this last case, the governing statute (2 Rev. Stat. N. Y. 463, § 38) declared that a corporation which, for *one whole year*, has remained insolvent or suspended its ordinary business, shall be deemed to have surrendered its franchises; and the statute was held to be *cumulative*, and the question was, whether it was

to be deemed to have surrendered its franchises, by reason of insolvency and a suspension of business for *less than a year*; and the court took the view that such a conclusion is not to be reached unless the corporation has lost all power to continue or to resume its business. See, as to this statute, *ante*, § 6619.

<sup>3</sup> *Kansas City Hotel Co. v. Sauer*, 65 Mo. 279; *State Nat. Bank v. Robidoux*, 57 Mo. 446; *Butchers and Drovers' Bank v. Pulitzer*, 11 Mo. App. 594.

<sup>4</sup> *O'Donnell v. Johns*, 76 Tex. 362; *s. c.* 13 S. W. Rep. 376.

attempted change of name was unlawful, it would still be a lawful corporation with the name by which it brought its suit.”<sup>1</sup>

§ 6666. **Insolvency of the Corporation.**—Neither the insolvency of a corporation, nor the circumstances which usually attend an insolvency, such as the *appointment of a receiver*, works a dissolution of the corporation, so as to disable it from exercising its corporate powers and using its corporate name for the purpose of protecting the rights of those beneficially interested in its assets and business;<sup>2</sup> since the *possession of property* is not essential to the existence of a corporation.<sup>3</sup> A corporation is not, therefore, dissolved because a *receiver* of its assets has been appointed by reason of its insolvency, unless the court appointing the receiver has, under the authority of a statute, issued an *injunction* against the exercise of its franchises, which injunction is made tantamount to a dissolution.<sup>4</sup> To state a case in illustration of this principle, let us suppose that a corporation is suing to enforce an obligation made to it; that the defendant sets up, by way of defense, that the corporation has become dissolved, and is hence incapable of maintaining the action, but that the right of action, if any, has passed to its trustees or other legal representatives for the purposes of its liquidation. It has been held that such an answer sets up no defense to the action, and that evidence under the answer, that the corporation has become insolvent and ceased to do business, is inadmissible.<sup>5</sup> But, on the other

<sup>1</sup> O'Donnell v. Johns, 76 Tex. 362; s. c. 13 S. W. Rep. 376. Compare *ante*, § 288, *et seq.*

<sup>2</sup> Hoyt v. Shelden, 3 Bosw. (N. Y.) 267; Nimmons v. Tappan, 2 Sweeny (N. Y.), 652; Pondville Company v. Clark, 25 Conn. 97; Boston Glass Manufactory v. Langdon, 24 Pick. (Mass.) 49; s. c. 35 Am. Dec. 292; Catlin v. Eagle Bank, 6 Conn. 233.

<sup>3</sup> Boston Glass Manufactory v. Langdon, 24 Pick. (Mass.) 49; s. c. 35 Am. Dec. 292.

<sup>4</sup> Moran v. Lydecker, 27 Hun. (N. Y.), 582; Moseby v. Burrow, 52 Tex. 396; Dewey v. St. Albans Trust Co., 56 Vt. 476; s. c. 48 Am. Rep. 803. Compare Denike v. New York & Co., 80 N. Y. 599; Davenport v. City Bank, 9 Paige (N. Y.), 12; Boston Glass Manufactory v. Langdon, 24 Pick. (Mass.) 49; s. c. 35 Am. Dec. 292.

<sup>5</sup> Butchers & Drovers' Bank v. Pulitzer, 11 Mo. App. 594.

hand, in pursuance of a principle already discussed,<sup>1</sup> where it is necessary to consider a business corporation dissolved in order to effectuate the rights of its creditors against its stockholders, a total insolvency, accompanied by a non-user of its franchises and a permanent cessation of its business, will be regarded as a *surrender* of its franchises and an *ipso facto* dissolution.<sup>2</sup>

§ 6667. **Breaches of Conditions Subsequent in their Charters.**—We have already considered the rule<sup>3</sup> that breaches of *conditions subsequent* in the charter or governing statute of a corporation, — those, for instance, which relate to the formalities of its organization, or the manner in which its stockholders shall pay up its subscriptions, the election of its directors, and the like, — do not furnish sufficient grounds for regarding the corporation as *ipso facto* dissolved. And this is especially true in regard to the election of directors, where there are by-laws providing that those elected shall serve until their successors are elected and qualified according to law.<sup>4</sup> Of this nature is a failure to comply with a provision in the charter of a bridge company, that the company should *give a bond* for the completion of the bridge within a limited time, where this was not, in terms, prescribed as a condition precedent.<sup>5</sup>

§ 6668. **Consolidation of Two Corporations.**—On principles already fully discussed,<sup>6</sup> the union or consolidation of two corporations, under a law which continues their liabilities, or without the existence of a special statute so enacting, does not work such a *dissolution* of either of them as will *abate an action* commenced against one of them before the consolida-

<sup>1</sup> *Ante*, §§ 3345, 3346, 3347.

<sup>2</sup> See also *post*, § 6670; Penniman v. Briggs, 1 Hopk. Ch. (N. Y.) 300; affirmed *sub nom.* Briggs v. Penniman, 8 Cow. (N. Y.) 387; s. c. 18 Am. Dec. 454. See Brinkerhoff v. Brown, 7 Johns. Ch. (N. Y.) 217; Slee v. Bloom, 19 Johns. (N. Y.) 456; s. c. 10 Am. Dec 273; Dryden v. Kellogg, 2

Mo. App. 87; Perry v. Turner, 55 Mo. 418, 427.

<sup>3</sup> *Ante*, § 6587, *et seq.* Compare *ante*, § 6611.

<sup>4</sup> Searcy v. Yarnell, 47 Ark. 269; s. c. 1 S. W. Rep. 319, 321.

<sup>5</sup> Toll Bridge Co. v. Connecticut River Co., 7 Conn. 28.

<sup>6</sup> *Ante*, §§ 396, 399.

tion was effected,<sup>1</sup> though it may require an *amendment of the pleadings* for the purpose of keeping the *record* straight.<sup>2</sup>

**§ 6669. Dissolution for the Purpose of Taxation.**—A corporation may cease to exist *de facto* for the purpose of *taxation*, although it has not been dissolved in a judicial proceeding. Thus, it has been held, under taxing laws of New York, that a *bank* is not taxable during the period of six years allowed by the statute,<sup>3</sup> after the redemption of ninety per cent of its circulation, for closing its business, if it has permanently ceased to transact any banking business. By ceasing to act as a bank, it loses its character as such, and is no longer deemed to exist as a bank for purposes of taxation.<sup>4</sup>

**§ 6670. When Deemed Dissolved for the Purpose of Effectuating the Rights of its Creditors.**—We shall now separately and briefly state a leading exception to the principle that a corporation is not *ipso facto* dissolved by its *insolvency*, the *cessor of its business*, the *divesture of its property*, or the *non-user of all its franchises*. This principle has arisen out of the necessity of doing justice, under those statutes which have been enacted in many of the States providing that, for all *debts* of certain corporations, due and owing *at the time of their dissolution*, the persons then composing the corporation shall be liable to the extent of their respective shares of stock therein, to its creditors.<sup>5</sup> With such a statute in force, an insolvent corporation would cease to exercise its franchises and fade out of existence; and when its creditors proceeded against its stockholders to enforce their statutory liability, the latter would plead that the condition named in the statute had not arrived, because the corporation was not dissolved; and they would plant themselves on the proposition that a corporation is not dissolved by a non-user of its franchises,

<sup>1</sup> Baltimore &c. R. Co. v. Musselman, 2 Grant Cas. (Pa.) 348.

<sup>2</sup> *Ante*, § 403.

<sup>3</sup> N. Y. Laws 1859, ch. 236.

<sup>4</sup> Metcalf v. Messenger, 46 Barb. § 6729, *et seq.*

<sup>5</sup> For a consideration of such statutes, see *ante*, § 3344, *et seq.*; *post*,



but that there must be a *direct proceeding by the State*, resulting in a judgment of forfeiture and dissolution. The courts found themselves obliged, for the mere sake of justice, to meet this defense with the proposition that a corporation may do or suffer acts to be done, which amount, in contemplation of law, to a *surrender of its franchises*; and that if it suffer acts to be done which have the effect of destroying the end and object for which it was created, this will be equivalent to a surrender of its rights, and will work its dissolution.<sup>1</sup> But the limitations of this doctrine must be carefully kept in view. It has no just application, in a litigation by or against a corporation, *where the corporation itself asserts the fact of its own existence*. It was so held in an important case in Tennessee, upon a bill of review in chancery filed by a railway company.<sup>2</sup> It has not escaped the observation of capable judges that the *dissolution of a corporation* sometimes means an annulment of its franchises or a termination of its existence, and sometimes a mere judicial act which alienates its property and suspends its business without terminating its existence; so that the corporation may, for certain purposes, be considered as dissolved, so far as to be incapable of doing injury to the public, while it yet retains vitality so far as essential for the protection of the rights of others.<sup>3</sup>

**§ 6671. When an Injunction against a Corporation is Made Perpetual.**—Under other statutory systems, a corporation is deemed *dissolved for all purposes*, when an injunction

<sup>1</sup> *Slee v. Bloom*, 19 Johns. (N. Y.) 456; *s. c.* 10 Am. Dec. 273; *Moore v. Whitcomb*, 48 Mo. 543, 547; *Briggs v. Penniman*, 8 Cow. (N. Y.) 387; *s. c.* 18 Am. Dec. 454; affirming *Penniman v. Briggs*, 1 Hopk. Ch. (N. Y.) 300; *State Sav. Asso. v. Kellogg*, 52 Mo. 583; *Dryden v. Kellogg*, 2 Mo. App. 87; *Perry v. Turner*, 55 Mo. 418, 427. Compare *Lagrange &c. R. Co. v. Rainey*, 7 Coldw. (Tenn.) 420, 438.

<sup>2</sup> *Lagrange &c. R. Co. v. Rainey*, 5268

7 Coldw. (Tenn.) 420, 438. Chancellor Kent, in his Commentaries, has carefully pointed out what he deems to be a just limitation of the doctrine of the celebrated case of *Slee v. Bloom*, 19 Johns. (N. Y.) 456, *s. c.* 10 Am. Dec. 273,—which is that it is merely a doctrine devised to save the rights of creditors, and that it does not apply in other cases. 2 Kent's Com. 311.

<sup>3</sup> *Re Independent Ins. Co.*, 1 Holmes (U. S.), 103.

against the exercise of its franchises is made perpetual, in statutory proceedings, dissolve it and wind it up by means of a receiver,<sup>1</sup>—and not until then.<sup>2</sup> Under a statute of Maine,<sup>3</sup> making each stockholder of a bank liable, upon the expiration of the charter, for the redemption of all unpaid bills, in proportion to the stock he then holds, the charter expires when an injunction against the further prosecution of business is made perpetual.<sup>4</sup> On the other hand, it was laid down by Chancellor Walworth, on unquestionable grounds, that judgments and executions obtained against a corporation, and sales of corporate property thereunder, before any proceedings have been instituted to obtain a judgment or decree declaring a surrender of the corporate franchises and a dissolution of the corporation, are valid, and the purchasers at such sales acquire good titles.<sup>5</sup>

<sup>1</sup> Wiswell v. Starr, 48 Me. 401; Dane v. Young, 61 Me. 160.

<sup>2</sup> Mickles v. Rochester City Bank, 11 Paige (N. Y.), 118; s. c. 42 Am. Dec. 103, per Walworth Ch.

<sup>3</sup> Rev. Stat. Me. 1857, ch. 47, § 46.

<sup>4</sup> Wiswell v. Starr, 48 Me. 401; Dane v. Young, 61 Me. 160.

<sup>5</sup> Mickles v. Rochester City Bank, 11 Paige (N. Y.), 118; s. c. 42 Am. Dec. 103. This decision was under a statute of New York, elsewhere considered (*ante*, § 6619), authorizing the dissolution of corporations for non-user of their franchises for a whole year. The point in judgment was that the effect of the statute was not to put an end to corporations for all purposes, at the termination of the year from the commencement of which the insolvency or non-user dated, so as to deprive their creditors of all the remedies which they might otherwise effectuate by actions against the corporation; but that its object was to enable the creditors and all others who were interested in having a surrender of its privileges and its

dissolution declared, to take proper proceedings for that purpose. The conclusion, therefore, was that until a judgment upon a *quo warranto*, or a decree of a court of chancery declaring a surrender of the corporate franchises and a dissolution of the corporation, any creditor was at liberty to proceed, by suit against the corporation and its property, to obtain satisfaction of his debt, in the same manner as if the alleged surrender by insolvency or non-user had not occurred; and that, if any of the creditors should wish to prevent other creditors from obtaining *preferences*, they must file their bill for the purpose of obtaining a judicial declaration of the fact that the corporation had surrendered its rights and franchises according to the provisions of the statute, and for a decree declaring the corporation dissolved, and directing the appropriation of its moneys and effects to the payment of its creditors. Then, by an application under another section of the statute, they might, if a proper case was

§ 6672. **Dissolution how Pleaded.**—Where it becomes necessary to *aver*, in a judicial proceeding, that a corporation has become dissolved, without reference to the question whether it has been dissolved by a judicial proceeding, or whether it has suffered a *de facto* dissolution,—it is not necessary to aver the *manner* of its dissolution, but a general averment of dissolution is enough.<sup>1</sup> But an averment, in a bill in equity, that “complainant is *informed and believes* that the business of said bank has been so fraudulently and negligently managed that no suit at law can be brought against it, as the stockholders have failed and refused to elect directors as required by the charter, and many other acts and doings have taken place contrary to the charter, whereby they are dissolved,”—has been held an insufficient foundation to charge the stockholders individually.<sup>2</sup> On the other hand, the answer of a garnishee, that he had been informed and believed that the corporation ceased to have “any legal existence” previous to the issuing of the garnishment, is equivalent to the assertion that it was dissolved, which, if not negatived in the manner prescribed by the statute, will be taken to be true.<sup>3</sup> A statement, in a petition, that a corporation has ceased to transact business, and is insolvent, is not equivalent to an allegation that the corporation is dissolved.<sup>4</sup>

shown, be entitled to an injunction restraining proceedings at law by the other creditors to obtain a lien and preference, and allowing such creditors to come in and make themselves parties to the suit in chancery. *Ibid.* For a case in which it was held, upon forcible, though not conclusive, reasoning that the *de facto* dissolution of a corporation may be set up *collaterally*,—see *Carey v. Cincinnati & C. R. Co.*, 5 Iowa, 357, 366, opinion by Wright C. J. The argument of the learned judge that if the corporation never had an existence there is no direct proceeding by which the ques-

tion can be tested, is singularly unfortunate; since the law has always given such a proceeding *against the persons* usurping the franchise. *Post*, § 6782. See *Society Perun v. Cleveland*, 43 Ohio St. 481.

<sup>1</sup> *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. (N. Y.) 473; *Perry v. Turner*, 55 Mo. 418; *ante*, § 3348.

<sup>2</sup> *Blake v. Hinkle*, 10 Yerg. (Tenn.) 218.

<sup>3</sup> *Paschall v. Whitsett*, 11 Ala. 472.

<sup>4</sup> *Valley Bank & Sav. Ins. v. Ladies' Congregational Sewing Soc.*, 28 Kan. 423.

§ 6673. **Failure to Keep Alphabetical List of Stockholders.** — A corporation is not *ipso facto* dissolved by any species of misprision, which consists in a violation of the statute governing its existence, until the State supervenes and demands and receives a judgment of dissolution. Therefore, the mere failure of a corporation to keep in its office an *alphabetical list of its stockholders*, showing their residences, the number of their respective shares, and the amounts which each has paid in, does not of itself work a dissolution of the corporation.<sup>1</sup>

<sup>1</sup> *Baker v. Backus*, 32 Ill. 79.

## CHAPTER CLIV.

### SURRENDER OF FRANCHISES AND VOLUNTARY DISSOLUTIONS

#### SECTION

- 6678. Voluntary surrender of franchises.
- 6679. Doctrine that a surrender must be accepted by the State.
- 6680. This doctrine inapplicable to private corporations.
- 6681. Doctrine that an acceptance by the State not necessary in the case of a private corporation.
- 6682. By the act of the directors and officers.
- 6683. What will be evidence of a surrender.

#### SECTION

- 6684. Failing to accept charter.
- 6685. Whether unanimous vote necessary.
- 6686. Dissolving on the petition of a minority in value.
- 6687. Constitutionality of statutes providing for the dissolution and winding up of insurance companies.
- 6688. Pursuing the steps pointed out by statute.

§ 6678. **Voluntary Surrender of Franchises.**—The voluntary surrender by a corporation of its franchises is one of the recognized modes by which its existence may be terminated.<sup>1</sup> The dissolution of a corporation may be effected by the *concurrent act of the State and the corporation*, the corporation surrendering and the State accepting the surrender, of its franchises, without the intervention of any judicial proceedings for that purpose.<sup>2</sup> It has been reasoned that a private corporation *having public duties to perform*, as for instance, a railway company, may abandon its charter and dissolve, except in so far as the creditors may have a right to object,—and we have seen that creditors have no right to object, since it does not affect their rights at all,<sup>3</sup>—and that the legislature may, at pleasure, release it from the performance of its public duties,

<sup>1</sup> *Mumma v. Potomac Company*, 8 Pet. (U. S.) 281; *McMahan v. Morrison*, 16 Ind. 172; *s. c.* 79 Am. Dec. 418; *Washington &c. Road v. State*,

19 Md. 239; *People v. Olmstead*, 45 Barb. (N. Y.) 644.

<sup>2</sup> *Savage v. Walshe*, 26 Ala. 619.

<sup>3</sup> *Post*, § 6730.

and allow a transfer of those duties to another corporation.<sup>1</sup> It has been held that a *single stockholder* has no right to object to a transfer of all the property of the corporation to another company, where it is done under the authority of an act of the legislature,—though, as already seen,<sup>2</sup> he cannot be compelled by law to accept the stock of the other company in payment of the shares subscribed by him, because this would be forcing him into a contract which he had never agreed to enter; but (in Pennsylvania) the majority must give the dissenting stockholder security for his interest.<sup>3</sup>

§ 6679. **Doctrine that a Surrender must be Accepted by the State.**—The doctrine is frequently announced in judicial decisions that a corporation *cannot dissolve itself* by a mere corporate act, or by the vote of a majority of its members, so as to escape its responsibilities or liabilities,<sup>4</sup> but that a surrender of its franchises by a corporation must, in order to be effective, be followed by an *acceptance* on the part of the State.<sup>5</sup> It is added that a *record* of the acceptance must be made.<sup>6</sup> The doctrine, and the reasons on which it is founded, were thus stated in a leading case by Mr. Justice Morton: “Charters are in many respects compacts between governments and the corporators. And, as the former cannot deprive the latter of their franchises in violation of the compact, so the latter cannot put an end to the compact without the consent of the former. It is equally obligatory on both parties. The surrender of a charter can only be made by some formal, solemn act of the corporation; and will be of no avail until accepted

<sup>1</sup> *Lauman v. Lebanon Valley R. Co.*, 30 Pa. St. 42; *s. c.* 72 Am. Dec. 685.

<sup>2</sup> *Ante*, §§ 67, *et seq.*, 1273, 1274.

<sup>3</sup> *Ante*, § 345; *Lauman v. Lebanon Valley R. Co.*, *supra*.

<sup>4</sup> *Portland Dry Dock &c. Co. v. Portland*, 12 B. Mon. (Ky.) 77; *Polar Star Lodge v. Polar Star Lodge*, 16 La. An. 53; *Curien v. Santini*, 16 La. An. 27; *Revere v. Boston Copper Co.*, 15 Pick. (Mass.) 351; *Town v. Bank*

of River Raisin, 2 Dougl. (Mich.) 500. Compare, to the contrary, *McCurdy v. Myers*, 44 Pa. St. 535.

<sup>5</sup> *Mechanics' Bank v. Heard*, 37 Ga. 401; *Harris v. Muskingum Man. Co.*, 4 Blackf. (Ind.) 267; *s. c.* 29 Am. Dec. 372; *New York Marble Iron Works v. Smith*, 4 Duer (N. Y.), 362.

<sup>6</sup> *Norris v. Smithville*, 1 Swan (Tenn.), 164.

by the government. There must be the same agreement of the parties to dissolve that there was to form the compact. It is the acceptance which gives efficacy to the surrender. The dissolution of a corporation, it is said, extinguishes all its debts. The power of dissolving itself by its own act would be a dangerous power, and one which cannot be supposed to exist.”<sup>1</sup>

**§ 6680. This Doctrine Inapplicable to Private Corporations.**—This doctrine, though still frequently reiterated in judicial decisions, with the inconsiderate habit of imitation which characterizes lawyers and judges, is totally inapplicable to corporations of a strictly *private* nature. It has come down to us from a time when nearly all corporations were *municipal* corporations, and when nearly all charters were granted in consideration of the performance by the corporation of *public duties*. It has further been handed down to us from a time when, according to legal conceptions, the dissolution of a corporation did, in fact, *extinguish its debts*; for that was the ancient law.<sup>2</sup> Such a dissolution not only, according to that law, extinguished its debts, but it extinguished the possibility of its debts being satisfied out of its assets; since its lands reverted to the donor or grantor or his heirs, and its personality escheated to the crown.<sup>3</sup> But, in the modern law, as we have seen, the dissolution of a corporation neither extinguishes its debts, nor does it have the effect of removing its assets beyond the reach of its creditors;<sup>4</sup> nor has the ingenuity of lawyers and judges discovered any process by which the State can compel the *specific performance* of the obligation assumed by the members of a corporation, in consideration of the grant of the franchises to them, of performing the public duties expressed or implied in the charter. We shall hereafter see how ineffectual such a demand on the part of the State must be, in respect of a railroad company, which has, under its charter, assumed the duty of maintaining a railroad between

<sup>1</sup> Boston Glass Manufactory v. Langdon, 24 Pick. (Mass.) 49, 53; s. c. 35 Am. Dec. 292.

<sup>2</sup> Post, § 6718.

<sup>3</sup> Ibid.

<sup>4</sup> Ante, § 2951, et seq.; post, § 6730, et seq.

certain points and operating trains thereon.<sup>1</sup> The difficulties there pointed out may be generalized, and applied to any other corporation organized by its members for the mere purpose of pecuniary gain. The State can, indeed, prevent them from applying their funds to other purposes than those named in their charters,<sup>2</sup> and it may be assumed that it can compel them, by *mandamus*, to apply their funds to those purposes;<sup>3</sup> and certainly it may *indict* and *fine* them for not so applying their funds;<sup>4</sup> but, in the last-named case, the fine is paid out of the corporate funds, and it merely has the effect of diminishing the fund which it is possible to apply to the purposes named in the charter, and of diverting it into the coffers of the State, and thereby diminishing the capacity of the corporation to perform the public duties which it has assumed. As *members* of the corporation are different persons in law from the corporation itself, and do not stand as guarantors for the performance by the corporation of public duties which it has assumed, any attempt on the part of the State to compel it to perform those duties, can go no further than to compel the exhaustion of its funds for that purpose; and beyond that, all efforts must be futile. The State may, indeed, compel the performance of *minor* or *incidental* duties by a corporation, which it has assumed under its charter, — such as the operating by a railroad company of a *branch railroad*,<sup>5</sup> or the establishing and maintaining of a station at a particular place;<sup>6</sup> it may compel it, by *mandamus*, to restore a *part* of its railroad which it has *dismantled*;<sup>7</sup> and it may demand, in a judicial proceeding, a *forfeiture* of its franchises, in whole or in part, for refusing so to do.<sup>8</sup> It has even been held that a corporation which is a defendant in a suit *in equity* and liable to respond pecuniarily to the plaintiff in the suit, and which has

<sup>1</sup> *Post*, Ch. 190.

<sup>2</sup> *Post*, Ch. 187.

<sup>3</sup> *Post*, Ch. 190.

<sup>4</sup> *Ante*, § 6428.

<sup>5</sup> *People v. Albany &c. R. Co.*, 24 N. Y. 261; s. c. 82 Am. Dec. 295.

<sup>6</sup> See the reasoning in *Martindale*

*v. Kansas City &c. R. Co.*, 60 Mo. 508.

<sup>7</sup> *Rex v. Severn &c. R. Co.*, 2 Barn. & Ald. 646.

<sup>8</sup> *Attorney-General v. West Wisconsin R. Co.*, 36 Wis. 466, 496; *ante*, § 6622.



made one attempt to procure its own dissolution, may be *enjoined* from taking any proceeding to that end, or for the appointment of a receiver of its effects, or for the distribution of such effects among its stockholders or any other persons, or from making any distribution or transfer of any of its effects.<sup>1</sup> But the proposition that the State can compel a *private* corporation to *continue in existence* for the purpose of discharging the public duties which it was organized to perform, is delusive and chimerical. In respect of a *municipal corporation*, which is charged by the law of its creation with the reparation of streets and highways, the preservation of the public health, and, within certain limits, the maintenance of a suitable police and the preservation of the public peace, —the rule probably remains as it stood under the ancient law.

**§ 6681. Doctrine that an Acceptance by the State not Necessary in the Case of a Private Corporation.**—The general doctrine, therefore, is that a corporation, organized for the pecuniary gain of its members, which has not assumed *public duties* in consideration of the grant of its franchises, and with the continuance of whose existence the State has no special concern, *may dissolve itself*, by the voluntary action of its members, without the consent of the State.<sup>2</sup> That a corporation may be dissolved by a voluntary surrender of its franchises, evidenced by its mere *abandonment* and *non-user* of them, without any formal tender of them to the State or acceptance of them by the State, for the purpose of effectuating the remedy of its creditors against its stockholders, has been adjudged in numerous decisions, which have been already much considered.<sup>3</sup> And while the facts showing such a sur-

<sup>1</sup> Fisk v. Union Pac. R. Co., 10 Blatchf. (U. S.) 518.

<sup>2</sup> Merchants & Planters' Line v. Waganer, 71 Ala. 581, 588; Savage v. Walshe, 26 Ala. 619.

<sup>3</sup> *Ante*, §§ 3345, *et seq.*, 6670; Slee v. Bloom, 19 Johns. (N. Y.) 456;

*s. c.* 10 Am. Dec. 273; Briggs v. Penniman, 8 Cow. (N. Y.) 387; *s. c.* 18 Am. Dec. 454; McMahan v. Morrison, 16 Ind. 172; *s. c.* 79 Am. Dec. 418; Washington &c. Road v. State, 19 Md. 239; La Grange R. &c. Co. v. Rainey, 7 Coldw. (Tenn.) 420.

render are not available for the purpose of proving a dissolution of a corporation, in order to defeat an *action brought in its name*,<sup>1</sup>—yet, without special reference to the rights of creditors, it is clear, upon principle and authority, that a corporation may become defunct for all purposes, by its own voluntary act,—or rather, by the voluntary act or neglect of its members,—and that it does become defunct for all purposes, whenever there has been an abandonment of its franchises, committed under such circumstances, or continued for such a length of time, as renders it morally or legally impossible for it to resume them.<sup>2</sup> In the same line of thought, it has been held that where an act authorizes a certain proceeding to be had upon the surrender by a corporation of its franchises, the same may be had without waiting for the acceptance of the surrender by the State.<sup>3</sup>

§ 6682. **By the Act of the Directors and Officers.**—We have already seen,<sup>4</sup> that the directors of a business corporation are merely its *business managers*, and that they have no power, unless such power has been conferred by statute, or unless it is delegated by a vote of the stockholders in general meeting, to do what may be termed *constituent acts*; that is, to do any acts changing the constituent character of the corporation,—as, for instance, to *increase or diminish its capital stock*.<sup>5</sup> On the same principle, in the absence of any enabling statute, or of the authorization of the constituent body, the directors of a business corporation have *no power to surrender its franchises*, or to declare it dissolved.<sup>6</sup> It follows that a *resolution*, passed by the directors of a banking corporation, that the bank be closed, that its business cease, that it go into liquidation,

<sup>1</sup> *Bank of Niagara v. Johnson*, 8 Wend. (N. Y.) 645; *Cahill v. Kalamazoo Mut. Ins. Co.*, 2 Dougl. (Mich.) 124; s. c. 43 Am. Dec. 457; *Atchafalaya Bank v. Dawson*, 13 La. 497; *University of Maryland v. Williams*, 9 Gill & J. (Md.) 365; s. c. 31 Am. Dec. 72; *Brandon Iron Co. v. Gleason*, 24 Vt. 228.

<sup>2</sup> *Bradt v. Benedict*, 17 N. Y. 93.

<sup>3</sup> *Wilson v. Central Bridge*, 9 R. I. 590. The real reason was that the statute did not contemplate any further action on the part of the State.

<sup>4</sup> *Ante*, §§ 2076, 3979.

<sup>5</sup> *Ante*, § 2076.

<sup>6</sup> *Smith v. Smith*, 3 Desaus. (S. C.) 557.

and that its franchises be surrendered, does not operate to dissolve it, in such a sense as to preclude the maintaining of actions against it to enforce its liabilities.<sup>1</sup>

§ 6683. **What will be Evidence of a Surrender.**—A surrender may be made by acts or neglects *in pais* as well as by a formal proceeding for that purpose; and it may be concluded, upon abundant authority,<sup>2</sup> that a surrender by a corporation of its charter may be presumed from a neglect, for a long period of time, to choose directors and to exercise the corporate franchises,<sup>3</sup>—though this presumption is a disputable one and may be rebutted by other circumstances.<sup>4</sup> Yet it must be conceded that the cases are rare, where a *surrender for all purposes* has been held to have taken place in consequence of acts *in pais*, done without the express intent of effecting a surrender and the termination of the existence of the corporation. But in one case, where the property of a corporation had been *sold out under a mortgage* to its treasurer, and an action had been brought in the corporate name to set aside the same as *fraudulent*,—it was held, on a collection of facts, that there was such evidence of surrender as disabled any party in interest from using the name of the corporation for the prosecution of the action,—in other words, that the corporation had ceased to exist, and could not sue. The facts were that, after the defendant had purchased the land of the corporation at the foreclosure sale, he *bought the membership tickets* of nineteen of the twenty life members of the society,

<sup>1</sup> Lake Ontario Nat. Bank *v.* Onondaga Co. Bank, 7 Hun (N. Y.), 549. In opposition to this is the conclusion of a Federal district judge, which may possibly be justified as the proper interpretation of a statute, but which otherwise does not rest upon sound principle,—that where the governing statute provides that the majority of the stockholders may authorize a dissolution of the corporation, a vote of the stockholders, authorizing such

a dissolution, does not, of itself, dissolve the corporation, nor compel the directors to do so; but that the act of dissolution *must proceed from the directors*, who alone can exercise the corporate powers. Wallamet Falls &c. Co. *v.* Kittridge, 5 Sawy. (U. S.) 44, *per* Deady, J.

<sup>2</sup> *Ante*, §§ 6655, 6659.

<sup>3</sup> State *v.* Vincennes University, 5 Ind. 77.

<sup>4</sup> *Ibid.*

after which the society never met, and officers were never elected. The case proceeded upon the ground that the nineteen life members, who acted with full knowledge of the facts, intended to *ratify the sale* and to put an end to the society. What the court really held was that the only remaining life member could not use the name of the society for the purpose of undoing the sale.<sup>1</sup>

§ 6684. **Failing to Accept Charter.**— We have already seen that the grant of a charter to a body of adventurers does not constitute them a corporation, but that they must accept it and organize thereunder;<sup>2</sup> and it has been held, under a collection of facts too numerous to be set out, that a *failure to accept within a reasonable time* is evidence of a *surrender*, and that the franchises cannot be renewed without a new expression of the will of the legislature, but that the State is entitled to demand a judgment of ouster in a proceeding by *quo warranto*.<sup>3</sup>

§ 6685. **Whether Unanimous Vote Necessary.**— It has been held, in reference to an unincorporated joint-stock company, that it cannot be dissolved within the period named by its articles for the duration of its existence, without the unanimous consent of the stockholders, except by the interposition of a court of equity;<sup>4</sup> but this conclusion, if a sound one, must rest on the principle that the existence of such an association is a matter of *private contract* among the co-associates, and that some of them cannot put an end to the contract without the consent of the others. It is not perceived why the same principle, if sound, should not apply in the case of corporations, in the absence of some controlling statute; but it may be collected from more than one decision, that a *unanimous vote* of the stockholders or members is *not necessary* to a valid surrender of the franchises of a corporation, and that the dissent of a single member or stockholder will not be allowed to

<sup>1</sup> Union Agric. Soc. v. Gamble, 52 Iowa, 524.

<sup>2</sup> *Ante*, § 52.

<sup>3</sup> State v. Bull, 16 Conn. 179.

<sup>4</sup> Von Schmidt v. Huntington, 1 Cal. 55.

prevent a surrender desired by all the other members.<sup>1</sup> But it should be carefully kept in mind that in many States this subject is controlled by statutes,<sup>2</sup> which allow a surrender to be affected by a majority of the members, under prescribed conditions. In the absence of such statutes, other judicial authority is to the effect that a *majority* of the members *cannot*, against the will of the minority, *dissolve* the corporation, provided the minority are sufficient in numbers to keep it alive under the provisions of its governing statute. The majority may dissolve their own connection with the corporation, but this will not prejudice the vested rights of their co-corporators to have the corporation continued.<sup>3</sup> It follows that where the duration of the life of a corporation is not limited, by its charter or otherwise, except that the legislature retains general power to *repeal its incorporating act*, and the company enters into a contract with one of its stockholders to serve it during the period of its existence, and subsequently a majority of the stockholders vote to dissolve the corporation and wind up its concerns, in pursuance of which determination the corporation discharges the stockholder from its service, — he may maintain an action at law against it, for damages for the breach of the contract subsisting between him and it. The contract was construed to be a contract for service until the existence of the corporation should be determined in the mode fixed by law, or until the death of the plaintiff, or until it should be determined by a failure on his part to perform the agreement; and the resolution was not such a dissolution of the corporation as was contemplated by the contract. And while it released the plaintiff from his obligation to serve the corporation, it entitled him to *indemnity* for the loss which he had sustained in consequence of the refusal of the corporation further to employ and pay him.<sup>4</sup> It is reasoned that a

<sup>1</sup> *Wilson v. Central Bridge*, 9 R. I. 590, 597; *Union Agric. Soc. v. Gamble*, 52 Iowa, 524.

<sup>2</sup> *Post*, §§ 6688, 6694, 6695, 6713.

<sup>3</sup> *Polar Star Lodge v. Polar Star Lodge*, 16 La. An. 53, 76. To the

same effect see *Campbell v. Mississippi Union Bank*, 6 How. (Miss.) 625, 681; *Revere v. Boston Copper Co.*, 15 Pick. (Mass.) 351.

<sup>4</sup> *Revere v. Boston Copper Co.*, *supra*.

*majority* of the members of a corporation may, indeed, by the abuse of the powers of the corporation, *commit an act* which will entitle the State to demand an *ouster* of its franchises, but they cannot make such an act the basis of an action, instituted by themselves against the minority, for the purpose of having the franchises of the company forfeited. A corporate body is (it is said), a juridical being, separate and distinct in its rights and obligations from the individual members who compose it; and while it lasts, a majority of its members cannot maintain an action against the minority, for the sale of its assets and a distribution of the proceeds arising therefrom.<sup>1</sup> These conclusions rest largely on the ground, elsewhere stated,<sup>2</sup> that the State is necessarily a party to any proceeding to determine the existence of a corporation. Upon principles already discussed,<sup>3</sup> this reason can have no just application in the case of a corporation of a purely *private nature*, with the continuance of whose business the State has no special interest. It is accordingly held that corporations of a private nature, established solely for *trading* or *manufacturing* purposes, may, by a vote of the majority of their members, against the protest of a minority, wind up their affairs and close their business, if, in the exercise of a *sound discretion*, they deem it expedient so to do; and may sell the whole of their property to a new corporation, taking payment in shares of the new corporation, to be distributed among those of the old stockholders who are willing to take them.<sup>4</sup>

### § 6686. Dissolving on the Petition of a Minority in Value.

In the absence of statutory authorization, a court cannot, in virtue of its equity powers, entertain a petition of a minority in value of the stockholders to dissolve and wind up the corporation, or to produce, under any form of language, that substantial result. The reason goes back to a principle, elsewhere discussed and often misapplied, that a corporation

<sup>1</sup> Curien v. Santini, 16 La. An. 27.

<sup>2</sup> *Ante*, § 6033.

<sup>3</sup> *Ante*, § 6680.

<sup>4</sup> Treadwell v. Salisbury Man. Co.,

7 Gray (Mass.), 393, 404; s. c. 66 Am.

Dec. 490; *ante*, § 4443.

owes its life to the sovereign power, and that the circumstances under which it shall forfeit or be deprived of that life, depends on the same power. "A corporation," it is said, "may be dissolved by forfeiture, through abuse or neglect of its franchises; but such forfeiture, unless there be special provisions by statute, can only be enforced by the sovereign, in some proceeding instituted in its behalf."<sup>1</sup> Another such court has held that diversity of interest among the members of a corporation, and differences of opinion as to the advisability of continuing the existence of the concern, such as make it certain that no benefit can result to any party interested by perpetuating its existence, furnish sufficient grounds for its dissolution, in a judicial proceeding at the suit of some of its stockholders.<sup>2</sup> It has been held not a sufficient ground for dissolving a *manufacturing corporation*, on the petition of a majority in number of the stockholders owning a minority of the stock, that one owner of a majority of the stock has, for many years, controlled the election of the officers, and elected himself agent and clerk; that he has for a long time managed the business "according to his own will and choice, regardless of the wishes and interests of the petitioners"; that, according to his statement, the corporation has been doing a losing business for many years; that he has refused to make any change in the business, or to purchase the shares of the petitioners; and that, if the business were skillfully and properly managed, it might be made a source of profit to all concerned. In such a case, there must at least be a showing of illegal and fraudulent acts upon the part of the governing stockholder, to the prejudice of those holding a minority of the shares.<sup>3</sup> It must be borne in mind, in this connection, that the power to take proceedings on the

<sup>1</sup> *Denike v. New York &c. Co.*, 80 N. Y. 599, 605. It has been held, by a subordinate court in New York, that a *life insurance corporation*, organized under the laws of that State, may be dissolved and wound up at the suit of a single stockholder. *Mas-*

*ters v. Eclectic Life Ins. Co.*, 6 Daly (N. Y.), 455.

<sup>2</sup> *Re Importers & Grocers' Exchange*, 28 N. Y. St. Rep. 416.

<sup>3</sup> *Pratt v. Jewett*, 9 Gray (Mass.), 34.

petition of *stockholders* for the winding up of a corporation, is totally distinct from the power to *lay hold of its assets* at the suit of *creditors*, or even of stockholders, and distribute them, in a case where it has voluntarily put an end to its own existence.<sup>1</sup>

**§ 6687. Constitutionality of Statutes Providing for the Dissolution and Winding up of Insurance Companies.**—Statutes providing for the dissolution and winding up of insurance companies which have become insolvent, or whose reserve has become so reduced that they cannot continue business with safety to the members of the public who may be induced to accept their policies of insurance,—are valid exercises of the *police power* of the State. This power may be exercised upon corporations without regard to the time of their creation. Nor does such an exercise of it impair the obligation of contracts subsisting between the company and its policy-holders, in a constitutional sense; because these contracts must be understood to have been entered into, subject to this right of legislation. Nor is such a statute obnoxious to the constitutional objection that it deprives the stockholders in such companies of their property, liberties, or franchises without due process of law, where the statute provides for a full *hearing upon notice* to all parties interested. It was so held in regard to the Illinois act of 1874<sup>2</sup> for the dissolution of insurance companies.<sup>3</sup>

**§ 6688. Pursuing the Steps Pointed out by Statute.**—Where the statute prescribes the steps to be taken by the members of a corporation for a surrender of its charter, those steps must, of course, be followed, in order to terminate the existence of the corporation. But it is necessary to discriminate between those steps which are made by the statute *essential* to effect the surrender, and other collateral steps which are merely *directory*. Thus, where a statute provided that the

<sup>1</sup> *Ante*, § 6555, *et seq.*

<sup>2</sup> Rev. Stat. Ill. 1889, ch. 73, § 103.

<sup>3</sup> *Ward v. Farwell*, 97 Ill. 593;

*Republic Life Ins. Co. v. Swigert*, 135 Ill. 150; *s. c.* 25 N. E. Rep. 680.



owners of a majority of the stock of a bank might vote to surrender their charter, at a meeting duly called for that purpose, and that the corporate capacity of such bank should continue for the term of two years from the time of filing a written notice of such surrender, certified by its clerk, with the Secretary of State, within thirty days from the passage of the vote; and that any bank surrendering its charter should *publish a certain notice* thereof in a prescribed place and manner, — it was held that where the steps for the surrender were taken in compliance with the statute, except the publication of the notice, the surrender was effectual. The publication of the notice formed no element in the process of surrendering the charter, but was simply declarative of that fact, and the corporation could not avail itself of its omission to comply with the requirement in regard to the publication of notice, in order to defeat the validity of the surrender, when the act was valid without the publication.<sup>1</sup>

<sup>1</sup> *American Bank v. Cooper*, 54 Me. 438. Voluntary dissolution and winding up under *California statute*: Cal. Code Civ. Proc., §§ 1227, 1228, 1229, 1230, 1231, 1232, and 1233, as amended April 16, 1880. That these provisions are *exclusive*, see *Kohl v. Lilienthal*, 81 Cal. 378, 387, *per Fox, J.*, — a seemingly unsound conclusion. That they do not apply to corporations formed for ideal purposes, having no stockholders, see *People v. College of California*, 38 Cal. 166. Dissolution and winding up under *statute of West Virginia* (W. Va. Code, ch. 53, § 57), — with the conclusion that the shareholders may proceed *in pais* or by a *bill in equity*, and that if they proceed in equity, the corporation is a *necessary party defendant*: *Hurst v. Coe*, 30 W. Va. 158, 166; *s. c.* 3 S. E. Rep. 564. Dissolving and winding up on the application of a *stockholder* under *statute of Connecticut*: *Hart v. Boston &c. R. Co.*, 40 Conn. 524. Voluntary

*dissolution and winding up* under *statutes of New York*: See Rev. Stat. N. Y. 463; § 38 Laws N. Y. 1889, ch. 314, p. 384; *Medbury v. Rochester Frear Stone Co.*, 19 Hun (N. Y.), 498; N. Y. Code Civ. Proc., §§ 2419, *et seq.*; *Re Santa Eulalia Min. Co.*, 4 N. Y. St. Rep. 174; *Lake Ontario Nat. Bank v. Onondaga Co. Bank*, 7 Hun (N. Y.), 549. See also *Chamberlain v. Rochester Seamless Paper Vessel Co.*, 7 Hun (N. Y.), 557. Voluntary winding up under *statute of Oregon*: *Wallamet Falls Co. v. Kittridge*, 5 Sawy. (U. S.) 44 (untenable in so far as it holds that the act of dissolution must proceed from the *directors*). Voluntary winding up under *English Companies Act*: Lind. Comp. Law (5th ed.), 875, *et seq.*; *Re Torquay Bath Co.*, 32 Beav. 581; *Re London India Rubber Co.*, L. R. 1 Ch. 329, citing *Re Sunderland &c. Building Soc.*, 21 Q. B. Div. 349. As to what will be a good *notice of a meeting* to

pass a resolution to wind up, see Lind. Comp. Law (5th ed.), 877; Re Bridport Old Brewery Co., L. R. 2 Ch. App. 191; Re Silkstone Fall Colliery Co., 1 Ch. Div. 38; Re National Sav. Bank Asso., L. R., 1 Ch. App. 547, 553. That such a notice may be good in part though bad in part,—good so far as it relates to the passing of a resolution to wind up, though bad as to matters which are *ultra vires*,—see Cleve v. Financial Corp., L. R. 16 Eq. 363; Stone v. City & County Bank, 3 C. P. Div. 282, 307, 313. Impeaching resolutions for a voluntary winding up and amalgamation, for want of sufficient notice of the meeting: Re Imperial Bank, L. R. 1 Ch. App. 339. See Re Bank of Gibraltar, L. R. 1 Ch. App. 69. What claim does not constitute a party a creditor, so as to entitle him to obtain an order continuing the voluntary winding up under the supervision of court: Re Pen-y-van Colliery Co., L. R. 6 Ch. Div. 477. Circumstances under which an order will be made continuing the voluntary winding up under supervision: Re United Service Co., L. R. 7 Eq. 76. Sufficient that creditor is such at the date of proving his claim, though not such at the date of the order for continuing the voluntary winding up: Re Oriental Commercial Bank, L. R.

6 Eq. 582. State of pleadings under which a creditor could not claim a winding-up order on the ground that the company was insolvent: Re Spence's Patent Non-conducting &c. Co., L. R. 9 Eq. 9. Costs of the liquidator incurred previous to an order made on the petition of a creditor to continue the voluntary winding up under supervision: Re New York Exchange Co. [1893], 1 Ch. 371. The court will not, at the instance of contributories, interfere with a voluntary winding up, by ordering a winding up by or under the supervision of the court, except where the resolution for winding up voluntarily has been obtained by fraud, or by an inequitable overbearing of the rights of a dissentient minority by proper influence. Re London &c. Discount Co., L. R. 1 Eq. 277; Re Beaujolais Wine Co., L. R. 3 Ch. App. 15. If the resolution disables the company from performing its contracts, it, of course, remains liable in an action for damages for the breach of them. Inchbald v. Western Milgherry Coffee Co., 17 C. B. (n. s.) 133. But it is added by Sir Nathaniel Lindley that, "generally speaking, a winding-up order is not equivalent to a breach of contract." Lind. Comp. Law (5th ed.), 883; post, § 6743.

## CHAPTER CLV.

### WINDING UP AT THE SUIT OF STOCKHOLDERS.

#### SECTION

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§ 6692. Under Statutes of New York.—Provisions of the New York Code of Civil Procedure are to the effect that a *majority of the directors* of a corporation may apply for a dissolution when they deem it for the interest of the stockholders, and that a final order may be made, if it appears to the court that a dissolution would benefit the stockholders, and not injure the public interest.<sup>1</sup> Under this statute it has been held

<sup>1</sup> N. Y. Code Civ. Proc., §§ 2419, 2429.

that a corporation organized as a business exchange ought to be dissolved on such an application, where it appears that the members have no community of interest; that a dissolution is favored by 135 out of 216 of them, and also by 13 of the 15 directors who own the capital stock and control the operations of the body, and that the small minority, who would alone be benefited by its continuance, have not done business on the exchange for years, and that its operations have long since substantially ceased.<sup>1</sup> Another statute of New York<sup>2</sup> authorizes the dissolution of a corporation in case the *trustees* are *unable to agree* as to its management. Under this statute it is held that the court may, in proper cases, direct the *assets*, which remain after the payment of the expenses of the receivership, and the debts and liabilities of the corporation, to be *sold*, and the proceeds divided among the stockholders.<sup>3</sup> In determining the judicial character and quality of such a proceeding, it must be constantly kept in mind that it is a *special statutory proceeding*, and that, unless it takes place in substantial compliance with the steps pointed out by the governing statute, it will be either *void*, or *erroneous* in the sense of being reversible on error or appeal, according to the nature of the omitted statutory steps. If the statute requires an *order to show cause*, and this is omitted, or not made and served in substantial compliance with the statute, the judgment will be *void*, as heretofore stated.<sup>4</sup> And so, if the *petition* which is filed does not state a condition of facts upon which the statute predicates the right of dissolution, or the power of the court to dissolve the corporation, it will not support a judgment of dissolution, but such a judgment will be reversed on appeal or error. It was so held where the petition failed to state facts showing (what was required by the statute), that the dissolution would be beneficial to the stockholders.<sup>5</sup>

<sup>1</sup> Re Importers' &c. Exchange, 8 N. Y. Supp. 322.

<sup>2</sup> Laws N. Y. 1876, ch. 442.

<sup>4</sup> *Ante*, § 6673.

<sup>3</sup> Re Woven Tape Skirt Co., 8 Hun (N. Y.), 508.

<sup>5</sup> Re Pyrolusite Manganese Co., 29 Hun (N. Y.), 429.

## § 6693. Order to Show Cause against the Application. —

Where the statute provides for an *order to show cause* against the application, and for *service* or *publication* in a certain way, unless the order is so made and served or published, the whole proceeding will be *void*. The reason is, that the order to show cause is in the nature of *original process*, bringing in parties in interest, who have the right to oppose the winding-up;<sup>1</sup> and, of course, such a proceeding will be *dismissed*, at the instance of any party in interest at any stage of it, upon it being made to appear that no order to show cause has been made, served, or published, in conformity with the statute.<sup>2</sup> When, therefore, the governing statute<sup>3</sup> prescribed that, on presentation of the petition, the court might make an order requiring all persons interested in the corporation to show cause why it should not be dissolved, and the order that was in fact made and served, was an order to show cause “why the prayer of the petition should not be granted,” and there was no statutory provision for the service of a copy of the petition with the order to show cause,—it was held that subsequent proceedings were *void*.<sup>4</sup>

§ 6694. Whether a Majority can Wind up. — In another connection,<sup>5</sup> we have discussed the question whether it is competent for a majority of the members of a corporation, against the will of a minority, to *surrender its franchises*,—with the conclusion that, while corporations organized for *ideal purposes* cannot be dissolved by the action of a mere majority, so long as the minority is sufficient in numbers to maintain the corporate existence,<sup>6</sup> yet that this principle has no application to corporations which are organized for strictly *private business purposes*; and that, in respect of such corpo-

<sup>1</sup> Re Pensacola Lumber Co., 8 Ben. (U. S.) 171; Freeman's Nat. Bank v. Smith, 13 Blatchf. (U. S.) 220; People v. Seneca Lake Grape &c. Co., 52 Hun (N. Y.), 174; s. c. 5 N. Y. Supp. 136; 17 Civ. Proc. Rep. (N. Y.) 130.

<sup>2</sup> Re Pyrolusite Manganese Co., 29 Hun (N. Y.), 429.

<sup>3</sup> N. Y. Code Civ. Proc., § 2423.

<sup>4</sup> People v. Seneca Lake &c. Grape &c. Co., 52 Hun (N. Y.), 174; s. c. 5 N. Y. Supp. 136; 17 Civ. Proc. Rep. (N. Y.) 130.

<sup>5</sup> Ante, §§ 4443, 6685.

<sup>6</sup> Ibid.; Polar Star Lodge v. Polar Star Lodge, 16 La. An. 53.

rations, the principle of the *rule of the majority* obtains to the extent that, if the majority conclude that the business cannot be carried on with profit or advantage to all, they may, against the will of the minority, elect to wind it up.<sup>1</sup> When we consider that it is not only competent for a *majority of the stockholders*,<sup>2</sup> but also for a *quorum of the directors*,<sup>3</sup> to assign all the property of the corporation to a trustee for the payment of its debts, an act which, in itself, substantially works a dissolution of the corporation and a winding up of its affairs,—the conclusion that it is within the power of the majority to take action to wind up any business corporation, in the absence of a statutory prohibition, seems unavoidable. Nor can any reason be suggested why this should not be the case with a joint-stock business corporation, as well as with a commercial partnership. If it is conceded that such action on the part of the majority is lawful, then the principle follows that the judicial courts will not examine into the affairs of the corporation for the purpose of determining whether the action is expedient, or for the purpose of scanning the motives which have led to it.<sup>4</sup> A qualification of the principle of the foregoing discussion is discovered in a case in West Virginia, referable no doubt to the provisions of a statute, where the court held that, although it is competent for a majority in interest of the shareholders to discontinue the business of the corporation, yet a statutory proceeding for a dissolution cannot be had at the instance of a majority, without a showing of good cause therefor.<sup>5</sup>

**§ 6695. Decisions Relating to the Number and Value of Stockholders whose Concurrence is Necessary to Support the Proceeding.**—Several of the statutes providing for volun-

<sup>1</sup> Treadwell v. Salisbury Man. Co., 7 Gray (Mass.), 393, 404; s. c. 66 Am. Dec. 490; Trisconi v. Winship, 43 La. An. 45; s. c. 26 Am. St. Rep. 175; 9 Rail. & Corp. L. J. 469; 9 South. Rep. 29; Berry v. Broach, 65 Miss. 450; s. c. 4 South. Rep. 117; 21 Am. & Eng. Corp. Cas. 347.

<sup>2</sup> Ante, § 6466.

<sup>3</sup> Ante, § 6473; De Camp v. Alward, 52 Ind. 468.

<sup>4</sup> Bailey v. Birkenhead & Co. R. Co., 12 Beav. 453; Oglesby v. Attrill, 105 U. S. 605, 610.

<sup>5</sup> Hurst v. Coe, 30 W. Va. 158; s. c. 3 S. E. Rep. 564.

tary proceedings for the winding up of corporations, prescribe the *number and value of shareholders* who must concur in the proceeding, in order to authorize the court to act. Under one statute, requiring the concurrence of *three-fourths in value* of the shares at the time of the institution of the proceeding, *and of the final decree*, it was held that it was not necessary to the validity of the decree that it should appear that the petitioners for dissolution continued to desire the dissolution, from the filing of the petition up to the final decree, where they were prosecuting the case to the very last.<sup>1</sup> Where some of the shares are owned by a deceased person, his *executor or administrator* is a shareholder for the purpose of making up the requisite number; and his *appointment* as executor is sufficiently *proved* by a certified copy of the will and the proceedings of the court probating the will and directing his qualification.<sup>2</sup> Upon the question of the mode of *proving the amount of capital stock*, it has been held that it is sufficiently proved by a certified copy of the charter proceedings.<sup>3</sup> Upon the question of the amount of shares held by the petitioners, their *oral testimony* is admissible, and the stock-book of the corporation need not be produced; and the failure to produce it will not be reversible error, at least without evidence that there was such a book.<sup>4</sup> In *reviewing* such a proceeding, if it appears that all the material averments of the petition were established by uncontradicted legal evidence, the judgment will not be reversed, no matter how much immaterial, illegal, incompetent, or irrelevant evidence may have been admitted.<sup>5</sup> Any of the petitioners for the dissolution of a corporation may, before the court has found that they do not own the necessary amount of stock to entitle them to maintain the proceeding, withdraw therefrom, and if there are not left a sufficient number of

<sup>1</sup> Wolfe v. Underwood, 97 Ala. 375; s. c. 12 South. Rep. 234. As to a voluntary winding up under the Alabama statute, see also Wolfe v. Underwood, 91 Ala. 523; s. c. 8 South. Rep. 774; s. c. 32 Am. & Eng. Corp.

Cas. 644; Merchants' &c. Line v. Waganer, 71 Ala. 581.

<sup>2</sup> Wolfe v. Underwood, 97 Ala. 375; s. c. 12 South. Rep. 234.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

petitioners in amount, the court cannot proceed on the petition and dissolve the corporation.<sup>1</sup>

**§ 6696. When not Dissolved at the Suit of a Single Stockholder.**—It has been held that a corporation will not be dissolved on the petition of a single stockholder, on the ground that its officers have refused to allow the petitioner to inspect its books and accounts, that it is carrying on a losing business, and that the directors have levied an assessment for the purpose of compelling the petitioner to dispose of his shares.<sup>2</sup> Nor, according to a decision of a Court of Common Pleas in Ohio, will a corporation in that State be dissolved at the suit of a stockholder, because a *by-law* provides that it shall continue only for a certain period, and that period has expired; since the by-law imposes on those assenting to it no enforceable obligation.<sup>3</sup> Nor will a corporation be dissolved on such a petition, on the ground that it was actually formed *for a longer period* than that designated in the *preliminary subscription agreement*,—either on the ground that such agreement, of itself, terminates the corporate life, or that it should be specifically performed.<sup>4</sup>

**§ 6697. Doctrine that Equity will Decree a Dissolution where the Company has Collapsed.**—An early case in California is also to the effect that a court of equity has power, on a bill filed by some of the stockholders of the corporation, to decree its dissolution, where it has been found “impracticable to keep the company together.” “The successful prosecution of gold mining at the present time, under such an organization as is prescribed by these articles of association, appears to us to be an impracticability and a delusion, and in such event, it is proper for courts to interfere and decree a dissolution.”<sup>5</sup> “Besides the desire of the members is suf-

<sup>1</sup> Herancourt Brew. Co. v. Armstrong, 6 Ohio C. C. 468.

<sup>2</sup> Burnham v. San Francisco Fuse Man. Co., 76 Cal. 24; s. c. 21 Am. & Eng. Corp. Cas. 644; 17 Pac. Rep. 939.

<sup>3</sup> Cronin v. Potters Co-Op. Co. (Ohio C. P.), 29 Ohio L. J. 52.

<sup>4</sup> *Ibid.*

<sup>5</sup> Citing Story on Part., § 390.



ficiently indicated, and, being in accordance with the interests of all concerned, ought not to be thwarted.”<sup>1</sup>

**§ 6698. Right of a Shareholder to have the Corporation Wound up where It has Embarked in an Ultra Vires Business.**—According to a decision of Mr. Justice North in the English Chancery Division, where a company has ceased to carry on its proper business, but carries on a business *ultra vires*, the shareholder is not confined to his remedy by injunction, but is entitled to have the company wound up. It was so held where a company organized to do a *banking business* had given up that business and had undertaken to carry on some *land speculations*, the formation of a foreign company, and the business of investing in shares and securities.<sup>2</sup>

**§ 6699. Various Matters of Procedure.**—In a proceeding to wind up an insolvent corporation under the statutes of New Jersey, the bill need not allege that the corporation is doing business *in the State* at the time when the bill is filed; since the court has, under the statute, jurisdiction in the case of a foreign corporation which has previously done business in the State and still has property there.<sup>3</sup> A *stockholder*, who is *also a creditor*, may file a bill in equity in Tennessee, to wind up an insolvent corporation, and may have all suits pending against it by creditors, consolidated, and proper accounts taken for the settlement of its affairs; and other

<sup>1</sup> Von Schmidt v. Huntington, 1 Cal. 55, 73. It should be noted that the corporation was organized by articles of association under the laws of New York, presumably the celebrated statute of that State authorizing the formation of manufacturing and mining corporations. It is also to be noted that the court dealt with it as it would have dealt with a partnership. It should be added that the bill did not pray for a decree of dissolution, — the lawyer who drew it had too much sense for that; — but what the court

really did was to direct a decree to be entered dissolving the company as of the date of the judgment appealed from, directing the receiver to sell its property to pay the costs of suit, including counsel fees, and to make a *pro rata* distribution of the balance among all the stockholders, excluding two of them, etc.

<sup>2</sup> Re Crown Bank, 44 Ch. Div. 634. Compare *ante*, § 4538, *et seq.*

<sup>3</sup> Albert v. Clarendon Land &c. Co. (N. J. Eq.), 23 Atl. Rep. 8.

stockholders may show that the claim of the one filing the bill is not valid, although the bill has been taken for confessed against the corporation.<sup>1</sup> Where, in a proceeding to wind up the affairs of a corporation, a stockholder was ordered to turn over certain bonds, or else to pay in money the balance remaining due after deducting the indebtedness of the corporation to him, and he did neither, — it was held that his refusal should be treated as an *election* to retain the bonds, and that an absolute money judgment should go against him, without granting him further time.<sup>2</sup>

**§ 6700. Notice of the Application for Dissolution.**— A proceeding for the dissolution of a corporation and a decree or judgment of dissolution, rendered without *notice* to the parties entitled to oppose the rendition of such judgment or decree, would be merely void, not only under the principles of the common law, but under American constitutions, Federal and State. It would be contrary to that clause incorporated in most of our State constitutions, which provides that no man shall be deprived of his freehold, *liberties*, or privileges without due process of law, — the franchises of a corporation being *liberties* within the meaning of the word as there used. A statute allowing such a proceeding to take place without notice would also be contrary to that clause of the fourteenth amendment to the constitution of the United States which prohibits the States from depriving any person of his property without due process of law. In conformity with this principle, it was held that, where a corporation had become dissolved and its assets had become, under an existing statute, vested in its trustees then in office, in trust for its creditors and stockholders, — a subsequent proceeding, under a subsequent statute, instituted by the Attorney-General, such trustees not being made parties, resulting in a decree appointing a receiver and divesting the property out of the hands of such trustees, and vesting it in the receiver, for the purposes

<sup>1</sup> Crutchfield v. Mutual Gaslight Co. (Tenn.), 2 S. W. Rep. 658.

tion Co., 72 Iowa, 405; s. c. 34 N. W. Rep. 190.

<sup>2</sup> Peters v. Ft. Madison Construc-

of a winding up, was a violation of a constitutional inhibition against the taking of property without due process of law.<sup>1</sup> The theory of the decision is that the right to have the property administered under the existing statute by the existing trustees, was a right accruing to the *creditors and stockholders*, which it was not competent for the legislature, by a subsequent act, to release or discharge.<sup>2</sup> It is obvious that if notice had been given to the trustees in possession, it would not have cured the defect.

§ 6701. Notice to the Attorney-General.—Where the legislature has prescribed a statutory proceeding for the winding up of a corporation, on the application of stockholders or otherwise, and has not provided for notice to the State, or any officer of the State, it may be assumed that no such notice is necessary to the validity of the proceeding; since it is, of course, competent for the State to *waive* any notice to which it might be entitled. A statute of New York<sup>3</sup> provides that a copy of all motions, all motion papers, and a copy of any other application to the court, together with a copy of the order of judgment to be proposed thereon, in every action for the dissolution of a corporation, shall, in all cases, be *served on the Attorney-General*, whether the application be *ex parte*, or upon notice, and that any order or attachment granted in any such action or proceeding, without notice, or the service of

<sup>1</sup> *People v. O'Brien*, 111 N. Y. 1; s. c. 7 Am. St. Rep. 684; 18 N. E. Rep. 692; 2 L. R. A. 255; 19 N. Y. St. Rep. 173; reversing s. c. 45 Hun (N. Y.), 519. Compare *People v. O'Brien*, 103 N. Y. 657.

<sup>2</sup> *People v. O'Brien*, 111 N. Y. 1, 56; s. c. 7 Am. St. Rep. 689; citing and following *Dash v. Van Kleeck*, 7 Johns. (N. Y.) 477; s. c. 5 Am. Dec. 291. The court also cited *Parker v. Browning*, 8 Paige (N. Y.), 388; s. c. 35 Am. Dec. 717; *Taylor v. Porter*, 4 Hill (N. Y.), 140, 147; *Wynehamer v. People*, 13 N. Y. 434; *Westervelt v. Gregg*, 12 N. Y. 202; s. c. 62 Am. Dec.

160; *Kilbourn v. Thompson*, 103 U. S. 168. Under a statute of *Pennsylvania* (Pa. Act April 4, 1872, Pamph. L. 40), notice of an application for the dissolution of a corporation should be published once a week for three weeks. *Re Philadelphia &c. Sewing Machine Co.*, 6 Pa. Co. Ct. 65; *Re Ashton Hand Man. Co.*, 5 Pa. Co. Ct. 450. And where a place of meeting is maintained in a county other than that in which the principal office is located, such advertisement should be in *both counties*. *Re Ashton Hand Man. Co.*, 5 Pa. Co. Ct. 400.

<sup>3</sup> N. Y. Laws 1883, ch. 378, § 8.

the papers on the Attorney-General, shall be *void*. It has been held that this applies to *proceedings for the voluntary dissolution* of corporations.<sup>1</sup> But an application for the appointment of a new trustee of an insolvent insurance company in the place of the trustee appointed under an old statute<sup>2</sup> of New York, providing for the appointment of trustees under the sanction of the court of chancery by insolvent insurance companies, not being a proceeding for the distribution of the assets of the corporation, need not be accompanied with notice to the Attorney-General, under the above statute.<sup>3</sup>

§ 6702. **Intervention of Creditors.**—A final settlement, made between a corporation and its members, on the winding up of its affairs, is not, of course, valid as against its creditors, unless they have been parties to the proceeding.<sup>4</sup> On general principles of equity, where such a proceeding takes place in a court possessing equity powers, it would be within the discretion of the court to allow a *creditor to intervene*, even after the expiration of the time previously limited for that purpose,—at least it has been so held where the proceeding was instituted by creditors,<sup>5</sup>—and no reason is perceived why the rule should be different where it is instituted by stockholders.

§ 6703. **Power of Courts of Equity in Dissolving and Winding up Corporations.**—In the absence of enabling statutes, courts of chancery have no jurisdiction to decree the dissolution of a corporation;<sup>6</sup> nor, as a general rule, can such a court, during the life of the corporation, wind up its busi-

<sup>1</sup> *People v. Seneca Lake &c. Co.*, 52 Hun (N. Y.), 174; *s. c.* 5 N. Y. Supp. 136; 17 Civ. Proc. Rep. (N. Y.) 130. Vacating such an order on *motion* of the *Attorney-General*, when made on petition of stockholders and creditors: *Matter of Mart*, 22 Abb. N. Cas. (N. Y.) 227.

<sup>2</sup> N. Y. Act April 15, 1814.

<sup>3</sup> *Matter of Gay*, 21 N. Y. St. Rep. 346; *s. c.* 4 N. Y. Supp. 602.

<sup>4</sup> *Heggie v. People's Building &c. Asso.*, 107 N. C. 581; *s. c.* 12 S. E. Rep. 275.

<sup>5</sup> *Spooner v. Bay St. Louis Syndicate*, 48 Minn. 313; *s. c.* 51 N. W. Rep. 377; *ante*, §§ 3484, 6567; *post*, § 7025, *et seq.*

<sup>6</sup> *Ante*, § 4538; *Wheeler v. Pullman Iron &c. Co.*, 143 Ill. 197; *s. c.* 32 N. E. Rep. 420; 17 L. R. A. 818.

ness and sequester its property and effects, on the application of a stockholder as such;<sup>1</sup> but when a corporation *dies* by reason of the *expiration of its charter*, or becomes substantially dead by reason of the non-user of its franchises, a court of equity has jurisdiction, under principles already elaborated,<sup>2</sup> to lay hold of its assets by its receiver and distribute them among its creditors. In Virginia, such a court has jurisdiction, at the suit of the holders of *unredeemed shares* in a *building association*, to call the *redeemed shareholders* to account, for the purpose of enforcing payment of what they respectively owe, and to distribute the fund among the unredeemed shareholders and wind up the concern.<sup>3</sup> Jurisdiction to dissolve a corporation may, of course, be conferred upon a court of equity by a statute;<sup>4</sup> and, considering the constitution of these courts and their modes of procedure, statutes conferring such a jurisdiction are very appropriately enacted, and exist in many of the States. In some cases the statutes go no further than to provide for an adjudication of insolvency, and for the appointment of a receiver, and the winding up of the affairs of the corporation, by collecting its debts and converting its assets into money, and distributing the money ratably among its creditors first, and thereafter among its stockholders.<sup>5</sup>

<sup>1</sup> Cronin v. Potters Co-Op. Co. (Ohio C. P.), 29 Ohio L. J. 52.

<sup>2</sup> Ante, § 2951, et seq.

<sup>3</sup> Edelin v. Pascoe, 22 Gratt. (Va.) 826.

<sup>4</sup> Chicago Mut. Life &c. Asso. v. Hunt, 127 Ill. 257; s. c. 20 N. E. Rep. 55; 2 L. R. A. 549. Such jurisdiction was conferred by the Illinois act of 1883 (1 Starr & Curt. Ill. Stat., p. 1348) in reference to *mutual benefit societies*. Ibid.

<sup>5</sup> Such a statute exists in Minnesota: Gen. Stat. Minn. 1878, ch. 76. See Merchants' &c. Bank v. Bailey Man. Co., 34 Minn. 323; s. c. 25 N. W. Rep. 639; Hospes v. Northwestern Man. &c. Co., 41 Minn. 256;

s. c. 43 N. W. Rep. 180. Equitable jurisdiction existing in *Pennsylvania*, under the Act of June 16, 1836, § 13, as to corporations, is said to be general and unlimited, and includes a bill to remove the assignee of an insolvent corporation. Failey v. Stockwell (Pa. C. P.), 2 Pa. Dist. R. 197; s. c. 12 Pa. Co. Ct. 403. The power of a court of equity, on good cause shown, to dissolve or close up the business of any corporation, which is conferred by section 25 of the *Illinois* statute for the incorporation of companies for pecuniary profit, exists only as a portion of the relief provided for by that section, and does not authorize the exercise

§ 6704. **What Deemed Acts of Insolvency.**—It has been held that the rule that the filing of a petition *in bankruptcy*, is *per se* an act of insolvency which renders the *actual* solvency or insolvency of the petitioner, immaterial,—applies as well to proceedings by corporations as by individuals.<sup>1</sup> Under the provisions of a statute<sup>2</sup> that a corporation shall be dissolved when it shall have remained insolvent, or neglected or refused to pay its notes or evidences of debt, or suspended its

of such power, except for causes for which the State might procure a judgment of forfeiture at law. *Wheeler v. Pullman Iron &c. Co.*, 143 Ill. 197; *s. c.* 32 N. E. Rep. 420; 17 L. R. A. 818. That *banking associations*, established under the general banking law of New York, are *corporations* within the provisions of the Revised Statutes relative to *proceedings against insolvent corporations*, etc., and that such association, failing to make an annual return, as required by the statute of 1841, is liable to be proceeded against as insolvent,—see *Metropolitan Bank v. Godfrey*, 23 Ill. 579; *Leavitt v. Blatchford*, 5 Barb. (N. Y.) 9; *Gillet v. Moody*, 5 Barb. (N. Y.) 185; *Boisgerard v. New York Banking Co.*, 2 Sandf. Ch. (N. Y.) 23; *Mabey v. Adams*, 3 Bosw. (N. Y.) 346; *Robinson v. Bank of Attica*, 21 N. Y. 406. There was a long controversy in New York, as to what kinds of corporations were included in the term “*moneyed corporations*” as used in the statutes of that date. It was finally held that the provisions of the New York Revised Statutes in relation to “*moneyed corporations*,” had no application to *banking associations* organized under the general act of 1838. The regulations for the purpose of preventing the insolvency of moneyed corporations were entirely unsuited to the *free banking system*. Under that system, the sole

object of the legislature was to secure the currency which these institutions might put in circulation. This object was accomplished, not by regulations to prevent insolvency, which had been tried and found ineffectual, but by requiring adequate security, beforehand, for all the circulation which any individual or association might be allowed to issue. The legislature did not intend that associations formed under that law should be subject to the statutes then in force, relating to a very different class of moneyed institutions. They intended to introduce a new and independent system of banking, and to establish, for the government of institutions organized under such new systems, new and independent regulations, and to leave all previous statutes relating to moneyed corporations to be applied to the chartered banks then in existence. *Leavitt v. Blatchford*, 17 N. Y. 521; *s. c.* 5 Barb. (N. Y.) 9. To the same effect, *Tracy v. Talmage*, 18 Barb. (N. Y.) 456. To the contrary, *Mabey v. Adams*, 3 Bosw. (N. Y.) 346; *Leavitt v. Tylee*, 1 Sandf. Ch. (N. Y.) 207; *Leavitt v. Yates*, 4 Edw. Ch. (N. Y.) 134; *Matter of Bank of Dansville*, 6 Hill (N. Y.), 370.

<sup>1</sup> *Re Atlantic Mut. Life Ins. Co.*, 9 Ben. (U. S.) 270.

<sup>2</sup> 1 Rev. Stat. N. Y. 604, § 4; 2 *Ibid.* 463, § 38.

business for *one year*,—a corporation is not regarded as having committed an act of insolvency, or as having neglected or refused to pay its obligations, because its demand notes have remained *outstanding* until the payment has been demanded.<sup>1</sup> Insolvency in the ordinary sense, which is simply an inability to pay and discharge one's obligations as they accrue in the ordinary course of business,<sup>2</sup> is not sufficient to warrant a decree of dissolution under the foregoing statute.<sup>3</sup> When, therefore, a referee found that a company was insolvent at the date of the commencement of the action, but also that it had not been insolvent for one year prior thereto; that it had not, for one year, neglected or refused to pay and discharge its obligations or suspend its ordinary and lawful business,—it was held that a judgment entering a decree of dissolution was rightly reversed.<sup>4</sup>

**§ 6705. Ordering the Election of Directors.**—There is authority for the conclusion that, in the absence of an enabling statute, where an insolvent corporation has long been in the hands of a court of equity, through its receiver, it is competent for the court to order the election of a board of directors, unless there is some statutory obstacle in the way, to the end that the stockholders may be properly represented in the proceeding by their proper trustees, and to the end that the court may have the aid of the directors in administering the trust.<sup>5</sup>

<sup>1</sup> *Denike v. New York &c. Co.*, 80 N. Y. 599.

<sup>2</sup> *Hazelton v. Allen*, 3 Allen (Mass.), 114; *Brouwer v. Harbeck*, 9 N. Y. 589; *Ferry v. Bank of Central New York*, 15 How. Pr. (N. Y.) 445.

<sup>3</sup> *Denike v. New York &c. Co.*, *supra*.

<sup>4</sup> *Ibid.* 607.

<sup>5</sup> *Lehigh Coal &c. Co. v. Central R. Co.*, 35 N. J. Eq. 349. In so holding, Chancellor Runyon said: "There are many very important respects in which the action of the board, as rep-

resentatives of the company, may prove exceedingly useful to the court in administering the trust; and in many of such matters the future of the company, after it shall have passed out of the hands of the court, may be most materially affected by the action of the board. It is therefore eminently proper that the board should be the representatives of the stockholders, and therefore that a proper opportunity should be afforded to the latter, to make selection of their agents. Moreover, should the

§ 6706. **Enjoining the Prosecution of Other Suits.**—Where the winding up of the affairs of an insolvent corporation passes into the hands of a court of chancery, that court may, on the general principles which govern its jurisdiction and procedure, enjoin the prosecution of attachment suits in other courts, so that all litigation may be conducted as a single insolvent proceeding.<sup>1</sup>

§ 6707. **Proceedings for the Winding up of Insurance Companies.**—The winding up of insolvent *insurance companies* is, it may be assumed, the subject of careful statutory regulation, in every State of the Union.<sup>2</sup> It is safe to conclude that, under most of these statutes, proceedings to wind up insurance companies, when their reserve passes below the statutory limit, or when they otherwise become insolvent, are properly taken, in the first instance, by a designated officer of the State: in Missouri, the Superintendent of Insurance;<sup>3</sup> in Illinois, the Auditor of the State;<sup>4</sup> in New York, by the Attorney-General.<sup>5</sup> Statutes of this kind have been held not obnoxious to any provision of the Federal or State constitutions.<sup>6</sup> To such a proceeding the *stockholders* of the company are *not necessary parties*.<sup>7</sup>

court deem it advisable to turn over the property to the company, the stockholders must receive it by the hands of the board. Therefore, there must be directors; and in such case, as well as generally, the board should be the true and lawful representatives of the stockholders, whose property they are to control and administer." *Ibid.* 353. The case was that of a *rail-road company* which had been in the hands of a *receiver* during the period of *six years*, during which time no board of directors had been re-elected.

<sup>1</sup> *Smith v. St. Louis Mut. Life Ins. Co.*, 6 Lea (Tenn.), 564.

<sup>2</sup> Compare *post*, § 7219, *et seq.*

<sup>3</sup> 2 Rev. Stat. Mo. 1889, § 5938.

<sup>4</sup> Rev. Stat. Ill. 1889, ch. 73, § 103;

*Republic Life Ins. Co. v. Swigert*, 135 Ill. 150; s. c. 25 N. E. Rep. 680; 9 Rail. & Corp. L. J. 22. The statute of Illinois, which is above cited, authorizes the State Auditor to apply for an *injunction* to restrain insurance companies from further proceeding with their business, when their condition becomes such as to render their further continuance in business hazardous to the insured, or to the public.

<sup>5</sup> 2 Rev. Stat. N. Y. (Birdseye's ed.), p. 1568, § 38.

<sup>6</sup> *Republic Life Ins. Co. v. Swigert*, *supra*; *Ward v. Farwell*, 97 Ill. 593; *ante*, § 5392.

<sup>7</sup> *Ante*, § 3499; *Ward v. Farwell*, 97 Ill. 593. Compare *ante*, § 3493, *et seq.*



§ 6708. **Insolvency Proceedings against Railway Companies.**—There are holdings to the effect that *railroad corporations*, like other business corporations, or natural persons, may be subjected to compulsory insolvency or bankruptcy proceedings.<sup>1</sup>

§ 6709. **Insolvent Building Associations Wound up According to the Principles of Equity.**—It has been held, in substance, that where, by the common consent of the shareholders, a *building and loan association* is to be wound up, and a majority of the shareholders agree upon a scheme of winding up, which is contrary to the principles of equity when applied to the rights of members under their constating instruments, and a minority file a bill in equity to *enjoin* the majority from carrying out such scheme, praying that the rights of the parties shall be ascertained and the assets disposed of by the court according to the principles of equity, — this relief will be granted; but the injunction ought not to extend so far as to hinder the collection of the debts due from defaulting stockholders.<sup>2</sup>

§ 6710. **Distribution in the Voluntary Winding up of Savings Banks.**—In the voluntary winding up of an incorporated *savings bank*, under the direction of the court, only those who were *depositors* when the proceedings were instituted, are entitled to share in the *surplus*.<sup>3</sup> It has been held that where a voluntary winding up of such an institution is in progress, the directors, in a proceeding instituted in the name of the corporation, have a right to apply to a court of chancery for *instructions*, on the ground that the relation of *trustee and cestui que trust* exists between the managers and depositors.<sup>4</sup>

<sup>1</sup> Platt v. New York &c. R. Co., 26 Conn. 544; Winter v. Iowa &c. R. Co., 2 Dill. (U. S.) 487. Compare Central Nat. Bank v. Worcester &c. Railroad, 13 Allen (Mass.), 105.

<sup>2</sup> City Loan &c. Asso. v. Goodrich, 48 Ga. 445; s. c. as to the liability of

the officers carrying out such a scheme, 54 Ga. 98.

<sup>3</sup> Morristown Inst. v. Roberts, 42 N. J. Eq. 496.

<sup>4</sup> Ibid.; Re Newark Savings Inst., 28 N. J. Eq. 552. That a *savings institution* is a mere *trustee* for its deposi-

§ 6711. **Proceedings by Bank Commissioners.** — Where the statute law creates a board of State officers, known as bank commissioners, and authorizes them to proceed against banks created by the State, and they have become insolvent or forfeited their charters, it is not necessary for them to state, in their petition, that *all* the commissioners met and consulted together as to the propriety of making the application, but it is sufficient if the petition is presented in the names of all the commissioners by their solicitor. The governing principle is, that where a suit is commenced in the names of several persons by their solicitor, the court will not inquire whether such suit has been authorized by all, unless *some of them object* to the proceedings, or unless the adverse party shows affirmatively that the suit is commenced and carried on in the names of some of the parties without their authority.<sup>1</sup>

§ 6712. **Dissolution by Unanimous Resolution of the Stockholders.** — If we recur to the doctrine of the cases which deal with the subject of the *de facto* dissolution of corporations, we shall see that it is the doctrine of all American courts that whenever a corporation does that which has the necessary effect of destroying the end and object for which it was created, this, for many purposes, will be treated in law as a dissolution and a surrender of corporate rights.<sup>2</sup> It has been so held where the dissolution took the form of resolutions, adopted by all the stockholders, authorizing a sale of the corporate property. The fact that the resolutions were not adopted *by the directors*, sitting as a board, did not impair their force as an

tors, see *Coite v. Society for Savings*, 32 Conn. 173; *Bunnell v. Collinsville Savings Soc.*, 38 Conn. 203. That a depositor is a *creditor*, in the sense of having a right of *set-off* against his debt due the bank, see *Hannon v. Williams*, 34 N. J. Eq. 255; *s. c.* 38 Am. Rep. 378. See further, as to the nature of savings banks, *Huntington v. Savings Bank*, 96 U. S. 388.

<sup>1</sup> *Bank Commissioners v. Bank of*

*Buffalo*, 6 Paige (N. Y.), 497. In *Bronson v. Mann*, 13 Johns. (N. Y.) 460, it was held that, *where a legal proceeding was to be instituted* by the commissioners of highways as such, it was not necessary that they should all meet or consult and agree to make the application, in order to render the institution of the proceeding valid.

<sup>2</sup> *Ante*, § 3345, *et seq.*; § 6670.

act of surrender, especially since the directors had no authority to surrender the charter and dissolve the corporation.<sup>1</sup>

**§ 6713. When Unanimous Consent Required to Wind up an Unincorporated Association.** — Where, by the articles, an unincorporated association is not to be dissolved before the expiration of a certain term, the same can only be dissolved by that article being canceled, like any other contract, by consent of all parties; except that, where it has been found impracticable to keep the company together, a court of equity may decree a dissolution, notwithstanding the term has not expired.<sup>2</sup>

<sup>1</sup> Webster v. Turner, 12 Hun Cal. 55, 73. In this case the court (N. Y.), 264. distributed the assets after deducting

<sup>2</sup> Von Schmidt v. Huntington, 1 a counsel fee.

## CHAPTER CLVI.

## EFFECT OF DISSOLUTION.

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§ 6718. **Effect of Dissolution of a Corporation at Common Law.** — Under the principles of the common law, excluding in this statement the principles of *equity* and the effect of saving *statutes*, — the effect of the dissolution of a corporation is to put an end to its existence for all purposes whatsoever, and to destroy every one of its faculties; so that thereafter it can neither make nor take contracts,<sup>1</sup> nor sue,<sup>2</sup> nor be sued;<sup>3</sup> and so that all debts to or from it become extinguished,<sup>4</sup> and all actions by<sup>5</sup> or against it<sup>6</sup> *abate*; and so that its *real property reverts* to the grantors or donors thereof, or their heirs;<sup>7</sup> and

<sup>1</sup> White v. Campbell, 5 Humph. (Tenn.) 38; Green v. Seymour, 3 Sandf. Ch. (N. Y.) 285; Carrington v. Commercial &c. Ins. Co., 1 Bosw. (N. Y.) 152; Saltmarsh v. Planters' &c. Bank, 14 Ala. 668.

<sup>2</sup> Bank of Louisiana v. Wilson, 19 La. An. 1; Whitman v. Cox, 26 Me. 335.

<sup>3</sup> Bonaffe v. Fowler, 7 Paige (N. Y.), 576; Carey v. Giles, 10 Ga. 9.

<sup>4</sup> Commercial Bank v. Lockwood, 2 Har. (Del.) 8; Fox v. Horah, 1 Ired. Eq. (N. C.) 358; s. c. 36 Am. Dec. 48; Port Gibson v. Moore, 13 Smedes & M. (Miss.) 157; White v. Campbell, 5 Humph. (Tenn.) 38; Hopkins v. Whitesides, 1 Head (Tenn.), 31; Malloy v. Mallett, 6 Jones Eq. (N. C.) 345; Commercial Bank v. Chambers, 8 Smedes & M. (Miss.) 9; Hightower v. Thornton, 8 Ga. 486; Thornton v. Lane, 11 Ga.

459; Robinson v. Lane, 19 Ga. 337; Bank v. Duncan, 56 Miss. 166; Von Glahn v. De Rosset, 81 N. C. 467, 473; Mumma v. Potomac Co., 8 Pet. (U. S.) 281; Thornton v. Marginal Freight Co., 123 Mass. 32.

<sup>5</sup> Eagle Chair Co. v. Kelsey, 23 Kan. 632; Bank of Mississippi v. Wrenn, 3 Smedes & M. (Miss.) 791.

<sup>6</sup> National Bank v. Colby, 21 Wall. (U. S.) 609; Nelson v. Hubbard, 96 Ala. 238; s. c. 11 South. Rep. 428; 17 L. R. A. 375; 12 Rail. & Corp. L. J. 182.

<sup>7</sup> Co. Litt. 136; Dean &c. of Windsor v. Webb, Godb. 211; Edmunds v. Brown, 1 Lev. 237; Attorney-General v. Gower, 9 Mod. 224; Hooker v. Utica &c. Turnp. Co., 12 Wend. (N. Y.) 371; Fox v. Horah, 1 Ired. Eq. (N. C.) 358; s. c. 36 Am. Dec. 48; State v. Rives, 5 Ired. L. (N. C.) 297; White v. Campbell, 5 Humph.

its *personal property escheats* to the Crown or to the State.<sup>1</sup> These principles illustrate at once the feebleness and the barbaric crudity of the common law, and expand into terror the jealousy with which corporations have been regarded by all classes of people, from sovereign to populace, in every country and in every age.

§ 6719. **Destroys its Power to Make Contracts.**—After a corporation has been dissolved *de jure*,<sup>2</sup> it can *make no contract* which will have the effect of binding its assets.<sup>3</sup> Such an effect has been ascribed to an order *enjoining* a corporation from exercising its franchises, in a statutory proceeding to dissolve it.<sup>4</sup> So, where a *note*, secured by a *deed of trust*, was executed to a defunct corporation, it was held that the note was void for want of a payee, and that the deed of trust was void for want of a beneficiary.<sup>5</sup> So, where the directors of a corporation, after they had been, by a vote of the stockholders, which took place in pursuance of the charter, divested of all authority except to close its concerns, issued *new obligations* in the name of the company and took a *mortgage* therefor,—it was held that the *mortgage* thus taken was *void*.<sup>6</sup>

§ 6720. **Destroys its Power to Sue.**—By the principles of the common law, after a corporation has become effectually dissolved in any mode known to the law, its *power to sue* in

(Tenn.) 38; Bingham *v.* Weiderwax, 1 N. Y. 509; Folger *v.* Chase, 18 Pick. (Mass.) 63, 65, 66; Acklin *v.* Paschal, 48 Tex. 147.

<sup>1</sup> Coulter *v.* Robertson, 24 Miss. 278; *s. c.* 57 Am. Dec. 168; Fox *v.* Horah, 1 Ired. Eq. (N. C.) 358; *s. c.* 36 Am. Dec. 48.

<sup>2</sup> The expression *de jure* is used to exclude from conception those *de facto* and shadowy dissolutions which are frequently held to have taken place, through *insolvency* or the *non-user* of the corporate franchises, for the purpose of letting in the rights of credit-

ors against their stockholders, and for some other purposes. *Ante*, § 3345, *et seq.*

<sup>3</sup> Carrington *v.* Commercial &c. Ins. Co., 1 Bosw. (N. Y.) 152; Green *v.* Seymour, 3 Sandf. Ch. (N. Y.) 285; White *v.* Campbell, 5 Humph. (Tenn.) 38.

<sup>4</sup> Carrington *v.* Commercial &c. Ins. Co., *supra*.

<sup>5</sup> White *v.* Campbell, 5 Humph. (Tenn.) 38.

<sup>6</sup> Green *v.* Seymour, 3 Sandf. Ch. (N. Y.) 285.

its corporate name is effectually extinguished.<sup>1</sup> It cannot, thereafter, be made a party defendant in an action brought by a receiver to set aside a fraudulent conveyance of its assets.<sup>2</sup> But this doctrine was never applicable to those *de facto dissolutions* which were sometimes held to have taken place for the purpose of letting in the rights of creditors against the stockholders.<sup>3</sup> Thus, the *non-user* by a corporation of its franchises,

<sup>1</sup> *Bank of Louisiana v. Wilson*, 19 La. An. 1; *Miami Exporting Co. v. Gano*, 13 Ohio, 269; *Saltmarsh v. Planters & Merchants' Bank*, 17 Ala. 761; *Greeley v. Smith*, 3 Story (U. S.), 657; *Whitman v. Cox*, 26 Me. 335; *Read v. Frankfort Bank*, 23 Me. 318. In these two cases it was held that the statutes repealing the charter of the Frankfort Bank, in the State of Maine, and providing for the distribution of its funds by receivers, incapacitated it any longer to sue or be sued in a court of law, otherwise than to promote the objects confided to the receivers.

<sup>2</sup> *Carey v. Giles*, 10 Ga. 9. An illustration of this barbarous rule of the common law is found in a decision of the Supreme Court of North Carolina, where the opinion of the court involves a great display of learning, but where its conclusion disgraces the very name of equity. A note had been made, payable to the cashier of a bank, and the bank had discounted it. After the charter of the bank expired, the cashier brought an action to recover upon it. It was held that, although the cashier might sue to recover at law, since he was the payee of the note,—yet, as the bank had the sole right to the money when collected, and as this right was extinguished by its dissolution as a corporation, a court of equity would perpetually *enjoin* the collection of the judgment: *Fox v. Horah*, 1 Ired. Eq. (N. C.) 358; s. c. 36 Am. Dec. 48. This

is believed to be the last and perhaps the only case where a court of equity was ever successfully called upon to *aid* the disgraceful rule of the common law that where a corporation becomes dissolved, its debts cannot be collected for the benefit either of its creditors or its stockholders. Instead of enjoining the collection of the judgment in this case, the court should, in a proceeding by a creditor or a stockholder, have declared the cashier a trustee in respect of the money collected, and should have compelled him to distribute it among the creditors and stockholders of the corporation according to the principles of equity. Decisions of this kind, which were not infrequent in the era of State banks of issue, can only be “reconciled” with modern holdings, in view of the well-known fact that nearly all the politicians were creditors of those political banks, by notes often renewed, at the time when they finally suspended, and that all the judges were politicians. It can hardly be doubted that, in many of those semi-barbarous decisions, the judges were either rendering decisions to exonerate themselves from their liabilities to the insolvent banks, or to exonerate powerful and influential politicians upon whom they depended for the tenure of their offices. This decision was, in effect, overruled in *Von Glahn v. De Rosset*, 81 N. C. 467.

<sup>3</sup> *Ante*, § 3345, *et seq.*

such as is evidenced by the cessation of its active business, does not impair its capacity to prosecute suits.<sup>1</sup>

§ 6721. **Destroys its Capacity to be Sued.** — The dissolution of a corporation equally destroys its *capacity to be sued*;<sup>2</sup> but this principle was never predicated upon those *de facto dissolutions* which have been held to have taken place upon the theoretical surrender of the franchises of a corporation, where it became necessary to hold them dissolved for the purpose of letting in the rights of their creditors against their stockholders.<sup>3</sup> And, although the insolvency of a corporation might, when coupled with other circumstances,<sup>4</sup> be tantamount to a dissolution, for the purpose named, — yet the mere *insolvency* of a corporation never operated to prevent the institution of suits against it.<sup>5</sup>

§ 6722. **Abates All Actions Commenced in its Name.** — By the principles of the common law, in the absence of any saving statute, the dissolution of a corporation has the effect of *abating* all actions pending against the corporation at the date when the dissolution takes effect,<sup>6</sup> as hereafter explained.<sup>7</sup> If, for instance, a corporation becomes extinct by the expiration of its charter, or by a decree of forfeiture, pending a suit at law by it for a corporate demand, and the fact be brought regularly to the notice of the court, the action must terminate, and any attachment made in aid of it must be dissolved; and if, after judgment in favor of the corporation, it becomes extinct, no *execution* can regularly issue thereon in the corporate name; and if one be sued out, it may be *quashed*, on showing that the corporation had become extinct before it was sued out.<sup>8</sup> The effect of this principle was such, that where,

<sup>1</sup> State Nat. Bank v. Robidoux, 57 Mo. 446.

<sup>2</sup> *Ante*, § 6718; *post*, § 6723; also ch. 184, art. IV.

<sup>3</sup> *Ante*, § 3345, *et seq.*

<sup>4</sup> *Ante*, § 6666.

<sup>5</sup> City Ins. Co. v. Commercial Bank, 68 Ill. 348.

<sup>6</sup> Bank of Mississippi v. Wrenn, 3 Smedes & M. (Miss.) 791; Eagle Chair Co. v. Kelsey, 23 Kan. 632; May v. State Bank, 2 Rob. (Va.) 56; s. c. 40 Am. Dec. 726.

<sup>7</sup> *Post*, ch. 184, art. IV.

<sup>8</sup> May v. State Bank, 2 Rob. (Va.) 56; s. c. 40 Am. Dec. 726.



in an action by a corporation, the plaintiff introduced in evidence its *articles of incorporation*, although no issue as to its corporate existence had been raised, and these articles showed that its *charter* had *expired* during the pendency of the action, — it was held that the court could not render a judgment in favor of the corporation upon the verdict which had been returned by the jury.<sup>1</sup> The doctrine of this section must be absolutely clear, so far as it relates to proceedings in courts which have no equity powers. In order to place it beyond the possibility of doubt, it is only necessary to consider that if, after the dissolution of the corporate plaintiff, the action should proceed to judgment, there would be no person capable in law of receiving the fruits of it. Decisions exist which have sometimes been quoted in opposition to this principle, but on examination it will be found that they are capable of being reconciled with it.<sup>2</sup>

<sup>1</sup> *Eagle Chair Co. v. Kelsey*, 23 Kan. 632.

<sup>2</sup> For instance, the case of *Louisville v. Bank of United States*, 3 B. Mon. (Ky.) 138, is sometimes quoted to the proposition that a corporation may maintain suits in its corporate name, even after the expiration of its charter, where such suits were commenced while its charter was in force, and this without the aid of a special statute authorizing the continuance of such suits; but, on examination of the decision, it will be found that there *was* a statute authorizing the continuance of suits in such cases, so that all that the court said about what might have been done in the absence of a statute was a mere *obiter dictum*; and besides, that was a suit *in equity*, and the rule of the text is a rule of the courts of *common law*. The case of *Bank of Alexandria v. Patton*, 1 Rob. (Va.) 499, is sometimes quoted in opposition to the principle of the foregoing text. In that case a decree was entered, dis-

missing a bill by a corporation, and an appeal was taken; and, pending the appeal, the charter of the corporation expired by its own limitation. A motion was made in the appellate court that the appeal be abated. It was urged, in opposition thereto, that, before the expiration of the charter, the corporation had *assigned all its interest* in the subject in controversy. The appellate court held that it might inquire into the fact of the assignment, and that if the fact should be found true, it might permit the suit to proceed, without *noticing upon its record* the fact of the dissolution of the corporation. But it is perceived that this ruling was made to enable the *assignee* to prosecute the action to its final termination; and the effect of the decision was merely that he might use the corporate name for that purpose, although it had become dissolved. While the decision is illogical, it is perceived that the holding was that the *real party in in-*

§ 6723. **Abates All Actions Pending against It.**—The necessary effect of the dissolution of a corporation is to abate all actions pending against it at the time of its dissolution, in the absence of a saving statute providing for the continuation of the same.<sup>1</sup> The reason is that a judgment can no more be rendered against a dead corporation than against a dead man.<sup>2</sup> "I cannot distinguish," said Mr. Justice Story, "between the case of a corporation and the case of a person dying *pendente lite*. In the latter case the suit is abated at law, unless it is capable of being revived by the enactment of some statute, as is the case as to suits pending in the courts of the United States, when, if the right of action survives, the personal representative of the deceased party may appear and prosecute or defend the suit. No such provision exists as to corporations, nor indeed, could exist without reviving the corporation *pro hac vice*; and, therefore, any suit pending against it at its death abates by mere operation of law."<sup>3</sup> Therefore, a suit against a *national bank*, to enforce the collection of a demand, was abated by a decree of a District Court of the United States, dissolving the corporation and forfeiting its franchises, rendered upon an information against the bank

*terest* might use of record the name in which the suit had originally been brought, although that person had since become deceased. The decision, therefore, related merely to a question of formality in procedure,—keeping the record straight, as lawyers sometimes say. Moreover, the decision was rendered in conformity with a rule of appellate procedure in Virginia, under which appeals or writs of error did not abate, by the death of either party, and that if an appeal was taken from a judgment in favor of a party, dead at the time of the judgment, no process from the appellate court was required to make the representative of the decedent a party by name to the appeal. In New York, an action commenced by

a corporation is not abated by a subsequent dissolution. *New York Marbled Iron Works v. Smith*, 4 Duer (N. Y.), 362; but this is in conformity with a saving statute.

<sup>1</sup> *Greeley v. Smith*, 3 Story (U. S.), 658; *Farmers' &c. Bank v. Little*, 8 Watts & S. (Pa.) 207; *s. c.* 42 Am. Dec. 293; *Mumma v. Potomac Co.*, 8 Pet. (U. S.) 281; *National Bank v. Colby*, 21 Wall. (U. S.) 609; *Nelson v. Hubbard*, 96 Ala. 238; *s. c.* 11 South. Rep. 428; 17 L. R. A. 375; 12 Rail. & Corp. L. J. 182; *Dobson v. Simonton*, 86 N. C. 492.

<sup>2</sup> *Mumma v. Potomac Co.*, *supra*.

<sup>3</sup> *Greeley v. Smith*, 3 Story (U. S.), 658; quoted with approval in *National Bank v. Colby*, 21 Wall. (U. S.) 609, 615.

filed by the Comptroller of the Currency, — there being no saving statute continuing rights of action.<sup>1</sup> Decisions are sometimes met with which hold, in general terms, a doctrine opposed to that stated in the text. Thus, according to an early decision in Missouri, the expiration of the charter of a corporation does not affect legal proceedings already commenced against it.<sup>2</sup> It is enough to say of such decisions that, unless they can be justified by some local statute, they were badly decided.<sup>3</sup>

**§ 6724. Dissolves Attachments Levied upon its Property.**— It seems necessarily to follow, from the doctrine of the preceding section, that, under the principles of the common law, and in the absence of any saving statute, the effect of the dissolution of a corporation will be to dissolve any attachment which has been levied upon its property, where the attachment suit has not ripened into a judgment at the time of the dissolution, — and this, whether the attachment is an original attachment, or is sued out in aid of a pending action. In either case, the effect of a seizure under the attachment is merely to impound the property by the court, through its officer, until the plaintiff recovers a judgment against the attaching debtor; and if no such judgment is recovered, the attachment is necessarily dissolved. Whatever, then, will abate the action to recover the judgment, will necessarily dissolve the attachment, which depends for its vitality upon the successful prosecution of the action in chief. It was accordingly held, in Pennsylvania, that in a foreign attachment against a corporation as defendant, the civil death of the corporation, before the judgment against it, produced by a

<sup>1</sup> National Bank v. Colby, *supra*.

<sup>2</sup> Lindell v. Benton, 6 Mo. 361.

<sup>3</sup> In Com. v. Huntingdon Bank, 2 Penr. & W. (Pa.) 438, it was held that a statute of the State exacting a duty of eight per cent upon the amount of dividends declared by the bank, and providing that, upon the failure of the bank to pay the same to the

State Treasurer within a given period, he should proclaim the charter of the bank forfeited, — did not preclude the State from recovering the duty in an action, although the State treasurer had, by proclamation, forfeited the charter. But as there was no opinion, the ground of the decision does not appear.

decree of forfeiture of its charter by a judicial tribunal, dissolved the attachment, and that a *garnishee* might take advantage of this by pleading it, notwithstanding judgment had been entered against the corporate defendant for default of appearance.<sup>1</sup> That the same doctrine is clearly applicable to what is called an *original attachment*, as distinguished from an *ancillary attachment*, will appear from the reasoning of the Pennsylvania court, that the object of a proceeding by a foreign attachment is primarily to procure the appearance of the defendant, and that such an attachment is necessarily dissolved at the instant when the defendant has lost his capacity to appear. In other words, the attachment creditor gains no property in the thing, by virtue of the levy of his attachment, but it is merely a security for the appearance of the defendant, and this security is released as soon as the conditions have been performed, or have become impossible.<sup>2</sup>

**§ 6725. Judgments Rendered against Corporation after Dissolution are Reversible on Error.**—There seems to be no ground to question the proposition that a judgment rendered against a corporation after it has become dissolved, either by the judgment of a court, by the expiration of its charter, or by a legislative repeal thereof, where the right of repeal exists,—is *erroneous*, in the sense that it may be vacated by a proceeding in the nature of the common-law *writ of error coram nobis*. Such a judgment, it has been held, will be *reversed* on writ of error brought by a *member* of the corporation, whose property has been levied upon under an execution issued to enforce the same.<sup>3</sup>

**§ 6726. Doctrine that Such a Judgment is Void.**—Other authoritative courts have gone to the length of holding that a judgment rendered against the corporation after its dissolution, although in an action previously commenced, is not

<sup>1</sup> *Farmers' &c. Bank v. Little*, 8 Watts & S. (Pa.) 207; *s. c.* 42 Am. Dec. 293; *post*, ch. 188.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Merrill v. Suffolk Bank*, 31 Me. 57; *s. c.* 50 Am. Dec. 649; *Rankin v. Sherwood*, 33 Me. 509.

merely erroneous, but absolutely void.<sup>1</sup> It follows that, under this doctrine, such a judgment may be impeached by anyone entitled to participate in the distribution of the assets of the corporation. It has been held that it may be impeached by a *creditor*; for every creditor, claiming payment out of the funds of an insolvent corporation, occupies an adversary position toward every other claimant, and has a right to contest the validity of the claim preferred by any other, and to see that another claimant does not get a preference under the operation of a *void judgment*.<sup>2</sup>

§ 6727. **Doctrine No Application to Proceedings to Enforce Liens upon Corporate Property.**—The doctrine of the preceding sections has no application to *proceedings in rem* to enforce *liens* upon corporate property. It is scarcely necessary to suggest that the dissolution of a corporation *cannot operate to divest any rights* which have become vested in or to its assets. If, for instance, a corporation, prior to its dissolution, makes and confirms a valid *conveyance* of all its real estate, no title thereto will pass, in the event of its dissolution, to the person who otherwise would have been entitled to take

<sup>1</sup> *McCulloch v. Norwood*, 58 N. Y. 562; reversing *s. c.* 4 Jones & Sp. (N. Y.) 180; *Sturges v. Vanderbilt*, 73 N. Y. 384; *Thornton v. Marginal Freight Co.*, 123 Mass. 32; *Dobson v. Simonton*, 86 N. C. 492; *Re Norwood*, 32 Hun (N. Y.), 196. In New York a judgment rendered against a corporation, whose charter has expired, is void, unless the action be continued by order of the court under the New York Law of 1832, chapter 295, to prevent abatement, etc. *Sturges v. Vanderbilt*, 73 N. Y. 384. Therefore, after the dissolution of a corporation, its attorneys are without power to enter into a stipulation affecting any pending action. *Re Norwood*, *supra*. A judgment recovered in a suit commenced against a corporation two months after its

dissolution was held to be *not even prima facie evidence* of a debt due from the corporation at the time of its dissolution. *Bonaffe v. Fowler*, 7 Paige (N. Y.), 576.

<sup>2</sup> *Dobson v. Simonton*, 86 N. C. 492, 497. That such is the right of a creditor in the administration of an *insolvent estate of a deceased person*,—see *Overman v. Grier*, 70 N. C. 693; *Wordsworth v. Davis*, 75 N. C. 159; *Long v. Bank of Yanceyville*, 85 N. C. 354. In *Hervey v. Edmunds*, 68 N. C. 243, an outside creditor of the defendant's intestate was permitted to assail the integrity of a judgment, for the reason that he was interested in the administration of the assets and in preventing the priority attempted to be given to the plaintiff therein.

in that event.<sup>1</sup> So, the dissolution of a corporation does not oust a court of *bankruptcy* of a jurisdiction previously obtained over its property, a proceeding in bankruptcy being a proceeding *in rem*.<sup>2</sup> So, the right of *trustees in a mortgage* of its property, executed by a corporation, to take *possession* and control of the property, and carry on the business for which the property was used, is such a right or interest in the property as survives a voluntary dissolution of the corporation.<sup>3</sup> But this is consistent with the proposition that, where a proceeding has been instituted, under a statute, by stockholders, to secure a *voluntary dissolution* of the corporation, this will exclude an independent proceeding to foreclose such a mortgage, and will remit the mortgagees to the remedy of filing their claim in the dissolution proceeding.<sup>4</sup> Especially is it true that the *voluntary* action of the stockholders in effecting a dissolution of the corporation, under the provisions of a statute, cannot be allowed to have such an effect; since this would *impair the obligation* of an existing contract. The court will, in such a case, direct the execution of the power contained in the mortgage.<sup>5</sup>

<sup>1</sup> Board of Church Extension v. Johnson, 22 Neb. 163; s. c. 34 N. W. Rep. 221.

<sup>2</sup> Platt v. Archer, 9 Blatchf. (U. S.) 559.

<sup>3</sup> Nelson v. Hubbard, 96 Ala. 238; s. c. 11 South. Rep. 428; 17 L. R. A. 375; 12 Rail. & Corp. L. J. 182.

<sup>4</sup> *Ibid.* Compare *post*, § 7022, *et seq.*

<sup>5</sup> Nelson v. Hubbard, *supra*. One court has refused to set aside a decree, foreclosing a mortgage, rendered against a corporation after it had been dissolved by a vote of its members, in accordance with a provision of its charter, although the suit had been commenced after the passage of such resolution. The case arose in this way: After the decree of foreclosure, the sale thereunder, and some other proceedings, an action

in the nature of a bill in equity was commenced, in the name of the corporation, to set aside the decree, on the ground, among others, that the court had no jurisdiction to render it. The court dismissed the bill, holding: 1. That the voluntary dissolution of the corporation did not, under the Iowa statute, take away the power to act in closing up its affairs, nor the right of the creditor to be relieved from the inequitable consequences of the dissolution. 2. That it would be presumed that the court rendering the decree pronounced the service, which was upon its last presiding officer, sufficient, and that its subsequent determination, though it might be erroneous, could not be void. 3. That if the corporation was dead at the time of the service and decree, it had never been revived, and could

§ 6728. **Effect of Dissolution after Judgment.**—It has been held that, if a corporation becomes dissolved after the recovery of a judgment by it, no *execution* can issue thereon in its name, and that if one is sued out, it may be *quashed* on showing that the corporation had become extinct before it was sued out.<sup>1</sup> In the same semi-barbarous era, it was held that where a judgment has been recovered upon a promissory note by the legal payee thereof, if the note really belongs to a corporation, which has become defunct by the expiration of its charter, equity will enjoin the collection of the judgment.<sup>2</sup>

§ 6729. **At Common Law, Dissolution Extinguishes Liability of Stockholders.**—The general rule of the ancient common law that debts owing by or to a corporation become extinguished upon the event of its dissolution, had the necessary consequence of exonerating the stockholders from their liability to pay calls to the corporation in respect of the shares for which they had subscribed.<sup>3</sup> Therefore, a stock-

not therefore have any standing in court to impeach the decree. *Muscatine Turn Verein v. Funck*, 18 Iowa, 469.

<sup>1</sup> *May v. State Bank*, 2 Rob. (Va.) 56; *s. c.* 40 Am. Dec. 726.

<sup>2</sup> *Fox v. Horah*, 1 Ired. Eq. (N. C.) 358; *s. c.* 36 Am. Dec. 48; *ante*, § 6720.

<sup>3</sup> *Malloy v. Mallett*, 6 Jones Eq. (N. C.) 345; *Paschall v. Whitsett*, 11 Ala. 472; *Merrill v. Suffolk Bank*, 31 Me. 57; *s. c.* 50 Am. Dec. 649; *Hightower v. Thornton*, 8 Ga. 486; *s. c.* 52 Am. Dec. 412. The court which rendered the first of these decisions seems to have been animated by sheer love of injustice, and, while professing to proceed according to the principles of *equity*, refused relief against the stockholders of a bank, notwithstanding the following clause in its charter: "The private property of the individual stockholders shall be liable for all the

debts, contracts, and liabilities of the corporation, in proportion to the stock subscribed by each individually." Notwithstanding this revision, it was held that a court of *equity* had no power, after the dissolution of a corporation, at the suit of a creditor of the same, to aid him in collecting his debt from the stockholders; and this is the way the court reasoned in reaching the conclusion: "The responsibility thus imposed upon the individual stockholders, is, we think, manifestly a secondary one; because it makes them liable for the debts of another person, to wit: the corporation. Such a liability was amply sufficient for the security of the creditors of the company, should they be diligent in enforcing it during the existence of the corporation; while, to have made it greater, would, in a considerable degree, have tended to defeat the purpose for which the company was

holder was not liable to garnishment, under a statute, by a creditor of a defunct corporation; because a garnishing creditor claims in right of his debtor, and whatever will disable his debtor from claiming will operate as a disability against him.<sup>1</sup> So, where, under the charter or governing statute, a judgment recovered against a corporation may be levied upon the property of any of its stockholders, a stockholder is privy to the judgment, in such a sense that he may maintain, in his own name, a writ of error, and reverse it where it has been recovered against the corporation after its dissolution.<sup>2</sup> But although the debts owing to or from the corporation are, at common law, extinguished by its dissolution, yet this does not exclude the conclusion that the individuals composing the corporation may, during its existence, incur liabilities, under the operation of statutes or otherwise, which will survive.<sup>3</sup>

**§ 6730. Modern Doctrine that the Obligations of Corporations Survive against their Assets.**—The doctrine of the common law, stated in preceding sections,<sup>4</sup> that the debts of corporations and the remedies furnished by that law for the collection of the same, die and abate with the corporation, has been generally repudiated by American courts, as odious to justice. In an opinion furnished as counsel by Chancellor Kent, after his retirement from the judicial bench, in an

created. The liability of the individual stockholders being thus secondary only for the debts of the company, it follows that when the corporation expired and its debts became thereby extinguished, their liability became extinguished also. Since there were debts of the company to be paid, the stockholders were bound to pay them, if necessary out of their private means; but when the debts of the corporation ceased to exist as such, there remained nothing upon which to attach a responsibility upon those who had been members of the defunct company." The court also found an analogy in the case of a creditor's bill

founded upon a judgment which is not in force. *Wint v. Webb*, 3 Dev. (N. C.) 27. The doctrine announced in *Von Glahn v. De Rosset*, 81 N. C. 467, though an *obiter dictum*, expresses the unquestioned rule of the American law, and necessarily involves a repudiation of the doctrine in this case.

<sup>1</sup> *Paschall v. Whitsett*, 11 Ala. 472; *ante*, § 3578, *et seq.*

<sup>2</sup> *Merrill v. Suffolk Bank*, 31 Me. 57; *s. c.* 50 Am. Dec. 649.

<sup>3</sup> *Hightower v. Thornton*, 8 Ga. 486; *s. c.* 52 Am. Dec. 412.

<sup>4</sup> *Ante*, § 6718, *et seq.*



important case,<sup>1</sup> that eminent jurist used this language: "To permit the odious and obsolete doctrine of ancient date, before moneyed institutions were introduced, to be now applied on the dissolution of a bank, perhaps by its own mismanagement and abuse, so that all its assets were to be considered as dispersed to the wind, without any owner or power anywhere to collect and justly apply, would be a disgrace to any civilized State. But this cannot be supposed to take place; the improved and enlightened administration of equity jurisprudence, in every part of our country, has taught and established sounder and juster doctrines."<sup>2</sup> This is quite in conformity with what the same celebrated jurist has laid down in his Commentaries: 'The rule of the common law has, in fact, become obsolete and odious. It never has been applied to insolvent or dissolved moneyed corporations in England. The sound doctrine now is, as shown by statutes and judicial decisions, that the capital and debts of banking and other moneyed corporations constitute a *trust fund and pledge* for the payment of creditors and stockholders; and a court of equity will lay hold of the fund and see that it be duly collected and applied. The death of a corporation no more impairs the obligation of contracts than the death of a private person."<sup>3</sup> As the death of a natural person did not, in the view of courts of equity, extinguish or impair his obligations to his creditors, but his estate remained subject to administration in those courts for the payment of his debts, as fully as though he were living, — so they have held that the dissolution of a corporation does not extinguish its contracts with its creditors. The obligation of such contracts survives, except such as, in the nature of the case, are incapable of a specific performance; and the creditor may still enforce his demands *against any property* belonging to the corporation, which has not passed into the hands of a *bona fide* purchaser.<sup>4</sup>

<sup>1</sup> Nevitt v. Bank of Port Gibson, 6 Smedes & M. (Miss.) 513, 520.

<sup>2</sup> This language was quoted with approval by Lumpkin, J., in Hightower v. Thornton, 8 Ga. 486, 493.

<sup>3</sup> 2 Kent's Com. 307, note.

<sup>4</sup> Mumma v. Potomac Co., 8 Pet. (U. S.) 281, 286; Nevitt v. Bank of Port Gibson, 6 Smedes & M. (Miss.) 513; Hightower v. Thornton, 8 Ga. 486; s. c. 52 Am. Dec. 412; Curran v. Arkansas, 15 How. (U. S.) 304, 311;

Under the operation of the modern doctrine, as already seen,<sup>1</sup> if the stockholders of the corporation have not paid their subscriptions according to the terms of their contract, or if the capital stock and property of the corporation have been divided among them, leaving its debts unpaid, every stockholder is deemed to hold a portion of the assets of the corporation; and equity will compel him to contribute to discharge its debts, *pro rata*, out of the funds of the corporation, which, in theory of equity, are in his hands.<sup>2</sup>

§ 6731. **Effect of This Doctrine on the Constitutionality of Statutes.** — From the same doctrine it follows that a legislative act dissolving a corporation, and transferring its franchises to another, is not unconstitutional, since it does not impair the obligation of its contracts.<sup>3</sup> So, it is a sound view that a man has no constitutional right not to pay his debts;<sup>4</sup> that an act of the legislature, compelling him so to do, does not impair the obligation of his contracts with his creditors, but gives validity to them; and hence that a statute providing that when a judgment is entered against an incorporated bank, ousting it of its franchises, its debtors shall not thereby be released from their debts and liabilities, and prescribing a mode for collecting such debts and enforcing such liabilities, is a valid exercise of legislative power.<sup>5</sup> A statute providing for a distribution among creditors of the property of corporations whose charters had become forfeited was likewise valid.<sup>6</sup> On the other hand, a law distributing the property

Tarbell *v.* Page, 24 Ill. 46; City Ins. Co. *v.* Commercial Bank, 68 Ill. 348; Platt *v.* Archer, 9 Blatchf. (U. S.) 559; Bacon *v.* Robertson, 18 How. (U. S.) 480; Tinkham *v.* Borst, 31 Barb. (N. Y.) 407; McCoy *v.* Farmer, 65 Mo. 244; Von Glahn *v.* De Rosset, 81 N. C. 467; Muscatine Turn Verein, *v.* Funck, 18 Iowa, 469; Howe *v.* Robinson, 20 Fla. 352; Powell *v.* North Mo. R. Co., 42 Mo. 63, 68; Hastings *v.* Drew, 50 How. Pr. (N. Y.) 254; National Pahquioque Bank *v.* First Nat. Bank, 36 Conn. 325; *s. c.* 4 Am. Rep.

80; Shamokin Valley &c. R. Co. *v.* Malone, 85 Pa. St. 25.

<sup>1</sup> *Ante*, § 2951, *et seq.*

<sup>2</sup> Hastings *v.* Drew, 50 How. Pr. (N. Y.) 254.

<sup>3</sup> Mumma *v.* Potomac Co., 8 Pet. (U. S.) 281; Platt *v.* Archer, 9 Blatchf. (U. S.) 559.

<sup>4</sup> Sparger *v.* Cumpton, 54 Ga. 355; Harris *v.* Glenn, 56 Ga. 94, 96.

<sup>5</sup> Nevitt *v.* Bank of Port Gibson, 6 Smedes & M. (Miss.) 513.

<sup>6</sup> Mudge *v.* Commissioners, 10 Rob. (La.) 460.

of an insolvent trading or banking corporation among its stockholders, or giving it to strangers, or seizing it to the use of the State, would as clearly impair the obligation of its contracts as a law, giving to the heirs the personal effects of a deceased natural person, would impair the obligation of his contracts.<sup>1</sup>

**§ 6732. Operation of This Doctrine where a Corporation Abandons its Franchises.**—It follows that a corporation cannot, by dissolving itself, defeat the rights of its creditors; but if its officers die, resign, or refuse to act, and its shareholders neglect or refuse to appoint others in their place, a court of equity, which never allows a trust to fail for want of a trustee, will interfere, and appoint a receiver or manager *ad interim* for the purpose of winding up and putting an end to the concern.<sup>2</sup> On the other hand, in conformity with a principle already stated,<sup>3</sup> the mere *non-user* by a corporation of its franchises does not, of itself, disable it from resuming them so as to bring actions to enforce its obligations; but so long as its organization remains, it may collect its dues and pay its debts, although the undertaking for which it was created has been abandoned.<sup>4</sup> The modern doctrine may perhaps be summed up in the language of the Supreme Court of Errors of Connecticut: "For the protection of creditors, it is also a well-settled rule that a dissolution of a corporation by winding up, or other act of its stockholders, or by limitation, or in any mode except legislative repeal or judicial decree,

<sup>1</sup> *Curran v. Arkansas*, 15 How. (U. S.) 304, 312, *per* Curtis, J.

<sup>2</sup> *Brown v. Union Ins. Co.*, 3 La. An. 177, 182; *Curry v. Woodward*, 53 Ala. 371, 375. In *Carlen v. Drury*, 1 Ves. & Bea. 154, which involved the question of the neglect of the managers of the association of the Bankside Brewery to act, the Lord Chancellor said: "This court is not to be required on every occasion to take the management of every playhouse and brew-house in the Kingdom.

But if the case justified the interference of the court, it may appoint a manager in the *interim*, for the purpose of winding up and putting an end to the concern. . . . But there must be a positive necessity for the interference, arising from the refusal or neglect of the committee to act." See also *Knowlton v. Ackley*, 8 Cush. (Mass.) 93.

<sup>3</sup> *Ante*, § 6659.

<sup>4</sup> *Hardy v. Merriweather*, 14 Ind. 203.

does not affect the rights of creditors; and that, as to them, and their right to enforce their claims, or determine their validity, by suit or otherwise, the corporation will be deemed to continue in existence.”<sup>1</sup>

§ 6733. **Statutes Abrogating the Common-law Rule.**—The enormous injustice of the rules of the common law already stated,<sup>2</sup> did not escape the attention of modern legislators, especially in view of the fact that many of the courts were disposed to cling to them, and even to favor them, out of, what would seem to have been, a sheer love of injustice. Statutes were therefore enacted, abolishing, in various forms and by various means, the common-law principle that the debts due by or to a corporation are extinguished with its dissolution, and providing for the survival of such debts, and for the continuation of the right of action to enforce the same. These statutes, being plainly *remedial*, have been *liberally construed*.<sup>3</sup> Whether such a statute will be construed as prescribing the remedy which is to be exclusive of all others, and which ousts the ordinary jurisdiction of courts of equity, is a more difficult question. If such a statute prescribes a *complete system of procedure* for the winding up of insolvent corporations, it may reasonably be concluded that the purpose of the legislature was to establish a course of procedure which should be exclusive,—just as the statutory system, enacted in some of the States, for administering the estates of deceased persons, is held to be exclusive of the jurisdiction formerly exercised by courts of equity upon that subject. In North Carolina, it has been held that the provisions of the code of that State,<sup>4</sup> continuing the existence of defunct corporations for three years after the expiration of their charters, for the purpose of bringing and defending suits and closing their general business, has the effect of ousting the former jurisdiction of courts

<sup>1</sup> National Pahquioque Bank v. 63, 66; Franklin Bank v. Cooper, 36 First Nat. Bank, 36 Conn. 325, 335; Me. 179; Michigan State Bank v. s. c. 4 Am. Rep. 80. Gardner, 15 Gray (Mass.), 362, 369.

<sup>2</sup> Ante, § 6718, et seq.

<sup>3</sup> Folger v. Chase, 18 Pick. (Mass.)

<sup>4</sup> Rev. Code N. C., ch. 26, §§ 5, 6.

of equity to accomplish the same result by the appointment of a receiver upon a creditors' bill. The conclusion was that a failure to proceed within the period of *three years* pointed out by the statute, would be a complete defense, not only to the corporation, but to its stockholders, who, by its charter, were individually liable in the event of its insolvency.<sup>1</sup> If the statute does not afford an adequate remedy to the creditor, a court of equity will assist him, in furtherance of the purpose and policy of the statute. It was so held under the provisions of the Mississippi act of 1843, which provided that, after a judgment of forfeiture, the debts due the bank should not be extinguished, but that a trustee should be appointed to collect them and apply the proceeds to the payment of the debts of the bank;<sup>2</sup> and it is scarcely necessary to add that if the statute does not furnish an adequate remedy, it does not oust the remedy in equity.<sup>3</sup> On the one hand, it was held that such a statute would be unconstitutional, in so far as it attempted to revive debts which had become extinguished, under the principles of the common law, before the enactment of the statute,<sup>4</sup> though it was not denied that the legislature might preserve the debts from extinction by an appropriate statute enacted before they became extinct.<sup>5</sup> On the other hand, it was held that, where a statute had been passed saving the rights of creditors of dissolved corporations, and appointing trustees to collect the assets of such corporations and administer them in the payment of their debts, a subsequent statute, cutting down the powers of the trustees, to the substantial *prejudice of the creditors of the bank*, by requiring them to sell the assets for cash, was unconstitutional.<sup>6</sup> Some of these statutes have been

<sup>1</sup> Von Glahn v. De Rosset, 81 N. C. 467.

<sup>2</sup> Commercial Bank v. Chambers, 8 Smedes & M. (Miss.) 9; Coulter v. Robertson, 24 Miss. 278; s. c. 57 Am. Dec. 168.

<sup>3</sup> Shamokin Valley &c. R. Co. v. Malone, 85 Pa. St. 25, 36, 37.

<sup>4</sup> Commercial Bank v. Lockwood, 2 Harr. (Del.) 8.

<sup>5</sup> Robinson v. Lane, 19 Ga. 337.

<sup>6</sup> Commercial Bank v. Chambers, 8 Smedes & M. (Miss.) 9; Coulter v. Robertson, 24 Miss. 278; s. c. 57 Am. Dec. 168. That the Mississippi act of 1843, saving the rights of creditors after dissolution, did not apply to banks dissolved by limitation of their charters, was held in Bank v. Duncan, 56 Miss. 166. That a statute pro-

held not to apply in the case of proceedings for the voluntary dissolution of corporations.<sup>1</sup>

**§ 6734. Statutes Continuing Existence of the Corporation for the Purpose of Suing and being Sued.**—A class of statutes of the kind under consideration merely enact that, for the purpose of winding up the concerns of a corporation after the expiration of its charter, or after it has otherwise been dissolved, its corporate powers shall continue, to the extent of prosecuting and defending actions, for a stated period, in some cases *three years*,<sup>2</sup> and in some cases *five*

viding that suits against corporations shall not abate by expiration of their charters, but that the provision shall not apply "to any corporation the affairs of which are being wound up by order of any court," etc. (Ill. Sess. Laws, 1869, p. 1, § 4), excepts only corporations which were being wound up at the time when the act took effect, and not all those in course of being wound up when a question of abatement might arise,—see *Ramsey v. Peoria &c. Ins. Co.*, 55 Ill. 311. A statute of West Virginia providing that "when a corporation shall expire or be dissolved, suits may be brought, continued, or defended in the corporate name, in like manner as before such dissolution or expiration" (W. Va. Code, ch. 53, § 59), applies to a dissolution by forfeiture of charter, as well as to voluntary dissolutions, and those decreed by equity. *Lumber Co. v. Ward*, 30 W. Va. 43; *s. c. sub. nom. Greenbrier Lumber Co. v. Ward*, 3 S. E. Rep. 227; 2 Rail. & Corp. L. J. 464.

<sup>1</sup> Thus, the continuation of the existence of corporations "dissolved by forfeiture or any other cause," provided for by the Alabama Code, § 1690, does not apply to corporations dissolved by the voluntary act of the owners of three-fourths of the stock,

under §§ 1683-1689, which supply a complete scheme or system of procedure for winding up its affairs. *Nelson v. Hubbard*, 96 Ala. 238; *s. c.* 11 South. Rep. 428; 18 L. R. A. 375; 12 Rail. & Corp. L. J. 182. So, the North Carolina statute (Rev. Code N. C., § 667, *et seq.*), providing that corporations whose charters shall have expired or been annulled, shall continue as bodies corporate for three years for the purpose of winding up their business, and that receivers shall be appointed to settle their affairs, etc.,—relates only to cases where the charters of corporations expire by limitation or are annulled by forfeiture or otherwise, and does not apply to the case where a building and loan association has been wound up by the voluntary action of its members, so as to render a judgment void which has been recovered against the corporation after the lapse of three years. *Heggie v. People's Building &c. Asso.*, 107 N. C. 582; *s. c.* 12 S. E. Rep. 275. Compare *Fox v. Horah*, 1 Ired. Eq. (N. C.) 358; *s. c.* 36 Am. Dec. 48.

<sup>2</sup> Such as Gen. Stat. Mass., ch. 68, §§ 36, 37; *Thornton v. Marginal Freight R. Co.*, 123 Mass. 32. See further as to the construction of such statutes: *Cunningham v. Clark*, 24

years.<sup>1</sup> It has been held that the rule which obtains in the construction of statutes, that the word "*may*" in a statute is to be made to read "*must*" or "*shall*," where the public interest and rights are concerned, and where the public or third persons have a claim *de jure* that the power permitted by the statute shall be exercised,—applies to a statute of the kind under consideration.<sup>2</sup> That these statutes, in so far as they fix a period of limitation within which the faculty of suing and being sued continues in the corporation, are founded in an erroneous policy, is shown by a modern decision of the Supreme Judicial Court of Massachusetts, to the effect that when the period of limitation has expired, a *judgment* recovered against the corporation is *void*.<sup>3</sup> The conclusion is based upon grounds which are strictly logical, though the result may be

Ind. 7; *Wright v. Rogers*, 26 Ind. 218; *Herron v. Vance*, 17 Ind. 595; *Blake v. Portsmouth &c. Railroad*, 39 N. H. 435; *Ferguson v. Miners' &c. Bank*, 3 Sneed (Tenn.), 609.

<sup>1</sup> Rev. Code Ala., § 1775; *Tuska-loosa &c. Asso. v. Green*, 48 Ala. 346.

<sup>2</sup> *Blake v. Portsmouth &c. Railroad*, 39 N. H. 435.

<sup>3</sup> *Thornton v. Marginal Freight R. Co.*, 123 Mass. 32, 35. In this case the statute, in substance, enacted (Gen. Stat. Mass., ch. 68, § 36) that corporate bodies should continue, after the annulment of their charters, for the term of three years for the purpose of prosecuting and defending suits by or against them, and of enabling them to settle and close their concerns and dispose of and convey their property and divide their capital stock. By the succeeding section (§ 37) the Supreme Judicial Court, sitting in equity, on the application of a creditor or stockholder, might, at any time within three years, appoint receivers, whose powers should continue as long as the court should deem necessary, to take charge of the estate and effects

of the corporation and collect the debts and property due to and belonging to it, to prosecute and defend suits in its name or otherwise, and to do all other acts which might be done by the corporation, if deemed necessary for the final settlement of its unfinished business. No application having been made for the appointment of a receiver of the particular corporation prior to the expiration of three years from the repeal of its charter, it was held that a judgment recovered against it by a creditor, after the expiration of three years from such repeal, was a nullity, and would not support a creditor's bill. The date of the repeal of the charter was May 6, 1872, and the date of the recovery of the judgment was July 18, 1875,—making it probable that the date of the commencement of the action was within the three years. The decision is consistent with the conclusion that if a receiver had been appointed within the three years, the creditor might have preferred his claim before the receiver and had it allowed and paid.

highly inconvenient, and even unjust. The reasoning is that, at common law, a judgment against a defunct corporation is void;<sup>1</sup> that an action against a corporation must abate upon the fact of its dissolution being brought to the attention of the court in which the action is pending;<sup>2</sup> and that, where the statute law provides for the continuance of the life of a corporation for a definite period of time, for the purpose of the prosecution of actions against it, when that time has expired, the condition of things is precisely the same as it would have been, if the corporation had, at that time, become dissolved without such a statute being in existence. The action against it would properly abate, and any judgment subsequently recovered in the action would be void. "And," continued Gray, C. J., "a court of equity has no general jurisdiction of a bill by a single creditor, who has not recovered a valid judgment against his debtor, and whose debtor has ceased to exist, to apply, to the payment of his debt, property of the debtor in the hands of a third party."<sup>3</sup>

§ 6735. **Further Decisions under Such Statutes.**—But where a statute, applicable to a banking corporation, extended the existence of the corporation during the period of two years, and authorized the trustees to institute actions in its name at any time within that period, and to prosecute them to final judgment,—it was held that such action, *commenced* within the prescribed period, might be *prosecuted* after the period had expired.<sup>4</sup> Where the charter of a bank provided that the bank should continue in existence until January 1, 1859, but contained a *proviso* that *all banking powers* should cease after January 1, 1857, "except those incidental and necessary to collect and close up its business," and an action of ejectment was brought against the bank during the period of its existence, and such proceedings were had therein that the action was, in the year 1862, pending in the Supreme Court of the United States on a writ of error, a motion to dis-

<sup>1</sup> *Ante*, § 6726.

<sup>2</sup> *Ante*, § 6723.

<sup>3</sup> *Thornton v. Marginal Freight R. Co.*, *supra*.

<sup>4</sup> *Franklin Bank v. Cooper*, 36 Me. 179.



miss the writ was refused, on the ground that its prosecution belonged to those "necessary and incidental powers to collect and close up its business" which were saved by the statute.<sup>1</sup> So, where a statute of Michigan provided that all corporations, whose charters expired by their own limitation, should continue to be bodies corporate for three years, for the purpose of prosecuting and defending suits by or against them, and that any suit pending in favor of a corporation, at the time of its dissolution, should not be thereby abated, but might be prosecuted by the trustees on whom its estate should have devolved, in its or their name, under the direction of the court in which the suit might be pending; and, shortly before the end of the three years next after the expiration of its charter, a corporation, established by the laws of Michigan, sold and assigned to an individual all its property and claims, upon his giving bond to pay its debts and do certain other things,—it was held that an action commenced in Massachusetts prior to the expiration of the charter, by the assignee, in the name of the corporation, might be prosecuted to judgment after the expiration of the three years.<sup>2</sup> This is in accordance with the construction put by the Supreme Court of Michigan upon the statute, which was that the purpose of the statute was not to limit, but to enlarge, the corporate privileges, so that the corporation might continue business throughout the whole charter period; for which reason it was held that it might begin legal proceedings in its own name at any time within three years after the expiration of its franchises, and continue such proceedings to a close, unless its powers should be superseded by the appointment of trustees or receivers.<sup>3</sup> Where a statute provides that, upon the dissolution of a corporation, suits against it shall not abate, the suit can be continued only upon the terms prescribed in the statute. The proper practice clearly is for the plaintiff to satisfy the court that, in the suit as continued, the proper parties will be represented. A suit

<sup>1</sup> *Pomeroy v. State Bank &c.*, 1 Wall. (U. S.) 23.

<sup>2</sup> *Michigan State Bank v. Gardner*, 15 Gray (Ma.s.), 362.

<sup>3</sup> *Bewick v. Alpena Harbor Co.*, 39 Mich. 700.

prosecuted against the defunct corporation by name, will not be binding upon the *receiver*, or other person having charge of the assets of the corporation, unless he is substituted for the corporation as defendant.<sup>1</sup>

**§ 6736. Such Statutes Applicable to Foreign Corporations.**

According to the liberal and enlightened view taken by the Supreme Court of Ohio, statutes of a State providing that suits shall not abate by the dissolution of any corporation, but that suits may be prosecuted by corporations at any time after their dissolution, apply to suits brought in the State of Ohio, in the name of a corporation organized and dissolved in another State, by its assignees in insolvency appointed in such other State. The reasoning of the court, in substance, is that such statutes are enacted to preserve the rights of, and furnish an effectual remedy to, persons entitled, by assignment or otherwise, to rights in action which have accrued to corporations during their continuance, and which must therefore be prosecuted in the name of the corporation, notwithstanding the operation of the common-law rule which forfeited all such rights on the unconditional dissolution of the corporation. The court reasoned further that, while many of the provisions of these statutes are necessarily confined to domestic corporations, those which relate to the prosecution of suits must, by a sound and just construction of them, be extended to assignees, holding such claims as these, by assignments from corporations beyond the limits of the State of Ohio.<sup>2</sup> But the Court of Appeals of New York have held that such a provision of the statute law of the State creating the corporation, is not operative outside of that State, but that the mode of continuing an action against a foreign corporation, after its dissolution, is a matter of practice governed by the law of the State of the forum.<sup>3</sup>

<sup>1</sup> McCulloch v. Norwood, 58 N. Y. 562.

<sup>2</sup> Stetson v. City Bank, 2 Ohio St. 167; reaffirmed s. c. 12 Ohio St. 577.  
As to right of action by foreign receiv-

ers and assignees, see *post*, § 7334, *et seq.*

<sup>3</sup> Sturges v. Vanderbilt, 73 N. Y. 384.

§ 6737. **What Powers may be Exercised During the Period of Continuance.** — Unless the statute is so expressed as to leave no room for construction upon this point, the implication necessarily is that, during the period to which the existence of the corporation is thus extended, no powers can be exercised by it or in its name, except such as may be necessary for the winding up of its affairs. Where the statute continued the corporate capacity of a bank for three years from its date, with all the powers necessary for collecting the debts then due to the corporation, for selling and conveying its property and finally closing its concerns, — it was held that the corporation had authority, within that period, to take a new note, in part payment or *renewal* of an old one, although the indorsers on the new note were not the same as those upon the old note.<sup>1</sup> Again, where the statute provided that corporations should be continued bodies corporate for the term of three years after the expiration of their charters, for the purpose of settling their business, but not for the purpose of continuing it, — it was held that a banking corporation was authorized, immediately before the expiration of the term of extension so limited, to indorse notes held by it to trustees appointed by it to wind up its affairs, on whom it had purported to confer, in the instrument of appointment, all of its powers. The reasoning of the court was that, the notes not having been collected before the expiration of the statutory period of extension, the bank had a clear right to sell them, or to dispose of them in any other reasonable and proper manner, so as to wind up its concerns. As it had a right to dispose of the notes to the trustees, it was no concern of the obligors therein how the money thus collected was to be disposed of.<sup>2</sup> This, it will be perceived, is merely an extension, — or rather an application, — of the settled rule of law, already considered,<sup>3</sup> that a corporation has the power to *assign* or otherwise dispose of its assets for the payment of its debts.

<sup>1</sup> *Mariners' Bank v. Sewall*, 50 Me. 220.

<sup>2</sup> *Folger v. Chase*, 18 Pick. (Mass.) 63.

<sup>3</sup> *Ante*, § 6466.

**§ 6738. Effect of Such Statutes upon the Remedies of Creditors against Stockholders.** — Where another applicatory statute prescribes that those who are stockholders when the charter of a corporation expires, shall be liable to its creditors, *the charter is deemed to expire*, in the case of a legislative repeal, *when the repealing act takes effect*, and not at the expiration of the three years permitted by such statute for the winding up of its concerns. The reason is that the effect of the statute prolonging the existence of the corporation, is merely to prolong its existence for the purpose of an administration of its estate; and that all rights in respect of its property become fixed at the date of its dissolution, although it is endowed by the statute with a nominal existence for the purpose of closing its concerns in the most convenient manner, and especially of compelling it to execute its contracts and discharge its obligations and liabilities.<sup>1</sup>

**§ 6739. Statutes Continuing the Directors and Managers as Trustees to Wind up.** — Other States have enacted statutes which, in substance, provide that, on the dissolution of a corporation, the directors or managers of its affairs at that time, shall be trustees of its creditors and stockholders, for the purpose of winding up its affairs.<sup>2</sup> Such statutes have the necessary effect of abrogating the rule of the common law that all debts due the corporation are extinguished, but they merely transfer the right of action to recover them from the corporation to the statutory trustees.<sup>3</sup> But it does not follow that if, thereafter, an action is brought in the name of the corporation, upon a contract made with the corporation while it was *in esse*, the action will fail; since, whether the action is brought in the name of the corporation, or by the directors as trustees, the substantial plaintiff is the same. Such a defect of parties plaintiff was held to be within the Missouri statute of

<sup>1</sup> Crease v. Babcock, 23 Pick. (Mass.) 334; s. c. 34 Am. Dec. 61; citing Foster v. Essex Bank, 16 Mass. 245; s. c. 8 Am. Dec. 135.

<sup>2</sup> Rev. Stat. N. Y. 600, § 9; 1 Wagn. Mo. Stat., p. 293, § 21; 1 Rev. Stat. Mo. 1879, § 744; *Ibid.* 1889, § 2513.

<sup>3</sup> McCoy v. Farmer, 65 Mo. 244.

jeoffails.<sup>1</sup> But the corporation itself may be none the less dissolved. Such a statute, unless it expresses something more than above indicated, does not have the effect of continuing the existence of the corporation, as *cestui que trust* or otherwise, so as to render it capable of defending actions in its corporate name after its charter has expired.<sup>2</sup> The effect of a statute of this kind does not arrest the running of the statute of *limitations* against any demand accruing to the corporation, upon which the directors, as trustees, acquire a right of action. A trust which has devolved upon them by the operation of the statute, is not such a trust as arrests the running of the statute of limitations, such as those trusts which are within the exclusive jurisdiction of equity, arising in cases of partnership, agency, and the like.<sup>3</sup>

**§ 6740. Does not Abate Actions against Directors for Malfeasance.**—Where a statute gives an action against the directors of a corporation for malfeasance in office, as, for instance, where it makes them personally liable for debts contracted beyond a certain prescribed limit,<sup>4</sup> the expiration of the charter, by its own limitation, while such an action is depending, does not have the effect of abating it.<sup>5</sup> But a dissolution of the corporation will have the effect of exonerating the directors as to any *future* liability. Thus, in New York, if a *receiver* of a manufacturing company is appointed before the expiration of the time allowed the trustees for making their *report*, the corporation is so far dissolved, that the trustees will not be liable to the *penalty* of the general manufacturing act,<sup>6</sup> for failing to make such a report.<sup>7</sup>

**§ 6741. Liability of Directors Continuing Business without Winding up.**—Directors who conduct the business of a corporation after the expiration of its charter, without attempt-

<sup>1</sup> *Kansas City Hotel Co. v. Sauer*, 65 Mo. 279, 287.

<sup>2</sup> *Sturges v. Vanderbilt*, 73 N. Y. 384.

<sup>3</sup> *Landis v. Saxton*, 105 Mo. 486; s. c. 203 Am. St. Rep. 403; 16 S. W. Rep. 912.

<sup>4</sup> *Ante*, § 4259, *et seq.*

<sup>5</sup> *Moultrie v. Smiley*, 16 Ga. 289.

<sup>6</sup> See *ante*, § 4226, *et seq.*

<sup>7</sup> *Huguenot Bank v. Studwell*, 74 N. Y. 621. Compare *People v. Cohocton Stone Road*, 25 Hun (N. Y.), 13.

ing to wind it up, may be required to account, in equity, in a proceeding by the stockholders to wind up the corporation.<sup>1</sup>

§ 6742. **Effect on the Power to Condemn Land.**—After the expiration of the time limited in its charter for the completion of its road, a railroad company has no power to condemn land for its right of way.<sup>2</sup>

§ 6743. **Effect upon Executory Contracts.**—In respect of contracts of such a nature as to involve a *continuing duty or liability* on the part of the corporation, the necessary effect of its dissolution is to put an end to the continuing duty or liability, and to entitle the other party to *just compensation*. This may be best illustrated in respect of contracts of *fire insurance*, where, if the insurance company becomes dissolved while the contract is in force, the contract is determined as a contract of insurance, and the insured is entitled to the *unearned pre-*

<sup>1</sup> *Mason v. Pewabic Mining Co.*, 133 U. S. 50.

<sup>2</sup> *Peavey v. Calais R. Co.*, 30 Me. 498; *Atlantic & C. R. Co. v. St. Louis*, 66 Mo. 228, 250. One court, however, forgetting the rule that where a corporation claims something, by virtue of its charter, in derogation of public right, it must put its finger on some distinct and unequivocal clause in its charter conferring upon it the privilege claimed (*ante*, § 5670),—has, in order to find some ground on which to justify a railroad company establishing and operating a track for the running of steam cars upon a public street and through a crowded portion of a populous city, discovered that where a railroad company has established its terminus at a given point in a city and kept it there for years, it may extend its line, even after the expiration of the time limited by its charter for the building of its road, under the power of building “branch roads.” In other words, the astuteness of this court discovered that the

extension of a railroad upon a right line is a “branch road.” And this decision was made against a municipal corporation endeavoring to assert, for the benefit of its citizens and the public generally, a right to have one of its highways preserved from the obstruction and nuisance of being converted into a steam railroad. This decision not only ignores the principles on which grants in derogation of public right are interpreted,—it is not only oblivious to the meaning of a common and well-understood word,—but it gravely lays down the doctrine that in such a contest a municipal corporation “is but an individual, having no more than the rights of an individual, and in no sense representing the State.” *Atlantic & C. R. Co. v. St. Louis*, 66 Mo. 228, 254, 255; reversing *s. c.* 3 Mo. App. 315. Under this disgraceful decision the railroad company could, at its mere pleasure, extend “branch roads” over any street in the city of St. Louis, and there would be no power to check it.

*mium* at the date of the dissolution.<sup>1</sup> In other cases, the obligee will be entitled to be paid, out of the assets of the dissolved corporation, compensation by way of *damages* for the *breach* of its contract.<sup>2</sup> It has been reasoned, in the English Court of Appeal, that, although a *bona fide disposition* of the property of a company, made *in the ordinary course of its trade*, after the presenting of a petition for winding up and completed before the winding up, will be confirmed as of course by the court, in the exercise of its discretion under the statute,<sup>3</sup> — yet, where such dispositions are incomplete, and rest in contract at the time of the winding-up order, the court would have discretionary power to order the contract to be fulfilled; but the obligee of the corporation, although he has paid his money, has only a general claim as a creditor for *damages* in respect of the breach of the contract. When, therefore, a customer of a trading company had, *bona fide*, ordered and paid for an invoice of goods, and the company had loaded the goods on a railway carriage marked to his address, and sent him the invoices after the presentation of a petition to wind up its affairs, but before the winding-up order had been made, — it was held that the disposition of the property was complete before the winding-up order, and the goods were ordered to be delivered to the customer.<sup>4</sup>

<sup>1</sup> Carr v. Union Mut. Fire Ins. Co., 28 Mo. App. 215.

<sup>2</sup> *Ante*, § 6688, end of last note; Re Walthshire Iron Co., L. R. 3 Ch. 443.

<sup>3</sup> Companies Act 1862, § 153.

<sup>4</sup> Re Walthshire Iron Co., L. R. 3 Ch. 443. Where a *telegraph company* had acquired, under an agreement with a railroad company, the right to maintain a line of telegraph along the right of way of the railroad company, but with the *proviso* that, "in the event of the dissolution of the telegraph company, or a suspension of operations on their part, either voluntarily or in consequence of legal process of any kind, then the railroad company shall be at liberty and are

authorized to take charge of the said telegraph line for their own purposes, with the appurtenances, until the said telegraph company shall resume active operations; and it is expressly understood that no interest which said telegraph company may have in said line shall be assignable so as to affect or impair, in any manner, the rights of such railroad company under these articles of agreement"; and before the telegraph company became dissolved by the expiration of its charter, the legislature passed an act reincorporating it for a further period, and providing that the charter of the old corporation should be deemed surrendered, and that "all the property

§ 6744. **When the Dissolution of a Corporation Takes Effect.** — If the charter of a corporation is *repealed* by a valid act of the legislature, its dissolution takes effect at the time when the repealing act takes effect, and is not postponed by a statute continuing the corporate faculties for three years for the purpose of winding up its affairs.<sup>1</sup> Where a statute provides for the winding up of a business corporation, by means of a *receiver*, it has been held that suits may be continued against it and prosecuted to judgment until a *decree* of dissolution has been *entered*, unless such actions are restrained by *injunction*.<sup>2</sup> But this is not inconsistent with the conclusion that a *judgment confessed* by a corporation, after the issuing of an order requiring all persons interested to show cause why it should not be dissolved, is void, whether confessed on a bond and warrant of attorney, or after the regular commencement of a suit.<sup>3</sup> It has been held that a creditor who recovers judgment against an insolvent corporation, after the filing of a petition for a dissolution of the corporation, though before the appointment of a receiver, acquires no lien thereby.<sup>4</sup> It has also been reasoned that the forfeiture of the franchises of a corporation, declared by judicial sentence, is incurred from the date of the *commission of the act* for which the judgment of forfeiture is rendered; but it is said in the next breath that, notwithstanding this, the corporation continues a corporation

and assets belonging to the said former corporation, of whatsoever nature and description, and all the debts and liabilities of said former corporation of whatever nature and description, shall . . . be devolved upon the said new corporation, which shall, for this purpose, be regarded as substituted by operation of law in the room and stead of the former corporation"; — it was held that, notwithstanding this reincorporation, the railroad company had the right to take possession of the line of the telegraph company, under the terms of the agreement. *Latrobe v. Western Tel. Co.*, 74 Md. 232; *s. c.*

21 Atl. Rep. 788. This decision seems clearly untenable. The plain intent of the contract was that the rights of the telegraph company should continue as long as its power to perform the duties which it undertook on its part continued.

<sup>1</sup> *Crease v. Babcock*, 23 Pick. (Mass.) 334; *s. c.* 34 Am. Dec. 61.

<sup>2</sup> *Kincaid v. Dwinelle*, 59 N. Y. 548. Compare *post*, § 6893, *et seq.*

<sup>3</sup> *Matter of Waterbury*, 8 Paige (N. Y.), 380.

<sup>4</sup> *Matter of Eagle Iron Works*, 3 Edw. Ch. (N. Y.) 385.



*de facto*, so as to render its transactions valid, until the judgment of forfeiture is actually pronounced.<sup>1</sup> Admitting the first premise, this last doctrine is founded on the necessity of the case; since the contrary rule would be dangerous to the public, who must deal continually with corporations. But the whole reasoning is misconceived. The misprision does not, *ipso facto*, work a forfeiture, but it remains with the State to say whether it will insist upon the extreme penalty of the law or *waive* it; and if the State chooses to waive it, the corporation, as we have already seen,<sup>2</sup> continues, not merely a corporation *de facto*, but a corporation *de jure*. This is the necessary conclusion from the doctrine that no other person than the State can take advantage of the cause of forfeiture.

§ 6745. **Effect of Dissolution upon Real Property of the Corporation.**—We have had occasion to note, in passing, the principle of the ancient common law that, upon the dissolution of a corporation, its *real property*, acquired by gift or grant for corporate uses, *reverts* to the donor or grantor, or his heirs;<sup>3</sup> and we have also noticed the pointed denial by Chancellor Kent that such was ever the law of England as regards *moneyed corporations*.<sup>4</sup> If Chancellor Kent was correct in this statement, a large number of American courts fell into an ignorant misconception, which was the more discreditable to them, as it resulted in a conclusion which involved the repudiation of honest debts. Nor was this misconception confined to careless or unlearned judges. Against the statement of Chancellor Kent may be opposed a learned exhaustive opinion delivered by Judge Gaston in the Supreme Court of North Carolina in 1841,—who, it may be observed, stands in the very first rank of American jurists in respect of learning

<sup>1</sup> *State v. Bank of Charleston*, 2 McMull L. (S. C.) 439; *s. c.* 39 Am. Dec. 135.

<sup>2</sup> *Ante*, § 6598, *et seq.*

<sup>3</sup> *Ante*, § 6718; *Dean &c. of Windsor v. Webb*, Godb. 211; *Edmunds v. Brown*, 1 Lev. 237; *Attorney-General v. Gower*, 9 Mod. 224; *Hooker v. Utica*

*Turnp. Co.*, 12 Wend. (N. Y.) 371; *White v. Campbell*, 5 Humph. (Tenn.) 38; *Bingham v. Weiderwax*, 1 N. Y. 509; *Folger v. Chase*, 18 Pick. (Mass.) 63, 66; *Acklin v. Paschal*, 48 Tex. 147.

<sup>4</sup> *Ante*, § 6730.

and ability. He stated the rule of the common law in the following language, and deliberately applied it to a banking corporation with the monstrous result elsewhere noted:<sup>1</sup> "We believe that the rules of the common law, governing the disposition of the property which the corporation held at the moment of death, are well settled, though differing according to the character of the property upon which they operate, as being either realty, personalty, or choses in action. The real estate remaining unsold reverts to the grantor and his heirs, 'because,' in the language of Lord Coke, 'in the case of a body politic or incorporate, the fee is vested in their political or incorporate capacity, created by the policy of man; and therefore the law doth annex a condition in law to every such gift and grant, that if such body politic or incorporate be dissolved, the donor or grantor shall re-enter, for that the cause of the gift or grant faileth.'<sup>2</sup> Goods and chattels, by the common law, were deemed of too transitory and fluctuating a nature to be susceptible of reversionary interests after an estate for life, and, on the death of a corporation, they do not revert to the grantor or donor, but, being *bona vacantia*, or goods wanting an owner, they vest in the sovereign, as well to preserve the peace of the public as in trust to be employed for the safety and ornament of the Commonwealth. Choses in action are under the operation of a different rule. They were rights of the corporation to demand money in the hands of persons by whom it was withheld. They derived their existence from contracts or quasi-contracts, by which the relation of debtor and creditor was created. When the creditor corporation died, and there was no successor, no representative, the relation of debtor and creditor ceased, and the debt became necessarily extinct. None but the creditor had a right to demand the money; and when his right is gone, the money becomes, to all purposes, the money of the possessor. These rules of the common law, except so far as they have been modified by the acts of our legislature, and excepting also those cases in which, by the

<sup>1</sup> *Ante*, § 6720, note.<sup>2</sup> Co. Litt. 136.

charters of incorporation, special provision is made in regard to the corporation property, are the law here.”<sup>1</sup>

§ 6746. **Modern Doctrine that Real Property does not Revert nor Personal Property Escheat.** — Notwithstanding this language, the author does not believe that a case can be found, decided in any of the English courts within the last hundred years, where it was held that land which had been *purchased* by an incorporated joint-stock business company, for a consideration, reverted, on the dissolution of the corporation, to the grantor or his heirs; or, where the personal property of *such* a corporation, upon the event of its dissolution, was held to escheat to the Crown. The doctrine, so far as it concerns real property, was applicable to gifts and grants to municipal and charitable corporations, for public and charitable purposes, and never had any just relation to business companies. Nevertheless, it acquired such an influence in the United States, through the blind habit of judges of following precedents beyond the original reasons on which they were founded, and after those reasons had ceased to exist, that it may be curious to note the manner in which some courts extricated themselves from it. The manner is worthy of comparison with the shallow and cowardly judicial policy, which has led judges, in past ages, to resort to *fictions* of law for the purposes of justice, — pretending to do a certain thing while doing exactly the opposite thing. As late as the year 1877, the doctrine was applied in Texas, in regard to real estate which had been donated to an educational institution which had become subsequently dissolved, — but with the *qualification* that the heirs of the grantor would hold the property subject to the burden of any debts owing by the institution.<sup>2</sup> In this way the effect of the decease of the corporation was made precisely analogous to the effect of the decease of a natural person: his land descends to his heirs, but subject to the right of his creditors to have it sold to pay his debts.

<sup>1</sup> Fox v. Horah, 1 Ired. Eq. (N. C.) 358, 361; s. c. 6 A. L. J. Dec. 48, 50, 51.

<sup>2</sup> Acklin v. Paschal, 48 Tex. 147, 175.

Again, it is to be observed that the rule of the ancient common law was never applied except as to real property, the title to which was lawfully held by the corporation *at the time of its decease*. Property which had become divested out of it, by its own act or by the act of the law, prior to its dissolution, did not so revert.<sup>1</sup> If we analyze the doctrine of courts of equity, which was first declared in this country in 1823 by Mr. Justice Story, at circuit,<sup>2</sup> on the shadowy authority of a decision rendered a century before, that the assets of a corporation are a *trust fund* for its creditors,<sup>3</sup> we shall see that it declared something more than a mere rule of procedure,—that it declared a rule for the devolution of property, which was distinctly contradictory to the rule of the common law, and which could not co-exist with it. When it is said that property is a trust fund for any purpose, the meaning necessarily is that the *legal title is in the trustee for the purposes of the trust*. Applying this principle to the subject under consideration, it is plain that, in the case of real property held by a corporation at the time of its decease, the legal title to its real property, which stood in the corporation at the time of its decease as a trustee for its creditors, could not revert to the donor or grantor thereof, or to his heirs, but that the title must necessarily *lapse*, until a court of equity, which never allows a trust to fail for want of a trustee, should appoint a new trustee,—generally a receiver,—to execute the trust. The only title which, in the face of this equitable doctrine, could pass to the donor, or grantor, or his heirs, was what is frequently called the *naked legal title*. In the hands of the holders of this title, the property would still be subject to the trust, and a court of equity would, if necessary to the due execution of the trust, charge them as trustees. But the point is that, in logic and sense, there cannot be two adversary owners of the same property, whose title is recognized by the law of the same sovereign. If one is the owner, the other is not;

<sup>1</sup> State v. Rives, 5 Ired. L. (N. C.) 297; Davis v. Memphis &c. R. Co., 87 Ala. 633, 637.

<sup>2</sup> Wood v. Dummer, 3 Mason (U.S.), 308.

<sup>3</sup> Ante, §§ 1569, 2951.

and hence, if the trust fund doctrine is the law, the title, for that reason alone, does not revert to the donor or grantor, or his heirs. The same reasoning may be applied, *mutatis mutandis*, to the subject of the escheating of the personal property of corporations to the State,—with the additional statement that no American case is believed ever to have been decided, in which such escheat was enforced in respect of a business joint-stock corporation. The modern rule then is, that, upon dissolution, the title to *real property* does not revert to the original grantors, or their heirs, and the *personal property* does not escheat to the State, but that both species of property vest in a *receiver* or other *trustee*; and that all the property, real and personal, of the corporation, is to be administered by him for the benefit of creditors and stockholders.<sup>1</sup>

§ 6747. **Effect of Dissolution upon Secondary Franchises, Such as Rights of Way, etc.**—The *secondary franchises* of a corporation,—that is to say, the peculiar *privileges* or *rights* which it may have received from the legislature under its *charter* or incorporating act, or from a municipal corporation under an *ordinance* by way of a *license*,—are in the nature of *property*, and do not revert to the State upon the death of the corporation, but, being vendible,<sup>2</sup> pass to a receiver or other representative of the corporation, among its other assets, to be administered for the benefit of its creditors; and the corporation may make a valid sale thereof, in like manner with its other property,<sup>3</sup> before it is dissolved.<sup>4</sup> This may be illustrated by considering the subject of the *right of way* of a railroad company which has been acquired by the *condemnation of land* of private owners and the payment of damages to them, under the right of eminent domain, which the State has delegated to the corporation, in view of the public use which the corporation has been created to subserve. While it has

<sup>1</sup> Owen v. Smith, 31 Barb. (N. Y.) 641; Towar v. Hale, 46 Barb. (N. Y.) 361.

<sup>2</sup> Ante, § 5352.

<sup>3</sup> Ante, § 5415.

<sup>4</sup> Bailey v. Platte &c. Milling Co., 12 Colo. 230; s. c. 21 Pac. Rep. 35; Davis v. Memphis &c. R. Co., 87 Ala. 633; Pollard v. Maddox, 28 Ala. 321; People v. O'Brien, 111 N. Y. 1.

been said that the right thus acquired is co-extensive with the life of the corporation,<sup>1</sup> yet the reasoning in the same case, and in other cases, plainly shows that the right is property, which is vendible in execution, and which passes under a sale foreclosing a mortgage covering the properties and franchises of the corporation.<sup>2</sup> The rule that the real property of a corporation reverts to the donor or grantor, or his heirs, does not, therefore, extend to the right of way of a railroad company, which has been transferred to another person or corporation under a sale foreclosing a mortgage.<sup>3</sup> It has been aptly said, with reference to such a case, that "it is the public use for which the land is taken, and so long as it is used for railroad purposes it is immaterial what company or what individuals operate it."<sup>4</sup> Such property does not revert to the donor or his heirs upon any theoretical dissolution of the corporation which may take place in consequence of the mere non-user of its franchises, although, according to the reasoning of one case, the period of *non-user* had reached the term of *forty years*.<sup>5</sup> But the State may, in the case of a non-user, by a *second* exercise of the right of eminent domain, vest the right of way in another corporation, which will carry out the purposes of the condemnation, upon paying compensation to the preceding corporation, which has failed to carry out such purposes.<sup>6</sup>

**§ 6748. Effect of the Repeal of a Charter.**—A statute authorizing a corporation to surrender its charter and be dissolved is not invalid as infringing the obligation of the contracts

<sup>1</sup> Davis v. Memphis &c. R. Co., *supra*.

<sup>2</sup> *Ibid.*; Allen v. Montgomery R. Co., 11 Ala. 437; Pollard v. Maddox, 28 Ala. 321. Compare People v. O'Brien, *supra*; ante, § 5415.

<sup>3</sup> Davis v. Memphis &c. R. Co., 87 Ala. 633, 637.

<sup>4</sup> *Ibid.*; citing 2 Wood Railw. Law, § 242.

<sup>5</sup> Davis v. Memphis &c. R. Co., 87 Ala. 633, 639.

<sup>6</sup> Noll v. Dubuque &c. R. Co., 32 Iowa, 66. This case involved the application of a statute providing for the transfer to another company, of a right of way condemned by a railroad company, upon the failure of the earlier company to construct its road within the period of ten years, upon the later company making compensation to the earlier company.

subsisting between the corporation and third persons. The obligation of its contracts survives. The theory is that, by the nature of its political existence, a corporation is subject to dissolution, by a surrender of its corporate franchises, and by a forfeiture of them for willful misuser and non-user. Every creditor must be presumed to understand the nature and incidents of such a body politic, and to contract with reference to them. The existence of the private contracts of the corporation does not force upon it a perpetuity of existence.<sup>1</sup> Upon the same principle, a statute annulling a corporation and repealing its franchises does not extinguish its property rights acquired during its corporate existence, nor affect the rights of stockholders and creditors to use and enjoy such property.<sup>2</sup> Such an act cannot take away or impair the remedy of a creditor against it for previously incurred liability, or affect a pending suit against it.<sup>3</sup> But, outside of the operation of this principle, where the power to repeal a charter has been reserved to the legislature, the act of repeal has precisely the same effect upon the corporation that a judicial dissolution has. The corporation is thereby *extinguished*, and is consequently incapacitated from suing or being sued in a court of law, except so far as the capacity may be continued by the repealing act, or by some other operative statute.<sup>4</sup> A corporation which has *illegally organized* in such a sense as to have no valid existence, can acquire no property in moneys which have been advanced by private parties for its use, since *nothing* cannot acquire property in *something*. It follows that a statute forfeiting the assets of such an organization does not affect the title to moneys loaned to its officers for its use.<sup>5</sup>

§ 6749. **Affects Rights of its Assignees.**—It was adjudged in 1849 in Mississippi, in a case exciting great interest, upon the decision of which a number of other like cases depended,

<sup>1</sup> *Mumma v. Potomac Co.*, 8 Pet. (U. S.) 281.

<sup>2</sup> *People v. O'Brien*, 45 Hun (N.Y.), 519; s. c. affirmed, 111 N. Y. 1; *ante*, § 5415.

<sup>3</sup> *Blake v. Portsmouth &c. Railroad*, 39 N. H. 435.

<sup>4</sup> *Whitman v. Cox*, 26 Me. 335; *Read v. Frankfort Bank*, 23 Me. 318.

<sup>5</sup> *Com. v. France*, 3 Brews. (Pa.) 148.

—that, where a banking corporation assigns a promissory note by mere delivery and without indorsement, and afterwards its charter is forfeited in a judicial proceeding, the assignee cannot sue at law, but must bring a bill in *equity*, because an assignment without indorsement passes an equitable title merely; and it was consequently held that the trustees appointed under a statute to wind up the bank could not bring the action to the use of the beneficial owner of the note, because the statute only vested in them the legal title co-extensive with the *beneficial rights* which the bank itself possessed.<sup>1</sup> But where a corporation had assigned rights during its existence, and a controversy in respect thereto was pending on appeal when its charter expired, in an action brought in the name of the corporation for the benefit of the assignee, the appellate court permitted the cause to proceed in the name of the corporation, for the sake of protecting the rights of the assignee, without noticing on the record the fact of the dissolution.<sup>2</sup>

§ 6750. **Extent of Title of Trustees to Wind up.**—Statutory trustees have whatever title the governing statute gives them.<sup>3</sup> It was said, with regard to the trustees appointed under the Mississippi act of 1843, to wind up insolvent banks, that they were appointed for a particular purpose, and were authorized to collect only such debts as belonged to the bank. They were so far the legal representatives of the bank as to authorize suits to be brought in their names, but not for any other purposes than those expressed in the act. They could not, therefore, allow a suit to be brought in their names to the use of an assignee of commercial paper of the bank,

<sup>1</sup> *Bacon v. Cohea*, 12 Smedes & M. (Miss.) 516. This would not be the rule under the modern codes of procedure, which require all actions to be brought in the name of the real party in interest.

<sup>2</sup> *Bank of Alexandria v. Patton*, 1 Rob. (Va.) 499. In *United States v. Alexander*, 4 Cranch C. C. (U. S.)

311, a bill by a creditor of a bank, after its dissolution, against other creditors of the bank, alleging that the directors had agreed to assign their claims to the plaintiff, was held not sustainable, because the charter had expired.

<sup>3</sup> See, as to the title of *receivers*, *post*, § 6917, *et seq.*



where the assignment had been made without an indorsement, so as not to pass the legal title, but only to pass an equitable title.<sup>1</sup> Trustees, under the same statutes, had no rights whatever as to debts or notes assigned by the bank before the forfeiture of its charter.<sup>2</sup> While such trustees could sue to recover debts due to the bank,<sup>3</sup> they were not so far substituted in the place of the bank as to be clothed with every naked, legal title which was in the bank, but they possessed no power except where the bank had a beneficial interest.<sup>4</sup> It was said, in another case, that the trustees appointed under that statute did not differ materially from a trustee appointed by contract.<sup>5</sup>

§ 6751. **Whether Trustee to Wind up Sues in the Name of the Corporation.**—Whether a trustee appointed under a statute to wind up an insolvent corporation brings action upon choses in action payable to it, in the name of the corporation or in his own name as trustee, depends upon the system of pleading in the particular jurisdiction. Under the common-law rule of pleading he must, as we have already seen,<sup>6</sup> sue in the name of the corporation to his use as trustee. The fact that the charter of a corporation has expired by limitation does not necessarily disable the trustees, to whom it has previously made a general *assignment* of its assets, from prosecuting actions to recover its debts in its corporate name for their use, where the common-law rule of pleading is in force.<sup>7</sup> Where the charter of a bank had been judicially forfeited and a judgment which the bank had recovered against a third person had been revived in the name of E. P., its trustee appointed under a statute to wind up its affairs, and the judgment was filed as a claim against the estate of the judgment debtor, who had died insolvent,—

<sup>1</sup> Bacon v. Cohea, 12 Smedes & M. (Miss.) 516, 524.

<sup>2</sup> Grand Gulf &c. Co. v. State, 10 Smedes & M. (Miss.) 428.

<sup>3</sup> Nevitt v. Bank of Port Gibson, 6 Smedes & M. (Miss.) 513.

<sup>4</sup> Bacon v. Cohea, *supra*.

<sup>5</sup> Commercial Bank v. Chambers, 8 Smedes & M. (Miss.) 9, 13.

<sup>6</sup> *Ante*, § 3570. See also *post*, § 6979.

<sup>7</sup> State v. Bank of Washington, 18 Ark. 554. Compare Bank of Alexandria v. Patton, 1 Rob. (Va.) 499.

it was held to be immaterial that it was filed in the name of the bank which had become defunct; since regularity of pleading is not required in such cases, and the vouchers showed that the claim was preferred by a party capable in law of asserting it, and that for all substantial purposes it ought to be regarded as the claim of the trustee.<sup>1</sup>

**§ 6752. Effect of Consolidation of Corporations.**— We have already considered that species of *dissolution* of a corporation which takes place where it is *consolidated* with another corporation, and where its existence is merged in that of the latter; or where two corporations are united, so that, in a sense, the existence of each is merged in the existence of the *new corporation* which is formed by the union, — with the conclusion that such a union is *not a dissolution of either corporation*, such as affects any substantial rights existing against it or its property, although it may affect remedies and methods of procedure.<sup>2</sup> A corporation becoming consolidated with another, and changing its name, pending a suit against it, is *not so dissolved*, nor its original liability so extinguished, that the suit *abates*.<sup>3</sup> On the other hand, where a judgment is recovered against a consolidated corporation, and, after the rendition thereof, the *consolidation is dissolved* in a judicial proceeding, the judgment creditor is entitled to *execution*, upon motion, *against either of the corporations*; since his judgment is not impaired by the decree of separation. The reason given for this conclusion is that the order dissolving the union of the two corporations cannot affect the plaintiff, nor destroy the validity of his judgment, as he was not a *party* to the proceeding, nor, in any sense, bound by it.<sup>4</sup>

<sup>1</sup> *Robertson v. Agricultural Bank*, 28 Miss. 237.

<sup>2</sup> *Ante*, § 365, *et seq.*; § 395, *et seq.*

<sup>3</sup> *East Tennessee &c. R. Co. v. Evans*, 6 Heisk. (Tenn.) 607.

<sup>4</sup> *Ketcham v. Madison &c. R. Co.*, 20 Ind. 260. Where a promissory note had been made payable to a corporation formed by the illegal union

of two corporations, which union had been subsequently dissolved in a judicial proceeding, and the decree of dissolution had directed the assignment of the note to one of the corporations, which corporation assigned it to the plaintiff, — it was held that if the consolidated corporation was to be regarded as existing *de facto*, be-

## § 6753. Effect of Dissolution upon Unexpired Leases. —

This subject is considered in another title,<sup>1</sup> with the conclusion that the receiver or assignee in bankruptcy of a corporation is *not bound to accept onerous property*, because this would be in violation of the rights of the creditors. While it seems clear enough that a dissolution of a corporation will terminate mere *tenancy at will*,<sup>2</sup> yet it has been held that a lease to a corporation is not terminated by the dissolution of the corporation, and that the receiver appointed to wind up its affairs will be required to pay rent due under the lease.<sup>3</sup> But the true principle is believed to be that, in respect of rent accrued at the time of the dissolution, the lessor is entitled only to take his dividend on the footing of other unsecured creditors; that if the receiver elects to remain in possession of the property, he must pay full rent in accordance with the terms of the lease; but that, if the receiver elects to surrender the premises to the lessor, the lessor then has a claim against the corporation, on the footing of *damages* for the *breach* of the *contract* of lease; and that, when the amount of these damages is adjudicated in the proper proceeding, he must take his *pro rata* dividend upon that amount, just as other creditors take their *pro rata* dividends upon the amounts due from the corporation to them.

## § 6754. Effect of Dissolution in a Foreign Jurisdiction. —

As a corporation is an artificial being, which exists only by

fore it was declared illegal, so that the assignment of the note under the decree of court passed the legal title, then the delivery of the note by it, under the decree, to the company which assigned it to the plaintiff, was sufficient and was well pleaded; and that if, on the other hand, the consolidated company was regarded as never having had even a *de facto* existence, then it was a case where a promissory note had been made payable to a *fictitious payee*, and that any *bona fide* holder might therefore sue upon it, and need not aver in his

complaint that he was a *bona fide* holder. *Farnsworth v. Drake*, 11 Ind. 101. The court also advanced the theory that possibly, although the companies were in an illegal partnership, a joint interest in the subject-matter of the note inured to them as joint payees, so that the transfer might, under that theory, be good. *Ibid.*

<sup>1</sup> *Post*, § 6998.

<sup>2</sup> *Lea v. Hernandez*, 10 Tex. 137.

<sup>3</sup> *People v. National Trust Co.*, 82 N. Y. 283.

force of the statute creating it, and as it must, for all constituent purposes, reside in the place of its creation,<sup>1</sup> it necessarily follows that, when it becomes dissolved in the State or country of its creation, in any mode known to the laws of such State or country, it is dissolved everywhere else; so that any action depending against it in a judicial tribunal in another State or country, will *abate*, upon the fact of its dissolution in the State or country of its domicile being brought to the attention of the court.<sup>2</sup> On the other hand, if a corporation is maintaining an action in the courts of a State other than the State of its creation, the action will abate upon the expiration of its charter, in like manner as though the action were depending in the State of its creation. And in such case it has been held that the action will not be *revived*, by virtue of a subsequent statute of the State of its creation, authorizing the trustees of its property to maintain actions to enforce its rights.<sup>3</sup> But this decision belongs to a class of barbarous holdings, very disgraceful to American jurisprudence, which are to the effect that an assignment of the property of a person or corporation taking place in one State, by operation of law, will not be allowed to receive effect in another State, except on a principle of comity, and then not to the prejudice of the rights of citizens of such other State,<sup>4</sup>—one of whose rights is not to pay their honest debts due to foreign creditors. It has been held that a statute of the State of the domicile of a corporation, making its directors and managers *trustees* for the purpose of winding up its affairs, is not operative outside of the State creating the corporation, for the purpose of continuing actions against it; but that the mode of continuing actions against foreign corporations is a matter of practice governed by the law of the forum.<sup>5</sup> Where a cor-

<sup>1</sup> *Ante*, § 688; *post*, ch. 193.

<sup>2</sup> *Farmers' &c. Bank v. Little*, 8 Watts & S. (Pa.) 207; *s. c.* 42 Am. Dec. 293.

<sup>3</sup> *Bank of Gallipolis v. Trimble*, 6 B. Mon. (Ky.) 599.

<sup>4</sup> *Post*, § 7334, *et seq.*

<sup>5</sup> *Sturges v. Vanderbilt*, 73 N. Y. 384. That a judgment recovered in Ohio against an insurance corporation organized under the laws of New York, which had voluntarily submitted itself to the jurisdiction of the Ohio court, was valid, although the

poration had been effectually dissolved by a judicial sentence in the State of its creation, and there had been what was called in that State, a *devolutive appeal*, it was held that the *reversal*, on the appeal, of the judgment of dissolution, did not have the effect of *reviving* an action commenced in Pennsylvania by *foreign attachment* against the assets of the corporation, which action had *abated* in consequence of the dissolution;<sup>1</sup> but the decision seems unsound, although an attempt was made to support it on theories of the ancient law.<sup>2</sup>

§ 6755. **Further of Foreign Dissolutions.**—It was held, in Maine, that a judgment of a court of New York, adjudging a dissolution of an insurance corporation created under the laws of that State, and appointing receivers to wind up its concerns, would not prevent an action, commenced against the corporation in Maine prior to the dissolution, from proceeding to judgment, unless it was shown that the corporation was *utterly extinct*; and the court professed to discover, in certain statutes of New York, that the effect of dissolving a corporation in a statutory proceeding under those statutes, appointing receivers of its assets, and perpetually enjoining

corporation had been dissolved, and a receiver of its effects had been appointed in New York, pending the action in Ohio,—was held in *McCullough v. Norwood*, 36 N. Y. Super. 180.

<sup>1</sup> *Farmers' &c. Bank v. Little*, 8 Watts & S. (Pa.) 207; s. c. 42 Am. Dec. 293.

<sup>2</sup> Upon the last point, the effect of the reversal of the Louisiana judgment of forfeiture, the court reasoned, upon the authority of *Drury's Case*, 8 Coke Rep. 142 b, that *collateral things executory* stand as if the reversed judgment had never been in force, but that *collateral things executed* are not divested. Consequently, it was held in that case that the reversal of a judgment against a debtor in execution was no reversal of a judgment

against a sheriff for his escape. The court also directed attention to the case of *Appesley v. Joe*, Cro. Jac. 645, in which it was held that the reversal of a judgment against a principal was no reversal of the judgment against his bail. "The principle," said Gibson, C. J., "has been established by many decisions; and it leads to the inevitable conclusion that the reversal of the judgment which had dissolved the foreign attachment by dissolving the existence of the defendant, did not restore it to the case of an action pending by relation to the time when the defendant in the attachment was defaulted, or make the judgment against him the less a judgment against a party defunct." *Farmers' &c. Bank v. Little*, *supra*.

it from the further exercise of its franchises, was not such a dissolution, in the State of New York, as would disable it from being a party to a pending action; and the court concluded that it could not give a greater effect in Maine, to the decree of the court in New York dissolving a corporation, than the decree was entitled to receive in the State where rendered.<sup>1</sup> The court seems to have misconceived the effect of the decree in New York, in so far as it ascribed to it the effect of producing only a *quasi* dissolution. We have already seen<sup>2</sup> that the effect of such a decree is totally to suspend rights of action against the corporation in New York, and to render judgments recovered in such actions not merely reversible on error, but absolutely *void*. Where an action was brought in the State of Illinois, against an insurance corporation created under the laws of Missouri, and having real estate in Illinois, and such real estate was attached in the action in Illinois, and the corporation was dissolved in a judicial proceeding in Missouri, and its affairs were put into the hands of a receiver there, but the decree of dissolution provided that suits might be brought and defended in the name of the corporation, — it was held by the Supreme Court of Illinois that the action in Illinois would not be abated by the dissolution of the corporation in Missouri, especially on the mere *suggestion* of the Superintendent of Insurance of Missouri, who had not made himself a *party* to the proceeding in Illinois.<sup>3</sup>

<sup>1</sup> Hunt v. Columbian Ins. Co., 55 Me. 290; s. c. 92 Am. Dec. 592.

<sup>2</sup> Ante, § 6726.

<sup>3</sup> Life Association of America v. Fassett, 102 Ill. 315. The court held that the suggestion by the Superintendent of Insurance in Missouri, of the dissolution of the corporation, was properly struck from the files, as his appearance was limited to the purpose of making the suggestion, and as he did not submit to the jurisdiction of the court, and as the suggestion, considered as a *plea in*

*abatement*, was bad, because not *verified* by affidavit. *Ibid.* The effect of a decree by a provisional or *revolutionary government*, — the Rivas-Walker Government of Nicaragua, — dissolving a corporation, at a time when the government was not yet recognized by the United States, was considered in a number of cases in New York: Hamilton v. Accessory Transit Co., 26 Barb. (N. Y.) 46; Murray v. Vanderbilt, 39 Barb. (N. Y.) 140; Lea v. American Atlantic &c. Canal Co., 3 Abb. Pr. (N. Y.) 1.

§ 6756. **Effect on Criminal Offenses Denounced by the Charter.**—In some of the charters which were enacted by the State legislatures during the period when corporations were created by special charters, there were penal clauses intended to punish offenses against the rights of the corporation,—such as a clause making it a *felony*, punishable by imprisonment in the penitentiary, to *embezzle* the funds of the corporation. It was held by the Supreme Court of Tennessee that such a statute was *unconstitutional*, on the ground that it entailed a deprivation of liberty otherwise than by the *law of the land*, which was held to be a *general law* applicable to the whole State.<sup>1</sup> But the tendency of the judicial decisions seems to have been to uphold the constitutionality of such provisions, on the ground that it was not a valid objection that prohibitions designed for the benefit of the corporation were guaranteed by a public penalty.<sup>2</sup> Penal provisions, in acts creating corporations or amending their charters, have accordingly been upheld, in the case of an act amending the charter of a village, which prohibited the sale of *ardent spirits* within a distance of four miles.<sup>3</sup> It is a principle in the construction of penal or criminal statutes, that where a statute denounces the criminal offense, the power to punish the offense dies with the statute, unless there is a saving clause in the repealing act.<sup>4</sup> Under the operation of this principle, there can be no conviction for a criminal offense denounced by a statute, unless the statute was in force *both at the date of the commission of the offense and at the date of the judgment*.<sup>5</sup> When, therefore, a penal statute is repealed without any sav-

<sup>1</sup> *Budd v. State*, 3 Humph. (Tenn.) 483; *s. c.* 39 Am. Dec. 189.

<sup>2</sup> *Com. v. Cain*, 14 Bush (Ky.), 525, 537.

<sup>3</sup> *O'Leary v. Cook County*, 28 Ill. 534. In *Kane v. People*, 8 Wend. (N. Y.) 203, there was a conviction, under a clause in the act of incorporation of a turnpike road and bridge company, making it a *misdemeanor* on the part of the president and in-

dividual directors, for the time being, to *fail to keep the road in repair*. The validity of the statute does not seem to have been questioned.

<sup>4</sup> *Com. v. Welch*, 2 Dana (Ky.), 331; *Yeaton v. United States*, 5 Cranch (U. S.), 281; *Com. v. Marshall*, 11 Pick. (Mass.) 350; *s. c.* 22 Am. Dec. 377.

<sup>5</sup> *Com. v. Marshall*, *supra*.

ing clause, after a conviction thereunder, the effect of the repeal is to arrest the judgment; and if the repealing statute enacts a new statute on the same subject, no sentence can be pronounced under the new statute, although it inflicts the same punishment.<sup>1</sup> Under the operation of this principle, if the charter of a corporation makes criminal the doing of a certain act relating to the corporation or to its funds,—as for instance, the *embezzlement* of its funds by its *officers*,—there can be no punishment for the offense, after the *charter* has *expired* by its own limitation.<sup>2</sup>

§ 6757. **Effect of Expiration of Charter on Torts Afterwards Committed.**—While it is a general principle that, after the charter of a corporation has expired, it is not even a corporation *de facto*,<sup>3</sup> yet it has been held that, where a private business corporation continues to do business after the expiration of its corporate existence, as fixed by its charter, it will be liable to be sued in a court of law for a tort committed after that time.<sup>4</sup> The court proceeded upon the ground that the corporation remained, after the expiration of its charter, a corporation *de facto*, which, as elsewhere seen,<sup>5</sup> is not the general conception.

§ 6758. **Effect upon Highways, Railways, etc.**—Where a turnpike company is incorporated for the purpose of establishing a certain road which is “declared in the charter to be a public highway forever thereafter,” a *de facto dissolution* of the corporation, by an *abandonment* and *non-user* of its franchises, will not work a *discontinuance of the highway*, but it will continue to be a public highway, and a person or corporation will be indictable for obstructing it.<sup>6</sup> In regard to a *railroad*, which is also a public highway, it was held by the Supreme Court of Pennsylvania, after great consideration,

<sup>1</sup> Hartung v. People, 22 N. Y. 95.

s. c. 13 Am. St. Rep. 903; 8 S. E. Rep.

<sup>2</sup> Com. v. Cain, 14 Bush (Ky.), 525.

600; 35 Am. & Eng. Corp. Cas. 460.

<sup>3</sup> Ante, § 530.

<sup>4</sup> Ante, §§ 530, 6651.

<sup>5</sup> State v. Western North Carolina

<sup>6</sup> Miller v. Coal Co., 31 W. Va. 836; R. Co., 95 N. C. 602.



but by a divided court, three judges against two, that, where the legislature, in granting a charter to a railroad corporation, has reserved the right to repeal it, and has subsequently exercised this right, the franchises are resumed by the State, and *the railroad remains public property*; that the corporators are not entitled to compensation for the deprivation of the property, for they did not own it, it being the property of the corporation; and that a commissioner, appointed by the Governor under authority granted by the repealing act, to take charge of the railroad and operate it, will not be enjoined in the performance of his duties.<sup>1</sup> Under the principles of the ancient common law, the effect of a repeal of the charter of a railroad company would be, that the land acquired by the company, in virtue of its right of eminent domain, would revert to the original owners or their heirs, unless, prior to its extinguishment, the railroad company had made a valid conveyance of its right of way.<sup>2</sup> It has been reasoned that if the right to maintain a *ferry* has been granted, as a mere *incident* to the right conferred in a charter to maintain a *turn-pike road*, so as to render travel over the road feasible, a forfeiture of the turnpike franchise will operate as a forfeiture of the privilege of maintaining the ferry.<sup>3</sup>

**§ 6759. Effect of Voluntary Dissolution.**—The dissolution of a corporation by the voluntary act of its stockholders does

<sup>1</sup> *Erie &c. R. Co. v. Casey*, 26 Pa. St. 287. The opinion seems to be clear enough, so far as it relates to the power of the legislature to exercise the right, which it had reserved, of depriving the corporators of the franchise of being a corporation; but it seems to be plainly wrong, in so far as it upholds the right of the State to take possession, without compensation to the stockholders, of the railroad, which was not public property in the sense in which the court used the term, but was the private property of the corporation, in fiction of

law, and of the corporators in real substance, sense, and justice. In fact, the act of the legislature was a mere judicial confiscation, and would have been of no validity under the fourteenth amendment of the constitution of the United States, which forbids the States to deprive citizens of their property without due process of law, — which amendment, however, was not in existence at that time.

<sup>2</sup> *State v. Rives*, 5 Ired. L. (N. C.) 297.

<sup>3</sup> *Darnell v. State*, 48 Ark. 321.

not have any greater effect in putting an end to the powers of the corporation, than would be produced by an expiration of its charter or a decree of forfeiture. It does not destroy the power to wind up its affairs, nor displace the rights of creditors.<sup>1</sup>

**§ 6760. Reviving Dissolved Corporations.**—Corporations may be revived by the legislature after they have become dissolved *de jure*;<sup>2</sup> but the act of revival will not operate to displace any rights which have been acquired in consequence of the dissolution. Thus, it has been held that where, under principles of the common law, the debts of the corporation become extinguished in consequence of its dissolution, the obligation to pay those debts cannot be restored, under the principles of American constitutions, by an act *reviving* the corporation.<sup>3</sup>

**§ 6761. Does not Invalidate Acts of Corporation de Facto.** Where a judgment of dissolution is rendered in consequence of informalities and irregularities in the attempt of the corporators to *organize* themselves into a corporation, transactions had in good faith between the pretended corporation and others, before the institution of the *quo warranto* proceedings, will be valid, upon the principle which upholds, for the protection of third persons, the acts of corporations *de facto*.<sup>4</sup>

<sup>1</sup> *Muscatine Turn Verein v. Funck*, 18 Iowa, 469.

<sup>2</sup> It has been held that a decree, by which an act of incorporation is annulled, and the corporation dissolved, "*except for certain purposes*," declaring that the corporation shall only continue in existence for the purposes specified, and appointing *receivers* of its assets and business,

does not operate to extinguish the corporation, in such sense that it cannot be revived by repeal of the decree, or by other governmental acts recognizing the corporation as existent. *Lea v. American Atlantic & C. Canal Co.*, 3 Abb. Pr. (N. S.) (N. Y.) 1.

<sup>3</sup> *Ante*, § 6733, p. 5320.

<sup>4</sup> *Society Perun v. Cleveland*, 42 Ohio St. 481.

## CHAPTER CLVII.

### QUO WARRANTO.

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§ 6767. **Origin and Early Use of the Writ of quo Warranto.**—The origin and early use of the writ of *quo warranto* is thus stated by Mr. Freeman in a learned note: “The writ of *quo warranto*, having its origin at some unascertained period, early in the history of the common law, was a *high prerogative writ*, in the nature of a *writ of right* for the King against one who usurped or claimed any office, franchise, or liberty of the Crown, to inquire by what authority he supported his claim, in order to determine the right. It also issued in cases of the misuser or non-user of a franchise, commanding the respondent to show by what right—“*quo warranto*,”—he exercised the franchise, having never had any grant of it, or having forfeited it by neglect or abuse.<sup>1</sup> If the respondent could not establish his right, the franchise or office, as it might be, was forfeited to the Crown. As many of the charters under which the franchises were claimed had been destroyed in the numerous insurrections under which the country suffered, or had been otherwise lost, sufficient authority for the exercise of the royal grants could not, in very many instances, be shown; and the Crown became enriched at the expense of its subjects. The writ was especially calculated to subserve the purposes of a grasping monarch, as the right of the respondent to his office, liberty, or franchise was heard before commissioners of the King’s own appointing. To correct the abuse of the royal prerogative, and to afford some opportunity for a fair and convenient hearing, the statutes of Gloucester,<sup>2</sup> and *de quo warranto novum*,<sup>3</sup> were passed. These statutes secured the right of a trial before the

<sup>1</sup> Citing 3 Bla. Com. 262-264; High on Extr. Rem., § 592.

<sup>2</sup> 6 Edw. I., 1278.

<sup>3</sup> 18 *Ibid.* 1290.

justices on their circuits, and confirmed those franchises resting in prescription, or claimed under charter granted within the time of Richard I., or granted prior thereto, but since allowed.”<sup>1</sup>

§ 6768. Rise of the Information in the Nature of *quo Warranto*.—Mr. Freeman, in the same learned note, thus sketches the rise of the *information in the nature of quo warranto*: “This writ was of a civil nature, forfeiting or annulling some franchise, or ousting the respondent from its exercise; and, being a writ of right, it was conclusive upon the Crown. These features of the proceeding, together with the reason that, with the discontinuance of justices in eyre,<sup>2</sup> the statute 18 Edw. I. lost its efficacy, led to the introduction of the speedier remedy, and one not so binding upon the Crown, of informations in the nature of *quo warranto*. This remedy was criminal in its nature, and not only forfeited the usurped or misused franchise to the Crown, but also punished the usurper. Like the original writ of *quo warranto*, the precise date of the appearance of this information is unknown. It grew up side by side with the older writ, and gradually supplanted it. It was a *criminal proceeding*, and warranted the imposition of a *fine* for the usurping of the King’s liberties; but the fine fell to a nominal amount, and the information existed merely as a substitution for the original *quo warranto*. Thus far the contest in respect to a given franchise was carried on under the writ of *quo warranto*, or information in the nature thereof, between the Crown and its subjects only. The province of the information was, however, greatly enlarged by the statute of 9 Anne,<sup>3</sup> which gave to private individuals the power of proceeding thereunder against anyone who had unlawfully usurped or intruded into any office or franchise. This act, one of vast importance, is preserved in substance in the majority of the States of the Union.”<sup>4</sup>

<sup>1</sup> Note to *People v. Rensselaer &c.*  
R. Co., 30 Am. Dec. 45; s. c. 15  
Wend. (N. Y.) 113.

<sup>2</sup> 2 Coke Inst. 498.

<sup>3</sup> Ch. 20, anno 1711.

<sup>4</sup> Note to *People v. Rensselaer &c.*  
R. Co., 30 Am. Dec. 45; s. c. 15  
Wend. (N. Y.) 113.

§ 6769. **Terms of the Fourth Section of the Statute of Anne.**—That portion of the statute of Anne<sup>1</sup> which describes the procedure under such informations, is as follows: “And be it further enacted by the authority aforesaid, that from and after the said first day of Trinity term, in case any person or persons shall usurp, intrude into, or unlawfully hold and execute any of the said offices or franchises, it shall and may be lawful to and for the proper officer, in each of the said respective courts, with the leave of the courts respectively, to exhibit one or more information or informations in the nature of a *quo warranto*, at the relation of any person or persons desiring to sue or prosecute the same, and who shall be mentioned in such information or informations to be the relator or relators against such person or persons so usurping, intruding into, or unlawfully holding and executing any of the said offices or franchises, and to proceed therein in such manner as is usual in cases of information in the nature of a *quo warranto*; and if it shall appear to the said respective courts, that the several rights of divers persons to the said offices or franchises may properly be determined on one information, it shall and may be lawful for the said respective courts to give leave to exhibit one such information against several persons, in order to try their respective rights to such offices or franchises; and such person or persons, against whom such information or informations in the nature of a *quo warranto* shall be sued or prosecuted, shall appear and plead as of the same term or sessions in which the said information or informations shall be filed, unless the court where such information shall be filed shall give further time to such person or persons against whom such information shall be exhibited, to plead; and such person or persons who shall sue or prosecute such information or informations in the nature of a *quo warranto*, shall proceed thereupon with the most convenient speed that may be; any law or usage to the contrary thereof in any wise notwithstanding.”

<sup>1</sup> Stat. 9 Anne, ch. 20, anno 1711.

§ 6770. **Theory of the Information against Corporations.** The writ of *quo warranto* and the *information* in the nature of *quo warranto* have been used against corporations, and against persons claiming corporate franchises from the earliest times.<sup>1</sup> The ancient theory of the remedy was that a franchise is a portion of the royal prerogative, granted to the subject and existing in his hands, and that to misuse or usurp this delegated right is an infringement upon the rights of the sovereign; and accordingly, as elsewhere seen,<sup>2</sup> the form of the judgment anciently was that the franchise be seized into the King's hands. In the United States, the sovereign power resides in the State, the Commonwealth, or the people, according to various theories, and the information in such a case proceeds on the same theory.<sup>3</sup> The theory is, that "it is a tacit condition of a grant of incorporation that the grantees shall act up to the end or design for which they were incorporated; and hence, through neglect or abuse of its franchises, a corporation may forfeit its charter as for condition broken, or for a breach of trust"; and that, "where there has been a misuser or a non-user in regard to matters which are of the essence of the contract between the corporation and the State, and the acts or omissions complained of have been repeated and willful, they constitute a just ground of forfeiture."<sup>4</sup>

§ 6771. **Scope of the Remedy.**—Under the writ of *quo warranto*, and the *information* in the nature of *quo warranto* which supplanted it, four classes of usurpations or intrusions might be redressed: 1. Usurpations of or intrusions into public offices; 2. Usurpations of corporate or other franchises by individuals; 3. Usurpations of franchises by private corporations; 4. Usurpations of franchises by public or municipal

<sup>1</sup> Mr. Freeman in note to People v. Rensselaer &c. R. Co., 30 Am. Dec. 48; s. c. 15 Wend. (N. Y.) 113.

<sup>2</sup> Post, § 6806.

<sup>3</sup> People v. Utica Ins. Co., 15 Johns. (N. Y.) 358; s. c. 8 Am. Dec. 243;

State v. Milwaukee &c. R. Co., 45 Wis. 579; State v. Barron, 57 N. H. 498.

<sup>4</sup> Com. v. Commercial Bank, 28 Pa. St. 383, 389; High Ex. Rem., § 648; ante, § 6609.

corporations. So far as it is used to oust intruders into public offices, it is not germane to this work, and decisions of that class will be referred to only so far as they relate to questions of procedure which are equally applicable where it is used in respect of corporations.

§ 6772. **Must be Prosecuted by the State.**— Unless the statute law expressly allows proceedings, having for their end the dissolution of corporations, to be commenced and prosecuted by *private individuals*, the *rule of law* is that such a proceeding can only be prosecuted by the State, and not then unless authorized by the legislature.<sup>1</sup> If there is no individual founder or donor, *the legislature are the visitors* of all corporations founded by them for public purposes, and may direct judicial process against them for abuses or neglects which, by the common law, would cause a forfeiture of their charters.<sup>2</sup>

§ 6773. **Such Actions Brought by the Attorney-General.** Under nearly all statute provisions relating to the prosecution of actions by or on behalf of the State, for the forfeiture of corporate charters or franchises, the action is brought by the Attorney-General, or by the People, or the State, on the relation of the Attorney-General.<sup>3</sup> This is a principle of procedure which we have inherited from England; and it is to be observed that the same rule obtains in Canada, where proceedings to declare forfeited the charter of a corporation created under a statute of the Dominion, are brought by the Attorney-General.<sup>4</sup>

§ 6774. **When without a Private Relator.**— It is doubtful whether any general rule can be stated upon this subject, because the practice is no doubt influenced in most of the States by local statutes; but in the absence of statutes vary-

<sup>1</sup> *Com. v. Union &c. Ins. Co.*, 5 Mass. 230; *s. c.* 4 Am. Dec. 50; *Rigin v. Union Bank*, 18 La. An. 677; *ante*, §§ 6768, 6769.

<sup>2</sup> *Amherst Academy v. Cows*, 6

*Pick. (Mass.)* 427, 433; *s. c.* 17 Am. Dec. 387, *per Parker, C. J.*

<sup>3</sup> *Ante*, § 770.

<sup>4</sup> *Dominion Salvage &c. Co. v. Attorney-General*, 21 Can. S. C. 72.



ing the rule, it must undoubtedly be, for reasons amplified in a former chapter,<sup>1</sup> that whether a proceeding shall be prosecuted to oust a corporation of any or all of its franchises, must be determined in the first instance by the Attorney-General, or at least by the executive department of the government, in the absence of an express statute requiring the Attorney-General to institute such a proceeding; and that, under our American governmental systems, such a proceeding cannot, in the absence of statutory authorization, any more be instituted and carried on by a private relator, using the name of the State as the nominal plaintiff, than an ordinary prosecution for a crime can be instituted and carried on by a private prosecutor, without the intervention of the Attorney-General or the prosecuting attorney of the particular district, circuit, or court. The point of divergence begins with the statute of Anne, already quoted.<sup>2</sup> This statute has extended the use of the information in the nature of *quo warranto* to cases where *persons* usurp, intrude into, or unlawfully hold and execute *offices* or *franchises*; and it provided that the information might be filed "at the relation of any person or persons desiring to sue or prosecute the same." This statute extended only to *individuals* usurping offices or franchises in corporations, private or municipal, and *not to corporations as a body*; so that, under this statute and its congeners, an information in the nature of a *quo warranto* will not lie against the whole corporation as a body, at the relation of a private person.<sup>3</sup> This statement of doctrine is varied in some deci-

<sup>1</sup> *Ante*, § 6598, *et seq.* In *Martindale v. Kansas City &c. R. Co.*, 60 Mo. 508, it is said that the only exception to the rule which prohibits collateral inquiry by a private citizen into the supposed illegal acts of a corporation, is where such investigation is expressly authorized by the legislature. But this is not true, either in the abstract or concrete; it is simply an instance of judicial over-argument.

<sup>2</sup> *Ante*, § 6769.

<sup>3</sup> *Com. v. Union Fire &c. Ins. Co.*, 5 Mass. 230; *s. c.* 4 Am. Dec. 50; *Rex v. Carmarthen*, 2 Burr. 869; *s. c.* 1 W. Black. 187; *Rex v. Ogden*, 10 Barn. & C. 230. But in a subsequent case it was ruled, distinguishing the last case, that the court will grant a *quo warranto* information at the instance of a private relator, against a member of a corporation, on grounds affecting his individual title, although

sions. Thus, in one case it was said by Lord Tenterden, C. J.: "If any number of individuals claim to be a corporation without any right so to be, that is an usurpation of a franchise; and an information against the whole corporation as a body, to show by what authority they claim to be a corporation, can be brought only by and in the name of the Attorney-General."<sup>1</sup>

§ 6775. **Further of This Subject.**—The general rule, accordingly, is, that the right to file an information in the nature of a *quo warranto*, or to institute any form of proceeding to arrest the alleged usurpation of the franchises of a corporation, private or municipal, does not belong to the individual citizen, but rests in the State, and, in the absence of statutory direction, in the discretion of its Attorney-General.<sup>2</sup>

it be suggested that the same objections apply to the title of *every member*, and, therefore, that the application is, in effect, *against the whole corporate body*. *Rex v. White*, 5 Ad. & El. 613; *State v. Paterson & Turnp. Co.*, 21 N. J. L. 9, 11.

<sup>1</sup> *Rex v. Ogden*, 10 Barn. & C. 230, 233.

<sup>2</sup> *Post*, § 6780; *Robinson v. Jones*, 14 Fla. 256; *Com. v. Union Fire & Ins. Co.*, 5 Mass. 230; *s. c.* 4 Am. Dec. 50; *Com. v. Lexington & C. R. Co.*, 6 B. Mon. (Ky.) 397; *State v. Leonard*, 3 Tenn. Ch. 177; *Rice v. National Bank*, 126 Mass. 300; *State v. Paterson & Turnp. Co.*, 21 N. J. L. 9; *Com. v. Farmers' Bank*, 2 Grant Cas. (Pa.) 392; *Wilmersdoerffer v. Lake Mahopac Imp. Co.*, 18 Hun (N. Y.), 387 (under N. Y. Rev. Stat. 463, § 38); *State v. Douglas County Road Co.*, 10 Or. 198; *State v. Smith*, 32 Ind. 213; *State v. Attorney-General*, 30 La. An., pt. II., 954. That, under the code of Tennessee, §§ 3412, 3413, the Attorney-General is a necessary party to a bill to have the franchises of a corporation declared forfeited for a

failure to comply with the provisions of the charter, — see *State v. White's Creek Turnp. Co.*, 3 Tenn. Ch. 163. And see *Wagner v. Vestry & c.* of Christ Church, 9 Rich. Eq. (S. C.) 155. An information in the nature of *quo warranto* under statutes of Massachusetts (Gen. Stat. Mass., ch. 145, §§ 16, 24) will not lie without the intervention of the Attorney-General, against the stockholders of a corporation organized under Mass. Stat. 1870, ch. 224, if the forms of law in the organization of the corporation have been complied with, and the certificate issued by the secretary of the Commonwealth, as provided by section 11, although the *certificate was obtained by fraud*. *Rice v. National Bank*, 126 Mass. 300. Private individuals, who have no interest other than as citizens, residents, and taxpayers of a *municipal corporation*, cannot maintain a proceeding by *quo warranto* against such a corporation. If the injury is one that particularly affects a person, he has his right of action; if it affects the whole community alike, their remedy is by pro-

But, as already seen,<sup>1</sup> a court of equity powers may, on the theory of protecting private rights, *enjoin*, at the suit of a private individual, the *ultra vires* acts of a corporation; and with this doctrine in view, it is sometimes said that the only remedy of a private person, interested in a franchise alleged to be unlawfully exercised, is by *injunction*.<sup>2</sup> Again, it is said in Pennsylvania,—and this probably expresses the law in most American jurisdictions,—that in questions involving merely the administration of corporate functions or duties which touch only individual rights, such as the election of officers or the admission of members, the writ of *quo warranto*, or an information in the nature of that writ, may issue, either at the suit of the Attorney-General, or of any person interested in prosecuting the same.<sup>3</sup>

§ 6776. **Relator must be Interested.**—We have, then, the general principle that, where the question of the usurpation of franchises by a corporation affects the *public generally*, and *not a private person in particular*, the public alone can proceed, through its Attorney-General or other prosecuting officer; and we must now deal with the corresponding question that, where the usurpation is one which also affects the rights of a private individual, so that a private individual may file the information as relator, such private individual, in order to be *qualified* to institute and maintain the prosecution, *must be interested* in ousting the defendant of the franchise usurped. And the rule is that one who has no other interest in a corporation than that which is *common to every citizen*, cannot be a relator for the purpose of prosecuting such an information. In other words, the law does not give the writ to a *private* relator in the case of a violation of *public* right, involving no grievance *peculiar to him*.<sup>4</sup>

ceedings by the State, through its appointed agencies. *Miller v. Palermo*, 12 Kan. 14; *Voisin v. Leche*, 23 La. An. 25.

<sup>1</sup> *Ante*, § 4519.

<sup>2</sup> *State v. Smith*, 32 Ind. 213.

<sup>3</sup> *Murphy v. Farmers' Bank*, 20

Pa. St. 415. As to the practice under the *Missouri statute providing for a private relator*,—see Rev. Stat. Mo. 1879, § 984; *Ibid.* 1889, § 2835; *Tyree v. Bingham*, 100 Mo. 451.

<sup>4</sup> *Com. v. Allegheny Bridge Co.*, 20 Pa. St. 185; *Murphy v. Farmers'*

§ 6777. **Right of State's Attorney to Control Proceedings.**—It must follow, from the foregoing, that where the proceeding is instituted for the purpose of *dissolving a corporation*, although at the instance of a private relator, such *relator is not a proper party*, and has not the right to control, on the part of the plaintiff, the course of the litigation, but that it may be dismissed, in the discretion of the State's attorney. The ground of the decision is that a private relator cannot be a party to the proceeding—is a mere stranger,—and that if his name is put in the information, it is *surplusage*.<sup>1</sup>

§ 6778. **When the Recital of a Private Relator is Surplusage.**—Where, under the foregoing principles, the Attorney-General has a right to file the information *ex officio*, for a purpose affecting the public right, and where the intervention of a private relator is not proper, if the information recites that it is filed on the relation or information of a person named, it is not thereby vitiated, but the statement may be *rejected as surplusage*.<sup>2</sup> So, the fact that an information was filed in the name of the Attorney-General without his knowledge or authority, on relation of the claimant to an office, is not necessarily ground for dismissing the information: the relator in such a case may be permitted to *withdraw from the proceeding*.<sup>3</sup> So, where an information, filed by the Attorney-General in behalf of the State, was stated to be "*at the request of J. R.*," a private individual, these words were rejected as surplusage.<sup>4</sup> And where the Solicitor-General, in an informa-

Bank, 20 Pa. St. 415; Com. v. Philadelphia &c. R. Co., 20 Pa. St. 518; Com. v. Cluley, 56 Pa. St. 270; s. c. 94 Am. Dec. 75; State v. Vail, 53 Mo. 97, 109; State v. Paterson &c. Co., 21 N. J. L. 9; State v. Smith, 32 Ind. 213 (under § 749 of the Code of Ind.). It has been held, in such a proceeding against certain individuals who assume to act as the *trustees* of an *incorporated village*, that if a private relator is required who is interested in the controversy, a relator who is an in-

habitant of the described territory is qualified. State v. Jenkins, 25 Mo. App. 484. But, under the principles of the common law, as already seen, no relator would be necessary in such a case.

<sup>1</sup> State v. Douglas County Road Co., 10 Or. 198. See next section.

<sup>2</sup> People v. Geneva College, 5 Wend. (N. Y.) 211, 220; State v. Douglas County Road Co., 10 Or. 198.

<sup>3</sup> People v. Knight, 13 Mich. 230.

<sup>4</sup> State v. City Council of Charleston, 1 Mills (S. C.), 36.

tion against one for usurping a public office, recited *an order of the house of representatives*, requesting him to file such information, and stated that he filed the same by virtue of the authority of and in compliance with said order, the court refused to quash the information as not having been duly filed, considering that it was, notwithstanding such recital and statement, filed by the Solicitor-General *ex officio*.<sup>1</sup>

**§ 6779. When Attorney-General Ordered to File Information.**—It must be apparent that there are many cases where the public rights are *primarily* involved, and yet where individual rights are *secondarily* involved, in such a sense that the individual suffering the wrong can have no adequate redress unless the Attorney-General institutes such a proceeding. If, in such a case, he declines, in the exercise of his mere *discretion*, to institute the proceeding, is the individual, for that reason, to remain remediless? It has been ruled that if the Attorney-General, in a proper case, declines to make application for leave to file the information, the court will *peremptorily* order him to make it, or appoint some other person to do so.<sup>2</sup> But when the settled doctrine is considered, that the right to forfeit the franchises of a corporation, which has incurred legal grounds of forfeiture, is one which the State can, at its mere pleasure, exercise through its proper officers, insist upon, or *wave*,<sup>3</sup>—it must be concluded that the Attorney-General cannot be compelled, in any form of judicial proceeding, to institute such an action for the purpose of ousting a corporation of its franchises,—at least, unless there is a *mandatory statute* requiring him to proceed. To hold otherwise would involve a total denial of the principle that such a proceeding cannot be instituted at the suit of a mere private relator. It has accordingly been held that a *rule* will not be granted, at the instance of private individuals, to require the solicitor-general to file an information in the nature of a *quo warranto* against a corporation, for the purpose of seizing its franchises.<sup>4</sup>

<sup>1</sup> Com. v. Fowler, 10 Mass. 290.

<sup>3</sup> *Ante*, § 6598, *et seq.*

<sup>2</sup> Re Bank of Mt. Pleasant, 5 Ohio, 249.

<sup>4</sup> Com. v. Union &c. Ins. Co., 5 Mass. 230; s. c. 4 Am. Dec. 50.

On the same principle, a *mandamus* has been refused, at the instance of private persons, to compel the Attorney-General to bring a suit for the forfeiture of the charter of a private corporation,—the court holding that it was *discretionary* with him whether or not to bring such a suit.<sup>1</sup>

**§ 6780. Whether the Attorney-General must have Express Statutory Authorization to Sue.**—In an opinion where the question was examined with great force of reasoning by Mr. Justice Roberts,<sup>2</sup> the conclusion was reached that, to authorize the institution of a suit in the name of the State to forfeit the charter of a corporation, it is not necessary that the legislature should, by some general or special statute, have authorized and directed it to be brought; and further, that a provision in the constitution of that State, that “two-thirds of the legislature shall have power to revoke and repeal all private corporations by making compensation for the franchise,”—is not a limitation upon the power of the State, confining it to that mode of revocation alone. Although there was no general or special statute authorizing either the Attorney-General, or the district attorney of the district in which the proceeding was instituted, to institute a proceeding of that nature, yet it was pointed out that it lay in the power of the King, under the British constitution, to direct his Attorney-General to institute such a proceeding, and that in this country the law officers of the State must necessarily proceed without such a direction, as the office of the Governor in that regard is, in the absence of statute, merely advisory. But the statute defining the duties of the district attorney make it his duty “to attend all terms of the District Court, to conduct all prosecutions for crimes and offenses cognizable in such court, to *prosecute* and defend *all other actions in which this State is interested*, and to perform such other duties as may be prescribed by the constitution and laws of the State”; and in the case under con-

<sup>1</sup> *State v. Attorney-General*, 30 La. An., pt. II., 954.

<sup>2</sup> Hon. Oran M. Roberts, afterwards Chief Justice, and still later

Governor of Texas,—one of the most distinguished judges which that State has produced.

sideration, the Attorney-General and the prosecuting attorney joined in filing the information. Nevertheless, the court did not rest its conclusion upon the language of the statute relating to the office of the district attorney, though the learned judge reasoned that, primarily, he was the proper officer to institute such actions, corresponding and advising with the Attorney-General. But the court rested its view chiefly on the conclusion that it is the duty of the Attorney-General, derived from the principles of the common law, to institute such actions, *ex officio*, whenever a corporation has, by the misuser or non-user of its franchises, forfeited its right to exist,—just as it is the duty of the law officers of the State to institute criminal prosecutions, without the special or general direction of statutes. In conclusion, the court said: “If we look beyond our own State, we find nothing in the decisions of other sister States which favors the view that the right to bring this action is not vested in the Attorney-General or district attorney; but, on the contrary, much inferentially to establish that it is the judicial sentiment of the whole country that such a right does exist where it is not expressly reserved.”<sup>1</sup> In Maryland, there is a statute which seems to limit the power of the Attorney-General to institute such proceedings to cases where he “shall be authorized by the Governor,” etc.<sup>2</sup> Under this statute, the Court of Appeals of that State regarded it as clear that proceedings, by *scire facias* or otherwise, against a corporation for the forfeiture of its charter, could not be maintained, except by the sanction and authority of the legislature; yet a special act of the assembly for that purpose was not required. It was competent for the legislature, instead of passing a special act authorizing such proceedings to be instituted in the particular case, to *authorize them by a general law*, such as the statute above referred to, and such as had been done by other statutes in that State.<sup>3</sup>

<sup>1</sup> State v. Southern Pacific R. Co., 24 Tex. 80, 114–120. The course of reasoning of the opinion is also to the effect that, to hold otherwise would give corporations an exemption from the

ordinary operation of the laws, which does not extend to private individuals.

<sup>2</sup> Md. Acts 1868, ch. 471, § 176.

<sup>3</sup> State v. Consolidation Coal Co., 46 Md. 1. The reasoning of some of

§ 6781. **Whether Attorney-General or District Attorney.** Under the revised code of North Carolina an information in the nature of a writ of *quo warranto* against a corporation for a decree of forfeiture must be filed in the name of the Attorney-General of the State, and cannot be instituted in the name of a solicitor of a judicial circuit.<sup>1</sup>

§ 6782. **Against Whom Brought.**—If the information has for its object to oust the defendants from acting as a corporation, and to test the fact of their incorporation, it must be filed *against the individuals*; but if the object is to effect the dissolution of a corporation which has an actual and admitted existence, or to oust such a corporation of some franchise which it is unlawfully usurping, the information must be filed *against the corporation*.<sup>2</sup>

§ 6783. **When Necessary to Obtain Leave to File Information.**—The writ of *quo warranto* was, as already seen,<sup>3</sup> a writ of right at common law, and the right to have it issued did not, hence, depend upon judicial discretion. It is said that, prior to the statute of Anne, the information in the nature of *quo warranto* was exclusively a prerogative remedy, employed to punish a usurpation of the privileges of the Crown, and in this respect resembled the writ of *quo warranto*. It was filed on the *Attorney-General's own motion*, and did not depend on the permission of the court.<sup>4</sup> Where it is still

the judges in *Com. v. Fowler*, 10 Mass. 290, seems to indicate their understanding that the Solicitor-General in that State had the power to institute such a proceeding without any statutory direction, general or special.

<sup>1</sup> *Houston v. Neuse River Nav. Co.*, 8 Jones L. (N. C.) 476.

<sup>2</sup> *People v. Rensselaer &c. Co.*, 15 Wend. (N. Y.) 113; *s. c.* 30 Am. Dec. 33, 37; *State v. Barron*, 57 N. H. 498, 502. But, where the real object of the information was to oust a corporation of its franchises by reason of its failure to make certain returns of its tolls,

required by its governing statute,—it was held that the information was properly filed against the individuals composing the corporation (*State v. Barron*, 57 N. H. 498); though this seems opposed to the principle above stated, which was admitted by the court in its opinion. *Transfer of the proceeding to equity* under a peculiar statute of New Hampshire: *Ibid.* 370.

<sup>3</sup> *Ante*, § 6767; *State v. St. Louis &c. Ins. Co.*, 8 Mo. 330.

<sup>4</sup> Mr. Freeman, in note to *People v. Rensselaer &c. R. Co.*, 30 Am. Dec. 46; *s. c.* 15 Wend. (N. Y.) 113.



employed by the Attorney-General for public objects, *ex officio*, and without a private relator, the proceeding may still be instituted by him upon his own motion and *without leave* asked.<sup>1</sup> There is confusion in the American decisions upon the question whether leave to file the information is not necessary in all cases, and in some of the cases where such leave has been denied there was no private relator.<sup>2</sup> But it is clear that, where the information is filed *at the instance of a private relator*, it is indispensable that the leave of the court to file it must first be obtained; and to this principle the writer has not discovered any exception. The necessity of obtaining leave grew out of the statute of Anne, which, as already seen,<sup>3</sup> required, in terms, that such leave should be obtained. Lord Mansfield described the policy of the statute of Anne in the following language: "The statute of 9 Anne, chapter 20, had a view to the speedy justice to be done against usurpers of offices in corporations, as well as to quiet the possession of those who had right. And that act does not leave it to the discretion of the officer, as it was before; but puts it in the discretion of the *court*. Therefore, the court must exercise a discretion. It would be very grievous that the information should go of course; and it would be a breach of trust in the court to grant it as of course. On the contrary, the court are to *exercise a sound discretion* upon the particular circumstances of every case."<sup>4</sup> This principle, that leave to file such an information is a matter of discretion, has been adopted in several American jurisdictions;<sup>5</sup> and cases are found in which

<sup>1</sup> Darley v. Queen, 12 Clark & Fin. 520; Attorney-General v. Delaware &c. R. Co., 38 N. J. L. 282; Com. v. Walter, 83 Pa. St. 105; s. c. 24 Am. Rep. 154; State v. Vail, 53 Mo. 97; High Ex. Rem., § 707.

<sup>2</sup> See, for instance, People v. Sweeting, 2 Johns. (N. Y.) 184, where a motion was made by the Attorney-General for leave to file an information against an acting supervisor of a county, and was denied.

<sup>3</sup> Ante, § 6769.

<sup>4</sup> Rex v. Wardroper, 4 Burr. 1963, 1964. To the same effect, see Rex v. Dawes, 4 Burr. 2120; Rex v. Sargent, 5 T. R. 466.

<sup>5</sup> State v. Centreville Bridge Co., 18 Ala. 678; People v. Sweeting, 2 Johns. (N. Y.) 184; People v. Waite, 70 Ill. 25; People v. Callaghan, 83 Ill. 128; Com. v. Arrison, 15 Serg. & R. (Pa.) 127, 133; s. c. 16 Am. Dec. 531; State v. Lehre, 7 Rich. L. (S. C.) 234,

the courts have refused leave to file an information at the suggestion of a private relator, even when a valid objection to the defendant's title has been shown.<sup>1</sup> The true distinction seems to be that where the proceeding is instituted by the Attorney-General in virtue of his official powers, in pursuance of legislative authorization, leave to file the information is not necessary; whereas, it is necessary in all cases where the proceeding is instituted by the Attorney-General, the prosecuting attorney of the district, or otherwise, *at the suit of a private relator*.<sup>2</sup>

**§ 6784. Circumstances under Which Leave Denied.**—If leave to file the information is prayed for by a *private relator*, so that the court has a *discretion* to grant or refuse it,<sup>3</sup> then the principle which is applicable to discretionary judicial action in other cases,—that it is not subject to review in a higher

246; *State v. Tolan*, 33 N. J. L. 195; *State v. Fisher*, 28 Vt. 714; *Com. v. Cluley*, 56 Pa. St. 270; *s. c.* 94 Am. Dec. 75. In this last case the Pennsylvania statute is examined at considerable length, and the practice thereunder stated. The provisions of the statute of 9 Anne, chapter 20 (*ante*, § 6769), were held to have been incorporated into the Revised Code of Pennsylvania, though they were not at first adopted in that State.

<sup>1</sup> *Rex v. Parry*, 6 Ad. & El. 810; *s. c.* 2 Nev. & P. 414; *State v. Tolan*, 33 N. J. L. 195; *Com. v. McCarter*, 98 Pa. St. 607, 615; *Com. v. Swank*, 79 Pa. St. 154, 157; *Gilroy v. Com.*, 105 Pa. St. 484, 487.

<sup>2</sup> *Ante*, § 774. It is said by Mr. Freeman, in the learned note already quoted from, that even since the statute of Anne, so far as the proceeding may still be employed by the Attorney-General for strictly public purposes, it may be resorted to without leave asked. "But where it is used to determine rights of private individuals, other reasons come in. Here,

the machinery of the government is set in motion on the relation, as it is called, of a private person. The Crown officer's name is used, because the proceeding is supposed to interest the public as well as the individual relator; and to guard against imposition upon the government, and to prevent the interference of persons actuated by improper motives, the permission of the court was first to be obtained before the information could be filed. This distinction is still preserved, where statutory modifications have not established another rule. It can be very easily understood, however, that in this country, where the people have so prominent a part in the filling of offices, a relator would not be wanting in case of a usurpation, so that the proceeding by the Attorney-General on his own motion has been rendered rare." Mr. Freeman, in note to *People v. Rensselaer & c. R. Co.*, 30 Am. Dec. 46; *s. c.* 15 Wend. (N. Y.) 113.

<sup>3</sup> *Ante*, § 774.

tribunal except in cases where the discretion has been plainly *abused*,—must obtain.<sup>1</sup> It must also be obvious that no very definite rule or rules can be discovered and laid down for the guidance of courts in the exercise of such a discretion, but that most must be left to the sense of justice of the judge, enlightened by his knowledge of the law. Nevertheless, cases are found in which judges have endeavored to lay down rules for the exercise of this discretion, and perhaps the most important of these is one decided by Lord Mansfield, C. J., in the English King's Bench, in 1767, where the proceeding was under the statute of Anne. The court had occasion to consider, at some length, the circumstances under which they would allow an information under the statute to be filed, or rather, the circumstances under which they would *not* allow it to be filed. The substance of their resolution was: 1. That they would not allow such an information to be filed where the relators themselves did not come into the court with *clean hands*, as where the relators, by their own conduct, had drawn the corporation into the very course of conduct which they were now alleging as the ground for ousting the particular person of his corporate franchise; 2. That they would also consider the *motive* and the *purpose* with which the information had been presented; and 3. The *consequences* of granting it. Where the motives were unworthy and corrupt, of such a character that the relators stood in the attitude of endeavoring to approve, through the action of the court, of their own wrong, the court unanimously held that "the cause of the King and the public, for the usurpation of a franchise, ought not to be trusted in *such hands*." Nor did the court neglect to consider that the consequences of granting the information

<sup>1</sup> In a case decided in the Supreme Court of Ohio in 1831, it was stated, among other things, that "upon the return of the rule [to show cause], the court, upon hearing, will sustain or refuse the application, as circumstances and proofs may show *to be right*." *Re Bank of Mt. Pleasant*. 5 Ohio, 249. A case is found, however,

where the court to which the information was presented having refused leave to file it, its action was reviewed and its judgment *reversed*, on the ground that the affidavits disclosed "probable ground" for allowing the information to be filed, and for awarding the writ. *People v. Callaghan*, 83 Ill. 128.

might be fatal to the borough, "and an example thereby set that men may lie in wait and lay a scheme for many years to draw a corporation into acts which they may afterwards, for occasional and corrupt views, turn to their destruction." And, with a good deal more emphatic talk of the same kind, leave to file the information was refused.<sup>1</sup> An American court has, in like manner, ruled that where a state of facts is shown which *make it inequitable* that the relator should have the remedy sought, the court, in the exercise of its discretion, may properly discharge the rule to show cause, and refuse leave to file the information.<sup>2</sup> It was in one case said by Lord Kenyon, C. J. (the other judges agreeing),—"If the prosecutor had clearly appeared to have stood in the same situation with the defendant whose title he attacked, that would have had its weight with me; . . . or, if it had appeared that the corporation would be dissolved in consequence of the loss of so considerable a number of its members, that also would have been a good reason for refusing this application."<sup>3</sup> The application was for leave to file such an information against one claiming to be a burgess of a certain borough. In a

<sup>1</sup> *Rex v. Dawes*, 4 Burr. 2120.

<sup>2</sup> *People v. Waite*, 70 Ill. 25. The relator, who, it would seem, was already an incumbent of the office, claimed that he had been lawfully elected to the *office of school trustee*, and that the respondent had usurped the office, etc. The affidavit showed that the respondent was himself elected to the office by the qualified voters of the town; but the relator insisted that election was void, for the reason that it was not held at the *place* designated in the notice required by law to be posted prior to holding it. The counter-affidavits showed that the relator participated in the election; that he voted thereat, and was himself a candidate in opposition to the respondent. Mr. Justice Scott said: "The relator knew then, as well as now, what irreg-

ularities had intervened in the conduct of the election; and he ought not to be permitted to disturb the public welfare by having an election declared void in which he participated, with full knowledge of all irregularities that existed. A sound public policy forbids it. The only informality charged is that the election was held at an improper place. This fact was known to relator. He uttered no complaint at the time, but submitted his claims to the office to the voters of the town voting at that place, and claimed the right to, and did have his own vote recorded. These facts make it inequitable that he should have the remedy sought. And the court, in the exercise of a sound legal discretion, properly discharged the rule." *Ibid.* 27.

<sup>3</sup> *Rex v. Bond*, 2 T. R. 767, 771.

later similar case it was said that where the circumstances tend to *throw suspicion on the motives* of the relator, the court would require additional affidavits, and would refuse the application where the consequences would be to dissolve the corporation.<sup>1</sup> Again, it has been held that leave to file such an information ought to be denied where it is sought to forfeit a franchise of a corporation, and where the judgment of the court, if rendered for the State, would not redress the grievance complained of by the relator.<sup>2</sup> On the other hand, under the New York statute<sup>3</sup> conferring upon the Attorney-General, "upon leave granted," the power to bring a proceeding to vacate the charter of a corporation, the court will not inquire whether the institution of the proceeding is a wise act, but will look no further than to see that the Attorney-General states, in his information, a *prima facie* case, or a case of such gravity as to require a judicial contestation.<sup>4</sup> In Illinois it is held that leave to file the information ought to be granted, where the petition for such leave exhibits, in the language of the statute, "probable ground" for the institution of the proceeding.<sup>5</sup>

**§ 6785. Issuing a Rule to Show Cause why an Information should not be Filed.**—The usual practice to be pursued in obtaining leave to file an information in the nature of *quo warranto*, is to present a petition or written motion to the court, supported by affidavits. If, on an examination, the court finds that the petition and the affidavits exhibit a *prima facie* cause for the relief sought, it is usual to issue an order to the defendant to *show cause* why the information should not be filed.<sup>6</sup> This practice, however, is not inflexibly pursued.

<sup>1</sup> *Rex v. Trevenen*, 2 Barn. & Ald. 479.

<sup>2</sup> *Attorney-General v. Erie &c. R. Co.*, 55 Mich. 15.

<sup>3</sup> N. Y. Code Civ. Proc., § 1798.

<sup>4</sup> *Re Application of Attorney-General*, 3 N. Y. St. Rep. 464; *s. c.* 50 Hun (N. Y.), 511.

<sup>5</sup> *People v. Oallaghan*, 83 Ill. 128.

<sup>6</sup> *Rex v. Symmons*, 4 T. R. 223; *People v. Richardson*, 4 Cow. (N. Y.) 97, 103; *People v. Tibbets*, 4 Cow. (N. Y.) 358, 383; *People v. Shaw*, 14 Ill. 476; *People v. Waite*, 70 Ill. 25; *United States v. Lockwood*, 1 Pinn. (Wis.) 359; *Re Bank of Mt. Pleasant*, 5 Ohio, 249; *Com. v. Jones*, 12 Pa. St. 365. In one case it was said by

It has been held that leave to file the information may be asked in the first instance without a rule to show cause, where notice of the motion is given, and sufficient time is allowed to the defendant to prepare affidavits in opposition thereto;<sup>1</sup> and it has been suggested that this course is preferable where the case is urgent and delay is sought to be avoided;<sup>2</sup> and this was held to be the proper practice where the proceeding related to the right to hold a small annual township office, and where the delay of issuing an order to show cause would be such as to render the proceeding greatly nugatory,—in which case, the order to show cause was dispensed with, and a rule on the defendant to plead was granted at the same time.<sup>3</sup>

§ 6786. **Affidavits for and against the Rule.**—The general practice is to support the motion for leave to file the information by *affidavits*,<sup>4</sup> and to allow the respondent to show cause why the leave should not be granted, by means of *counter-affidavits*.<sup>5</sup> The affidavits of the relator or prosecutor should be *positive*, and *not on information and belief*,<sup>6</sup> unless where the matter of information and belief goes merely to the fact of the respondent having exercised the office, and not to a fact touching the validity of his title.<sup>7</sup> Of course, the relator or prosecutor may avail himself of the statement of any material fact in the respondent's affidavit which has been omitted from his own affidavit.<sup>8</sup> Unless the defendant's affidavits are such as to put the matter beyond dispute, the court

Spencer, C. J.: "These applications being generally founded on the *ex parte* affidavit of the relators, it has of late years been usual, in the English Court of King's Bench and in this court, to afford the defendant an opportunity of being heard against granting leave to file the information. A rule to show cause is therefore generally entered; leave is afterwards granted or refused as circumstances shall appear upon cause shown." *People v. Kip*, 4 Cow. (N. Y.) 382, 383, note.

<sup>1</sup> *State v. Burnett*, 2 Ala. 140.

<sup>2</sup> Mr. Freeman, in note to *People v. Rensselaer & Co.*, 30 Am. Dec. 50; *s. c.* 15 Wend. (N. Y.) 113.

<sup>3</sup> *State v. Gummersall*, 24 N. J. L. 529.

<sup>4</sup> *People v. Kip*, 4 Cow. (N. Y.) 382, 383, and note.

<sup>5</sup> *People v. Waite*, 70 Ill. 25.

<sup>6</sup> *Rex v. Newling*, 3 T. R. 310.

<sup>7</sup> *Rex v. Slythe*, 6 Barn. & C. 240.

<sup>8</sup> *Rex v. Mein*, 3 T. R. 596.

will make the rule absolute for the information, in order that the question concerning the right may be properly determined.<sup>1</sup>

**§ 6787. Dismissing the Information upon Cause Shown against its being Filed.**—It is said that if the *facts* relied upon by the respondent, in answer to the rule to show cause, are *disputed*, or if new and doubtful questions of law are presented that would require *more time* for their satisfactory solution than could reasonably be given to them on such an application, then it would be the duty of the court to make the rule for an information absolute, “that the questions might receive a full and final determination.” But where the relator concedes the correctness of the facts relied upon by the respondent, and if the conclusion of law upon those facts is that the State is not entitled to the relief sought,—then the rule to show cause may be discharged and the *petition dismissed*, without further protracting the litigation.<sup>2</sup> On the other hand, according to the practice of the English King’s Bench, where the relator’s affidavit, by reason of some defect, fails to show a right to have the information filed, but this defect is helped out by the affidavit of the respondent, filed in pursuance of the rule to show cause, the court may, after looking at all the affidavits, make the rule to show cause absolute, and order the information to be filed.<sup>3</sup>

<sup>1</sup> Bull. N. P. 210 a; United States v. Lockwood, 1 Pinn. (Wis.) 359; State v. Burnett, 2 Ala. 140.

<sup>2</sup> Attorney-General v. Chicago &c. R. Co., 112 Ill. 520, 535.

<sup>3</sup> Rex v. Mein, 3 T. R. 596. Lord Kenyon, C. J., said: “If the matter had rested on the relator’s affidavit alone, I should have been clearly of the opinion that the information could not go; but, upon conference with my brothers, I find that it is not unusual to have recourse to the affidavit against the rule, in order to come, if possible, at the whole truth

of the transaction. And I agree that, in so doing, we must not garble any sentence referred to, so as to give it a different meaning from that which it naturally imports when taken all together; but still, we are not bound to take the whole of it to be true, but merely refer to it as evidence of certain facts. Now, the relator’s affidavit had omitted to state in whom the right of election was to the office of portreeve, which chasm is filled up by the defendant’s affidavit, disclosing the method of election.”

§ 6788. **Rule on the Respondent to Plead.**—After the rule to show cause, and the showing of cause or the failure to show cause, if the court allows the information to be filed, it is the practice, in some jurisdictions, to grant a rule requiring the defendant or defendants to plead to the information, within a stated time, fixed by the court. This rule to plead is served on the defendants, accompanied with a copy of the information.<sup>1</sup>

§ 6789. **Process and its Service.**—“The practice at common law,” said Dixon, J., “upon informations in the nature of writs of *quo warranto*, was to bring in the defendant by process; subpœna and attachment, when the defendant could be personally served, and was liable to arrest; *venire facias* and *distrigas* in other cases, as against peers, corporations, etc. If an appearance was not thus procured, proceedings of outlawry were had against defendants subject to it, and a judgment that the office or franchise said to be usurped should be seized, was rendered. Whether this judgment would mature into a final adjudication of the right, or was merely by way of distress to force the defendant to come within the jurisdiction of the court, may be doubtful.<sup>2</sup> No definite time was required to elapse between the *teste* or service of subpœna and its return. It might be tested on one day and served and returned on the next.<sup>3</sup> The appearance must have been entered on the *quarto die post*, and, after the appearance was effected under any of these judicial writs, the defendant must have been ruled to plead.”<sup>4</sup> This course was pursued whether the information was filed under the statute

<sup>1</sup> In *Attorney-General v. Delaware &c. R. Co.*, 38 N. J. L. 282, 285, this is stated to be the practice in that State, on the following authorities: *State v. Thompson*, 20 N. J. L. 689; *State v. Vreeland*, (M.S.) A. D. 1846; *State v. Gummarsall*, 24 N. J. L. 529;

*State v. Roe*, 26 N. J. L. 215; *State v. Pritchard*, 36 N. J. L. 101.

<sup>2</sup> Citing *Rex v. Amery*, 2 T. R. 515; s. c. 4 T. R. 122; 2 Kyd Corp. 496; *People v. Richardson*, 4 Cow. (N. Y.) 97, and note.

<sup>3</sup> Citing *Rex v. Ginever*, 6 T. R. 594.

<sup>4</sup> Citing the note to the last case.



of 9 Anne, chapter 20, or not.<sup>1</sup> In the modern practice in New Jersey, *no process*, in fact, *issues*, except the order to show cause; but, upon the information being filed, a *rule* is made upon the defendant *to plead*, and this rule, together with a copy of the information, is served upon him, and he then puts in his response.<sup>2</sup>

§ 6790. **Further of This Subject.**—It has been held that the *directors* of a banking corporation are without authority to *waive service* of a petition praying a forfeiture of its charter; or to waive or delay the period within which third persons may intervene in such a proceeding, to protect their interests; or to file an answer which virtually confesses the forfeiture of the charter and admits the necessity of an immediate liquidation of the bank.<sup>3</sup> But this decision is somewhat at variance with the decisions in other jurisdictions, which are to the effect that the directors have the power to make an assignment of all the assets of the corporation and to order a liquidation.<sup>4</sup> As elsewhere seen,<sup>5</sup> directors have, in general, full power to act for the corporation in all matters of litigation; and unless there is some restraining statute, no reason is perceived why they have not power to waive process, or to make, for the corporation, a suitable answer in a proceeding for its dissolution and the winding up of its affairs,—though it may be conceded, in view of what has preceded,<sup>6</sup> that if, in so doing, they betray the rights of the corporation or of the shareholders, individual shareholders may be permitted to intervene.<sup>7</sup> In Illinois, the practice code requires that the first process in all actions in courts of record shall be a *summons*, except when special bail is required, which summons shall be returnable to the first day of the next term of court,

<sup>1</sup> Attorney-General *v.* Delaware &c. R. Co., 38 N. J. L. 282, 284.

<sup>2</sup> *Ibid.*

<sup>3</sup> State *v.* Citizens' Sav. Bank, 31 La. An. 836.

<sup>4</sup> *Ante*, §§ 3986, 6473.

<sup>5</sup> *Ante*, § 3997; *post*, ch. 177, art.

<sup>6</sup> *Ante*, § 4478.

<sup>7</sup> In State *v.* Jefferson Iron Co., 60 Tex. 312, the absence of a citation against a corporation was one of the grounds upon which it was held proper to dismiss a proceeding to dissolve it.

unless ten days shall not intervene, in which case it shall be returnable to the first day of the succeeding term. In this respect, the practice in *quo warranto* is the same in that State as in civil cases, and the defendant is required to be summoned ten days prior to the first day of the term at which the writ is returnable.<sup>1</sup> Where leave was granted to file the information during term time, and a summons was ordered to be issued returnable at the same term, it was held that a *default* taken upon the service of the summons was irregular and erroneous.<sup>2</sup> In Massachusetts, the early practice was to file the information in any county; and this was held to produce no inconvenience, since the process was issued returnable to the county in which the respondents resided, and they would be holden to answer only in their own county.<sup>3</sup> In Pennsylvania, the early practice was that, when leave was granted to file the information, the defendants must be summoned by a *venire* or *subpœna*, and if they failed to appear must be brought in by a *distrigas* or *attachment*. An appearance, upon the previous rule to show cause, did not put them in court as to the information; therefore, upon filing the information, the relators were not entitled to a *rule to plead*.<sup>4</sup>

**§ 6791. Whether the Proceeding is Civil or Criminal.—**

There is a difference of theory upon the question whether the proceeding, by information in the nature of *quo warranto* against a private corporation, is in the nature of a civil or a criminal proceeding. Where it assumes the form of a proceeding by the State, on the relation of its Attorney-General or other proper prosecuting officer, to oust a body of adventurers in a proceeding against them personally, or to oust a corporation in a proceeding against it in its corporate name and character, of franchises alleged to have been usurped, it is certainly not a private, but a public, prosecution;<sup>5</sup> and its character is more nearly assimilated to that of a criminal pros-

<sup>1</sup> Lavalley v. People, 68 Ill. 252.

<sup>2</sup> *Ibid.*

<sup>3</sup> Com. v. Smead, 11 Mass. 74.

<sup>4</sup> Com. v. Sprenger, 5 Binn. (Pa.) 353.

<sup>5</sup> People v. Golden Rule, 114 Ill. 34.

ecution, especially in view of the fact that the judgment may result in a pecuniary *fine*, as well as in a forfeiture of franchises and privileges.<sup>1</sup> But nevertheless, in some of the State jurisdictions, it is regarded as a civil, rather than as a criminal, proceeding.<sup>2</sup> Under any theory, where the object of the proceeding is to determine, as between two private individuals, the title to an office, it is essentially in the nature of a civil proceeding.<sup>3</sup>

§ 6792. **Whether the Information should be Framed as a Civil or Criminal Pleading.**—With this preliminary statement, let us consider the question whether the information should be framed as a civil or criminal pleading. Some of the courts which, in theory, assimilate the proceeding to a criminal proceeding, take the view that the information should be drawn *with the same degree of certainty which is required in indictments*, and that it is fatally defective when it fails in this measure of certainty.<sup>4</sup> Other courts prefer that the pleader should pursue the analogy of *civil pleadings*,<sup>5</sup> and the latter view is favored by an authoritative writer on this subject.<sup>6</sup>

§ 6793. **Setting Forth the Ground of Forfeiture.**—In a proceeding by information in the nature of *quo warranto*, to forfeit the franchises of an *existing corporation*, on the ground

<sup>1</sup> *Post*, § 6806; *ante*, §§ 6767, 6768.

<sup>2</sup> Thus, in Colorado, an action for the usurpation of a franchise or office is a civil action under the code of that State, and is governed by the rules of proceeding applicable to civil actions, and is instituted by filing a complaint and issuing a summons; and the cause proceeds as in the case of an ordinary civil action. *Central &c. Road Co. v. People*, 5 Colo. 39; *Atchison, Topeka &c. R. Co. v. People*, 5 Colo. 60.

<sup>3</sup> *Ante*, § 767.

<sup>4</sup> *Territory v. Lockwood*, 3 Wall. (U. S.) 236; *Donnelly v. People*, 11 Ill. 532; *s. c.* 52 Am. Dec. 459; *Wight v. People*, 15 Ill. 417; *Lavalle v. Peo-*

*ple*, 68 Ill. 252; *People v. Kingston Turnp. Co.*, 23 Wend. (N. Y.) 193; *s. c.* 35 Am. Dec. 551; *People v. Bristol &c. Turnp. Co.*, 23 Wend. (N. Y.) 222.

<sup>5</sup> In *State v. Kupferle*, 44 Mo. 154; *s. c.* 100 Am. Dec. 265,—it is said that “the information, answer, and reply are subject to the rules governing corresponding pleadings in strictly civil causes,—the information in this regard answering to the petition in civil suits.” See also, in support of the same view, *State v. Commercial Bank*, 10 Ohio, 535; *People v. Richardson*, 4 Cow. (N. Y.) 97; *Com. v. Commercial Bank*, 28 Pa. St. 383.

<sup>6</sup> *High Ex. Leg. Rem.*, § 710.

of a neglect of the public duties which it has assumed, the facts necessary to show such neglect of duty must be set out with all the exactness of pleading required in actions for penalties;<sup>1</sup> and the same rule will equally apply where the ground of the proceeding is an abuse of its franchises. Such an information must not only exhibit a substantial cause of forfeiture,<sup>2</sup> but, according to this theory, it must set forth specifically the facts and *data* by reason of which the forfeiture is demanded.<sup>3</sup> Thus, where a forfeiture of the charter of a corporation was demanded on the ground that a loan made by the State to the corporation, to aid in the construction of its railroad, was not so used, it was necessary to state so in specific language, and to point out the misappropriation complained of.<sup>4</sup> But, as the allegation was that the defendant had misappropriated and misapplied the money received from the State, it would seem that to insist upon the pleader stating *how* it had been misappropriated and misapplied, would be to require the mere pleading of evidential matters. It has been held necessary to aver that the alleged non-feasance, misfeasance, or malfeasance, was *willful* on the part of the corporation.<sup>5</sup> It has been held that an information charging a corporation with usurping certain franchises by acting through other parties, — as, for instance, the action of the city of Cincinnati through the board of trustees of the Commercial Hospital of Cincinnati, — calls in question only the authority of the usurping corporation, and cannot be extended so as to include authority not derivable from the corporation, and which such parties exercise in their own right.<sup>6</sup>

**§ 6794. Contradictory Averments in the Same Paragraph Fatal.**—Under the Indiana Code of Civil Procedure, a complaint in such an information, setting forth, in the same para-

<sup>1</sup> *People v. Kingston &c. Turnp. Co.*, 23 Wend. (N. Y.) 193; *s. c.* 35 Am. Dec. 551; *People v. Bristol &c. Turnp. Co.*, 23 Wend. (N. Y.) 222. Compare *post*, § 6804.

<sup>2</sup> *Attorney-General v. Petersburg &c. R. Co.*, 6 Ired. L. (N. C.) 456.

<sup>3</sup> *State v. Southern &c. R. Co.*, 24 Tex. 80.

<sup>4</sup> *Harris v. Mississippi Valley &c. R. Co.*, 51 Miss. 602.

<sup>5</sup> *State v. Hampshire Turnp. Co.*, 2 Sneed (Tenn.), 254.

<sup>6</sup> *State v. Cincinnati*, 23 Ohio St. 445.

graph, several illegal acts, is construed as a single paragraph; so that, if the allegations are contradictory as to material facts, the whole paragraph will be adjudged bad.<sup>1</sup> Upon this question, it has been reasoned that, "if a complaint, consisting of a single paragraph, should aver in one place that articles of association were not filed, and in another aver that they were filed, the complaint would necessarily be bad, for the conflict would leave no facts admitted by the demurrer. Or if a single paragraph shows facts constituting a *prima facie* cause of action, but adds to them facts constituting a perfect defense, the pleading would certainly be bad on demurrer. Thus, if an information against one claiming a public office should show that the claimant did not receive a majority of the votes cast, but should also show that his competitor, the relator, was ineligible, it would be bad."<sup>2</sup> . . . . It is perfectly clear, therefore, that if one specification is overthrown by another specification in the same paragraph, the whole paragraph, in so far as it counts upon the cause on which the specifications are flatly contradictory, is bad."<sup>3</sup>

§ 6795. Other Allegations Which must be Made. — In Illinois, an information in the nature of a *quo warranto* must be exhibited "in the name and by the authority of the people of the State."<sup>4</sup> In Indiana, an information under a statute<sup>5</sup> against a number of persons who claim to be, but are not legally, an incorporated company, must state that they have acted within that State as a corporation.<sup>6</sup> It has been held in Mississippi that in a proceeding in the nature of a writ of *quo warranto against individuals*, alleging that they have exercised and enjoyed, without legal authority, the franchise of being a banking corporation, it is not sufficient for the defendants merely to show that, by an act of the legislature, a banking corporation was established, of which they are members, and by virtue of which they exercise the said franchise; but they must

<sup>1</sup> State v. Foulkes, 94 Ind. 493.

<sup>2</sup> Citing State v. Bieler, 87 Ind. 320; Reynolds v. State, 61 Ind. 392.

<sup>3</sup> State v. Foulkes, 94 Ind. 493, 496, 497.

<sup>4</sup> Wight v. People, 15 Ill. 417.

<sup>5</sup> Ind. Code Civ. Proc., § 49.

<sup>6</sup> State v. Kingan, 51 Ind. 142.

also show that the corporation was in such a state of organization that it could use the privileges of a bank, and that they are authorized to bind the corporation by their acts done according to the terms of the charter.<sup>1</sup> In a jurisdiction where many of the corporations of the kind proceeded against had been created under *special charters*, it was held necessary, in such an information, seeking to forfeit the franchises of a plank-road company, either to give the date of the organization of the corporation, so as to make it appear that it had organized since the period when special charters were prohibited by the constitution, or else to show *under what particular statute* it was organized and acting, so that the court might know what the powers and duties were which the information alleged had been *misused*.<sup>2</sup> On the other hand, it was said in a case in Michigan, by Mr. Justice Cooley, speaking for the court: "Where a corporation has been created by special charter, we do not regard it necessary, though perhaps usual, to do more in the information than to aver its existence in general terms; since the court is bound to take *judicial notice* of the charter,<sup>3</sup> and is thus informed of the actual corporate existence."<sup>4</sup> But it was held that this principle did not apply in a case where the information charged the defendants with *intrusion into the offices* of wardens and vestrymen of St. Paul's Church in Detroit, — "a corporation created by the authority of this State." Mr. Justice Cooley said: "As the body in question has no such charter, and if it exists as a corporation at all, must have been constituted such under some general law of the Territory or State, by acts *in pais*, it is obvious that there is nothing upon the face of this information by which the court can see that the allegation that the church is a corporation is true in fact. The bare averment that it is one is but a conclusion of law drawn by the pleader, but which the court ought to have the means of drawing for itself from the facts set forth."<sup>5</sup> A section of the Revised Statutes of

<sup>1</sup> State v. Brown, 33 Miss. 500.

<sup>2</sup> Danville &c. Co. v. State, 16 Ind. 456.

<sup>4</sup> People v. De Mill, 15 Mich. 164, 179; s. c. 93 Am. Dec. 179.

<sup>3</sup> Citing a statute so requiring: Comp. L. Mich., § 2, cl. 18.

<sup>5</sup> Ibid.

the United States relating to national banks declares that, "if the directors of any *national banking association* shall knowingly violate or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this title, all the rights, privileges, and franchises of the association shall be thereby forfeited."<sup>1</sup> It has been held that, as the section refers only to acts done by the directors, or by the executive officers with the knowledge of the directors, an information seeking a forfeiture, which charges *that the association did the act*, is insufficient. Therefore, in an information charging that "the banking association and the directors thereof did knowingly permit," etc., the allegation that the association, aside from the directors, permitted the doing of the alleged acts, tenders an immaterial issue, and should be *stricken out on motion*.<sup>2</sup>

**§ 6796. When the Information Admits the Existence of the Corporation.** — On a principle elsewhere more fully discussed,<sup>3</sup> it is a rule that, where the information proceeds against the corporation by its corporate name, this fact admits the existence of the corporation.<sup>4</sup>

**§ 6797. What the Information must State where the Proceeding is to Annul Franchises never Granted.** — Where the object of the proceeding is *to oust individuals or corporations of franchises which the State asserts that it has never granted*, then it is strictly analogous to the ancient writ of *quo warranto*, which was a prerogative writ proceeding in right of the King, by which the King, through his Attorney-General, demanded of the defendants to know by what warrant — *quo warranto* — they assumed to exercise certain franchises which it was alleged they were exercising.<sup>5</sup> Here the Attorney-General is not obliged to aver anything in the first instance,

<sup>1</sup> Rev. Stat. U. S., § 5239.

<sup>2</sup> *Trenholm v. Commercial Nat. Bank*, 38 Fed. Rep. 323.

<sup>3</sup> *Post*, ch. 184, art. II.

<sup>4</sup> *People v. Rensselaer &c. R. Co.*,

15 Wend. (N. Y.) 113; *s. c.* 30 Am. Dec. 33; *State v. Hannibal &c. R. Co.*, 37 Mo. App. 496.

<sup>5</sup> *Ante*, § 6767. Compare *post*, § 6804.

except in the most general terms; but, in right of his sovereign, he calls upon the defendants to show cause why they assume to exercise the franchises named; and this puts the burden upon them either to disclaim or justify.<sup>1</sup> Where this is the office of the information, it has no analogy, either to an indictment or to a declaration in an ordinary action at common law; the Attorney-General is not obliged to do more than set out in the most general terms the title of the Crown or of the State to the relief sought; since the source of the franchise is in the sovereign or in the State, and the respondents must, at all times, be prepared to show how they became entitled thereto.<sup>2</sup> But in a proceeding to *oust persons* alleged

<sup>1</sup> *Ante*, § 775.

<sup>2</sup> *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358; *s. c.* 8 Am. Dec. 243; *People v. Ridgley*, 21 Ill. 65; *State v. Gleason*, 12 Fla. 190, 265; *People v. Thacher*, 55 N. Y. 525; *s. c.* 14 Am. Rep. 312. Upon this question it has been said: "It is very well settled that, in an information in the nature of a *quo warranto*, it is not necessary to set forth the franchises and privileges alleged to be usurped, except in general terms. It is always the right of the government to call upon those who assume corporate powers, to require them to say by what warrant they do so; and when the defendants set forth their claims by plea, the Attorney-General may reply and show the special grounds he relies on." *People v. River Raisin &c. R. Co.*, 12 Mich. 389; *s. c.* 86 Am. Dec. 64, 66, opinion by Campbell, J.; citing 2 Kyd Corp. 399, 403, 440; *Ang. & Ames Corp.*, §§ 734, 756, 759, 760; *People v. Bank of Niagara*, 6 Cow. (N. Y.) 196; *People v. Bank of Hudson*, 6 Cow. (N. Y.) 217. In *People v. De Mill*, 15 Mich. 164, 180, this doctrine is fully recognized, and the court say: "We have no disposition to qualify these decisions in any

way,"—that is to say, the decisions holding that the allegations of the Attorney-General may be of the most general character, while the defendant is required to set forth specifically and with particularity the grounds of his claim to the continued existence of his right. But it is pointed out that the principle has no application where the Attorney-General files the information at the instance of a *private relator* to oust individuals from corporate offices. Informations in equity by the Attorney-General to restrain a corporation from doing an act which is *ultra vires* and injurious to public right, ought, it should seem, to be governed by the same rule of pleading which governs a proceeding by information in the nature of *quo warranto* to forfeit a corporate franchise; but it has been held that an information by the Attorney-General to restrain a corporation from performing a certain act must show, not merely a claim of power to do the act, but also an *apparent intention* to exercise this power. *Attorney-General v. Eau Claire*, 37 Wis. 400. And this is, perhaps, in accordance with the rule of equitable pleading applicable to all bills *quia timet*.



to be usurping the offices of a corporation, this rule has been held not to extend so far as to exonerate the Attorney-General from setting forth the *existence of the corporation*, which is a jurisdictional fact.<sup>1</sup>

§ 6798. **Course of Pleading in Such Cases.**—Where such is the nature of the proceeding, so that the State, in virtue of its sovereign authority, does no more, at the outset, than to call upon the defendants to show by what authority they exercise their franchises, they *show cause by pleading their charter*. The State then *replies*, setting up, in distinct paragraphs, the grounds of forfeiture upon which it intends to insist. The defendants then either *demur* to these grounds of forfeiture, or *traverse* them. If they demur to them, then, of course, the judgment of the court merely deals with their sufficiency in law. If they are traversed, the burden of establishing them is on the State.<sup>2</sup> The right to require the defendants to *show cause* why they exercise the given franchises, is merely the privilege of the State; and it may, of course, through its Attorney-General, *waive* the privilege, and assume, at the outset, the *burden* of alleging and proving the respect in which the defendants have misused or failed to use the franchises conferred upon them. Thus, in Pennsylvania, the Attorney-General may disclose, in his information, the specific grounds of forfeiture, or, he may merely set forth the franchises alleged to have been illegally exercised, and call upon the defendants to show by what authority they are held.<sup>3</sup>

§ 6799. **When Defendant must Justify or Disclaim.**—Where the object of the proceeding is such as already de-

<sup>1</sup> *People v. De Mill*, 15 Mich. 164, 181; s. c. 93 Am. Dec. 179; *ante*, § 776.

<sup>2</sup> This will appear from a number of characteristic cases:—*People v. Bank of Hudson*, 6 Cow. (N. Y.) 217 (determined on demurrer to the replication); *State v. Seneca County Bank*, 5 Ohio St. 171 (determined on

demurrer to the replication); *State v. Commercial Bank*, 13 Smedes & M. (Miss.) 569; s. c. 53 Am. Dec. 106 (determined on demurrer to the replication).

<sup>3</sup> *Com. v. Commercial Bank*, 28 Pa. St. 383. Information *amendable* and not *quashed for matter of form*. *Ibid.*

scribed,<sup>1</sup> to oust one or more persons, or a corporation, of franchises which *have never been granted*, but which have been usurped, the respondent or respondents must either *justify or disclaim*: a mere plea of not guilty or of *non-usurpavit is not a good plea*; because, as already seen,<sup>2</sup> the respondent is called upon to *show by what authority* he holds the office or franchise referred to; and such a plea does not show his warrant or authority.<sup>3</sup> He may, in a proper case, justify as to *part*, and disclaim as to *part*;<sup>4</sup> and, under the codes of some of the States, he may set forth as many defenses as he has.<sup>5</sup> "The defendant, in answering such demand of the State, unless he disclaim all right to the franchise in question, and deny that he has assumed its exercise, must show such facts as, if true, completely invest him with the legal title to it; otherwise the law considers him a usurper, and denounces judgment against him, leaving the franchise to be held by the State, or such other person as may have a valid legal title thereto, derived by or from some grant or authority from the State."<sup>6</sup>

**§ 6800. Nature of the Plea of Justification.** — A plea of justification is essentially a plea of *title*. It must set out, with distinctness, the source of the title claimed by the respondent or respondents. If the proceeding is against individuals, challenging their right to be a corporation, their plea must precisely state the manner in which they claim to be a corporation.<sup>7</sup> In such a case the plea usually sets forth the charter of the corporation, if there is one; and this is held to exhibit a *prima facie* defense, since the corporation is presumed to have continued to exist and to perform its duties until the date of the filing of the information. But if, in addition to this, the plea contains allegations intended to

<sup>1</sup> *Ante*, § 6797.

<sup>2</sup> *Ante*, §§ 775, 6797.

<sup>3</sup> Bull. N. P. 211 a; *State v. Utter*, 14 N. J. L. 84; *State v. Barron*, 57 N. H. 498; *State v. Harris*, 3 Ark. 570; s. c. 36 Am. Dec. 460; *Illinois &c. R. Co. v. People*, 84 Ill. 426.

<sup>4</sup> *People v. Richardson*, 4 Cow. (N. Y.) 97, 113, note, where forms are collected.

<sup>5</sup> *People v. Stratton*, 28 Cal. 382.

<sup>6</sup> *State v. Harris*, 3 Ark. 570; s. c. 36 Am. Dec. 460.

<sup>7</sup> *Rex v. Beardwell*, 2 Keb. 52.

show either the continued existence of the corporation down to the filing of the information, or a state of facts estopping the State from insisting upon a forfeiture of its franchises for causes arising prior to a certain period, these allegations are surplusage, and, on motion of the Attorney-General, may be stricken out.<sup>1</sup> The plea properly recites the several acts of the legislature constituting the defendant a corporation.<sup>2</sup>

§ 6801. **Attorney-General Demurs or Replies.** — After the plea of justification or disclaimer, the Attorney-General *demurs* or *replies*, and, according to an early statement in New York, the proceedings then continue in the same manner as in *civil actions*,<sup>3</sup> — though this may not be the rule in other jurisdictions where the proceeding is regarded as *criminal* in its nature.<sup>4</sup>

§ 6802. **When Court will Give Judgment on the Plea.** — It was ruled in the King's Bench, in an old case, that where the defendant to an information in the nature of a *quo warranto* for usurping a corporate office, sets out a bad title to the office in his plea, the court will give judgment on the plea, as importing a confession of the usurpation, and will not allow a repleader.<sup>5</sup> This rule was made at a time when the practice was so rigid that repleaders were not allowed except where the original plea had failed in matter of *form* merely, and when they were not allowed to cure deficiencies in matter of substance. The principles of modern pleading would allow the plea to be *amended*.

<sup>1</sup> Attorney-General v. Michigan State Bank, 2 Dougl. (Mich.) 359.

<sup>2</sup> State v. Mississippi &c. R. Co., 20 Ark. 495. Compare People v. De Mill, 15 Mich. 164; s. c. 93 Am. Dec. 179, — where it was held that the information must set forth such acts. It has been held, in a proceeding against a railway corporation for usurping banking privileges, by issuing paper in the similitude of bank notes, that a plea that the defendants have issued certain paper, which

is described, and which paper as described may or may not be within the meaning of the law forbidding banking by unauthorized persons, is defective, as tendering an immaterial issue. People v. River Raisin &c. R. Co., 12 Mich. 389; s. c. 86 Am. Dec. 64, 68.

<sup>3</sup> People v. Richardson, 4 Cow. (N. Y.) 97, 118.

<sup>4</sup> Compare *ante*, § 767, with *ante*, § 6791.

<sup>5</sup> Rex v. Philips, 1 Strange, 394.

§ 6803. **Substance of the Replication.**—The Attorney-General may reply, setting out the specific acts of omission upon which he grounds the right of the State to a forfeiture of the franchises claimed, and praying a judgment of dissolution,—and this is not a *departure* in pleading.<sup>1</sup> But judicial holdings have not been uniform in maintaining this illogical, incongruous, and uncertain course of pleading.<sup>2</sup>

§ 6804. **What the Information must State where the Proceeding is to Forfeit the Franchises already Granted.**—But where the proceeding is *against a corporation to forfeit for misuser or non-user, franchises already granted*, and put an end to its existence, or to forfeit some of its franchises which it has abused or neglected while allowing it to exist and exercise the others,—the nature of the proceeding is essentially different. It is essentially, in its nature, a *public accusation* of a public offense, and if the State establishes the existence of the offense, the judgment of the law which follows is highly penal. Such a proceeding is, therefore, closely analogous to a *criminal action*; and it must follow, upon the analogies of the common law, that the *burden* is upon the State in the first instance, as in a criminal case; that the State must, in the information filed by its Attorney-General, set forth the accusation which it makes against the defendant, upon which it demands the judgment of forfeiture, with the same particularity as in an indictment, or if not with that particularity, at least with clearness and definiteness as to every essential

<sup>1</sup> *Com. v. Commercial Bank*, 28 Pa. St. 383; *State v. Commercial Bank*, 10 Ohio, 535; *People v. Kankakee River Imp. Co.*, 103 Ill. 491; *People v. Bank*, 6 Cow. (N. Y.) 196; *State v. Pennsylvania &c. Canal Co.*, 23 Ohio St. 121; *People v. Richardson*, 4 Cow. (N. Y.) 97, 118.

<sup>2</sup> In Ohio, where the proceeding has been regulated by statute, it has been held that where such an information is filed against a defendant in its corporate name, charging usurpa-

tion of certain franchises, and the defendant answers in its corporate capacity, setting up its charter and justifying thereunder,—the Attorney-General cannot file a replication denying the validity of the incorporation of the defendant, because this is a departure from the information, which impliedly admits the existence of the corporation. *State v. Cincinnati Gaslight &c. Co.*, 18 Ohio St. 262.

matter.<sup>1</sup> In such a proceeding, the Attorney-General is required to set out in his information the specific ground of forfeiture, in a direct and traversable form.<sup>2</sup> Adherence to this rule would tend to simplicity and certainty in making up the issues, and would be favorable to justice in the subsequent stages of the proceeding. But there are cases which depart from it to the extent of holding that the information may charge the corporation generally with usurpation, and that when the corporation, in its plea, sets forth its charter and justifies under it, the Attorney-General may, without a departure, in his pleading, reply the causes of forfeiture specially.<sup>3</sup> The incongruity in these holdings is greater when it is considered that they were made in cases *where the proceeding was against the corporation*, which fact necessarily carried with it an admission of the existence of the corporation. It was, therefore, essentially a proceeding to oust an existing corporation of all or a part of its franchises, by reason of some ground of forfeiture which it had incurred; and upon the simplest and most obvious principles of pleading, the State ought to set out those grounds of forfeiture in the first instance, and not require the corporation to establish, in the first instance, what the State admits, and then allow the State to unmask, in a replication, the real ground of its action.<sup>4</sup>

§ 6805. **Burden of Proof.** — The same distinctions attend the question of the *burden of proof*. Recurring to the premise that the source of all franchises and offices is in the

<sup>1</sup> *Ante*, § 771.

<sup>2</sup> *Attorney-General v. Petersburg &c. R. Co.*, 6 Ired. L. (N. C.) 456 (under a statute); *People v. Manhattan Co.*, 9 Wend. (N. Y.) 351; *People v. Kingston &c. Turnp. Road Co.*, 23 Wend. (N. Y.) 193; *s. c.* 35 Am. Dec. 551; *State v. Parsons*, 40 N. J. L. 1.

<sup>3</sup> *People v. Bank*, 6 Cow. (N. Y.) 196; *People v. Karkakee River Imp. Co.*, 103 Ill. 491. Compare *ante*, § 6797.

<sup>4</sup> On the other hand, where the proceeding is prosecuted by a *private*

*relator*, who himself seeks to recover possession of an office, so that it is in effect a contest for the possession of a public office between two private persons, the *relator must allege the facts* which show his eligibility and title to the office. *State v. Boal*, 46 Mo. 528; *ante*, § 775. The reason is that a judgment against the respondent, without proof by the relator of his title to the office, will not reach the remedy which he seeks. *People v. Thacher*, 55 N. Y. 525; *s. c.* 14 Am. Rep. 312.

sovereign, and that where the object of the proceeding is merely to *oust* the corporation, or an individual or body of individuals, of *franchises which they have usurped*, or of *offices into which they have intruded*, and where it is not a proceeding by a *private relator* to contest a right to a corporate office, — and remembering also that the information in such a case need not show title in the people except in general terms, but that the defendant is required to allege specifically the grounds of the right which it claims, — the conclusion follows that *the general burden of proof is on the defendant*.<sup>1</sup> For instance, in such a proceeding, charging the defendants with usurping the public franchise of operating a ferry, if they attempt to defend on the ground that they have a legal right to use the ferry, the burden is on them to show a valid title.<sup>2</sup> On the other hand, where the information is prosecuted on the relation of a private individual to contest a right to a corporate office, or other right in a private corporation, he must not only specifically set out the grounds of his right,<sup>3</sup> but the burden of proof is upon him to establish it by evidence.<sup>4</sup> Where a private corporation claims *franchises* which are *against public right*, — such, for instance, as the exclusive right to maintain a railway in the streets of a city, — it must clearly show that it is entitled to the same. If the charter leaves the right doubtful, it must be resolved in favor of the Commonwealth.<sup>5</sup>

§ 6806. **Nature of the Judgment when Rendered for the State.** — Where the proceeding was against a corporation for

<sup>1</sup> *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358; *s. c.* 8 Am. Dec. 243; *People v. Thacher*, 55 N. Y. 525; *s. c.* 14 Am. Rep. 312; *People v. River Raisin &c. R. Co.*, 12 Mich. 389, 395; *Ang. & Ames Corp.*, § 756; *State v. Harris*, 3 Ark. 570; *s. c.* 36 Am. Dec. 460.

<sup>2</sup> *Gunterman v. People*, 138 Ill. 518; *s. c.* 28 N. E. Rep. 1067. It was ruled in an old case that, in a proceeding *penal* in its character, the fact of the acceptance of a law, by a

corporation, must in some way be affirmatively shown to the satisfaction of the court; and that an acceptance of it cannot be inferred, upon which to ground forfeiture of its charter. *Com. v. Bank of United States*, 2 Ashm. (Pa.) 349.

<sup>3</sup> *Ante*, § 775.

<sup>4</sup> *Ante*, § 776.

<sup>5</sup> *Com. v. Central Passenger Railway*, 52 Pa. St. 506. For other distinctions as to the burden of proof, see *ante*, § 776.

the *usurpation of a franchise*, the ancient form of the judgment was that the franchise be *seized into the hands of the King*; but under the later proceeding by information, a *fine* was imposed and an *ouster* adjudged, without forfeiture of the franchise.<sup>1</sup> In respect of the form of the judgment, a distinction is taken between an information against individuals for usurping a corporate franchise, and an information against a corporation. "Whenever individuals, or a corporation, shall be found guilty, either of usurping or intruding into any office or franchise, or of unlawfully holding, judgment of *ouster* shall be rendered, and a *fine* may be imposed; but where the proceeding is against a corporation, and a conviction ensues for misuser, non-user, or surrender, judgment of *ouster* and of *dissolution* shall be rendered: which is equivalent to judgment of *seizure* at common law."<sup>2</sup> The kind of judgment which may be rendered, in case the prosecution succeeds, may, perhaps, be classified, according to the nature of the case, thus: 1. Where the proceeding is *against individuals*, to require them to show by what authority they exercise the franchise of being a corporation, a judgment ousting them of such franchise. 2. Where it is prosecuted *against a corporation* for a misuser or non-user of its franchises, a judgment *ousting* it of its franchises, or, as it is sometimes called, a judgment of *seizure*,—seizing its franchises into the State's hands. 3. Where the corporation is usurping a particular franchise which it does not possess, a judgment ousting it of such franchise, though not ousting it of its general franchise of being a corporation. This judgment of *ouster* is equivalent to the judgment of *seizure* at common law.<sup>3</sup> 4. Where

<sup>1</sup> *Rex v. City of London*, 3 Harg. St. Tr. 545.

<sup>2</sup> *People v. Rensselaer &c. R. Co.*, 15 Wend. (N. Y.) 113, 128; *s. c.* 30 Am. Dec. 33, 37. See also *State v. Bradford*, 32 Vt. 50; *People v. Richardson*, 4 Cow. (N. Y.) 97, 120.

<sup>3</sup> See *People v. Rensselaer &c. R. Co.*, 15 Wend. (N. Y.) 113; *s. c.* 30 Am. Dec. 33, 37. In the case of *Rex*

*v. London* (3 Harg. St. Tr. 545), the rule was said by Sir Robert Sawyer to be this: When it clearly appears to the court that a liberty is usurped by wrong, and upon no title, judgment of *ouster* shall be entered. But when it appears that a liberty has been granted, but has been misused, judgment of *seizure* into the King's hands shall be given. The reason

the contest is by a private relator for the possession of a *corporate office*, then, by analogy to the rule in the case of a similar contest for the possession of a public office, a judgment of *ouster* against the incumbent does not, of itself, entitle the relator to be admitted, but he must *prove his title* to the office.<sup>1</sup>

5. A *fine* may be imposed, in the discretion of the court, but the fine is generally *nominal*. The imposition of a fine was authorized by an English statute,<sup>2</sup> which directed that if the defendant be convicted, judgment of ouster as well as fine might be given against him, and that the relator should pay or receive *costs* according to the event of the suit.<sup>3</sup> But it should be kept in mind that the judgment cannot go beyond what is stated above, and that, if it extend to a *seizure of the property* of the corporation, that part of the judgment will be erroneous.<sup>4</sup> Nor can it extend to the appointment of a *receiver* without statutory authority.<sup>5</sup>

#### § 6807. Ousting the Corporation of Particular Franchises.

An information in the nature of a *quo warranto* may be maintained by the State, or by the State through the Attorney-General, to restrain a corporation from exercising a *particular franchise*, power, or authority, not possessed by it under its charter or governing statute,<sup>6</sup> in which case, as elsewhere seen,<sup>7</sup> the judgment of the court, if in favor of the State or the peo-

given for this distinction was this: That which came from the King was returned there by seizure; but that which never came from him, but which was usurped, should be declared null and void.

<sup>1</sup> *People v. Thacher*, 55 N. Y. 525; *s. c.* 14 Am. Rep. 312; *State v. Boal*, 46 Mo. 528; *ante*, § 776.

<sup>2</sup> Stat. 9 Anne, ch. 20, *anno* 1711.

<sup>3</sup> A statute of Michigan allows the court to impose a *fine* instead of dissolving the corporation, but with the proviso that the imposition of the fine shall not bar further prosecution for a continuance of the misconduct complained of. Mich. Act, April 26,

1887; Pub. Acts Mich. 1887, No. 89, p. 97; amending How. Stat. Mich., § 8657.

<sup>4</sup> *Bank of Vincennes v. State*, 1 Blackf. (Ind.) 267; *s. c.* 12 Am. Dec. 234.

<sup>5</sup> *Post*, § 6828.

<sup>6</sup> *People v. New York*, 32 Barb. (N. Y.) 35; *s. c.* 10 Abb. Pr. (N. Y.) 144; 19 How. Pr. (N. Y.) 155. Compare *Com. v. Delaware &c. Co.*, 43 Pa. St. 295; *Thompson v. People*, 23 Wend. (N. Y.) 537, 574; *People v. Thompson*, 21 Wend. (N. Y.) 235.

<sup>7</sup> *Ante*, § 6806. Compare *post*, § 6809.



ple, will be a judgment ousting the corporation of the particular franchise, power, or authority, and perhaps adding the imposition of a nominal fine. Such an information may also be maintained, to oust a body of individuals, holding a particular franchise, such as that of maintaining a toll-bridge over a navigable stream, which franchise, though lawfully acquired, has become subject to forfeiture by reason of the non-compliance of the grantees with the conditions of the grant.<sup>1</sup> It has been held that an *exemption from taxation* is not a franchise, within the meaning of a statute relating to

<sup>1</sup> *Thompson v. People*, 23 Wend. (N. Y.) 537, 574; *People v. Thompson*, 21 Wend. (N. Y.) 235. A good illustration of the use of an information in the nature of a *quo warranto*, to oust a corporation which has a legal existence as such, not from its right of being a corporation, but from the exercise of a particular liberty or franchise, is furnished by a case where the object of the proceeding was to oust a *railway company* of the right to build a *bridge* across a *navigable river*. The court conceded that this was an appropriate use of the information in the nature of *quo warranto*, provided the right to build the bridge did not exist; but, upon consideration of the merits, decided in favor of the corporation. *Savage, C. J.*, in speaking of the office of this information, said: "It [judgment of ouster] is rendered against corporations, for exercising a franchise not authorized by their charter. In such case the corporation is *ousted* of such franchise, but not of being a corporation." *People v. Rensselaer &c. R. Co.*, 15 Wend. (N. Y.) 115; *s. c.* 30 Am. Dec. 33. Another early and leading case in the State of New York illustrates this use of such an information. The Attorney-General of the State of New York (*Martin Van Buren*) brought an information in

the Supreme Court of that State, giving the court to understand that the *Utica Insurance Company* was usurping the franchise of carrying on a banking business, "which incorporated banks may and do transact by virtue of their respective acts of incorporation," and praying for "advice of the said court in the premises, and due process of law against the said *Utica Insurance Company*, in this behalf to be made, to answer to the said people by what warrant they claim to have, use, and enjoy the liberties, privileges, and franchises aforesaid." The *Utica Insurance Company* answered, setting up the grounds on which they claimed to enjoy such liberties, privileges, and franchises; and ended by praying judgment "that the aforesaid liberties, privileges, and franchises, in form aforesaid claimed by them, the said *Utica Insurance Company*, may for the future be allowed to them; and that they may be dismissed and discharged by the court hereof, and from the premises aforesaid." Judgment was rendered *ousting the defendant of the privilege of carrying on a banking business*; but nothing in the report discloses that it was ousted of the privilege of being a corporation. *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358; *s. c.* 8 Am. Dec. 243.

proceedings by information in the nature of *quo warranto*, so that such an information will not lie to oust a corporation of such an exemption; but this was held under a statute which was construed not to have the mere effect of vesting the exemption in the corporation, but as creating a right inhering in the *property* to which it applied, and following the property into the hands of whomsoever might become its owner.<sup>1</sup>

**§ 6808. Ousting Usurpers from Corporate Offices.**—An information in the nature of *quo warranto* is a remedy much resorted to in modern times to oust from corporate *offices* those who are usurping the functions of such offices.<sup>2</sup> Although the writ of *mandamus* was the appropriate remedy at common law to restore a corporator to his franchises,<sup>3</sup> yet the information in the nature of *quo warranto* is now commonly resorted to in the case of contests for the possession, not only of public offices, but also of offices in private corporations.<sup>4</sup> But in New York, where one has been unlawfully deposed from office in a corporation, and another person has been elected to the vacancy caused by the deposition, it is held that an information in the nature of *quo warranto*, and not a writ of *mandamus*, is the proper proceeding to restore the deposed officer.<sup>5</sup> This is in conformity with the rule which has long obtained in that State, that when a person is an officer by color of right, the court will not grant a *mandamus* to admit another person who claims to have been duly elected, but that the proper remedy is by an information in the nature of *quo warranto*.<sup>6</sup>

<sup>1</sup> *International &c. R. Co. v. State*, 75 Tex. 356, 377.

<sup>2</sup> *Davidson v. State*, 20 Fla. 784; *Reg. v. Soutter* (C. A.) [1891], 1 Q. B. 57; *State v. McNaughton*, 56 Vt. 736.

<sup>3</sup> *Ante*, §§ 762, 829.

<sup>4</sup> *Ante*, § 1776, *et seq.*

<sup>5</sup> *People v. New York Infant Asylum*, 122 N. Y. 190; *s. c.* 25 N. E. Rep. 241.

<sup>6</sup> *People v. Stevens*, 5 Hill (N. Y.), 616; *Morris v. People*, 3 Denio (N. Y.), 381; N. Y. Code Civ. Proc., § 1948,

subsec. 1. It has been held that a *mandamus* will not be granted, upon the application of one claiming title to an office, for the purpose of determining the validity of his claim, where there is a serious question in regard thereto, and where another person is exercising the functions of the office,—and this, although the Attorney-General refuses to bring an action in the nature of *quo warranto*. *Re Gardner*, 68 N. Y. 467, 469. This seems to be little more than the appli-

## § 6809. Ousting Individuals of Particular Franchises.—

One of the largest uses of the remedy by *quo warranto*, or by the modern information in the nature of *quo warranto*, is to oust individuals of particular franchises which they are usurping; and this extends to other franchises besides the franchise of being a corporation. For instance, it has been held that the right to preside over the meetings of a *city council* is a *franchise* given by law; so that if this franchise is usurped by one not entitled thereto, the remedy is by *quo warranto*, or by an information in the nature of that writ.<sup>1</sup> The remedy by a writ of *quo warranto*, authorized by the Louisiana code of practice, is not confined to cases of the usurpation of office, but extends also to the usurpation of franchises,—as, for instance, where the *recorder* of a municipal corporation

cation of the doctrine that a writ of *mandamus* will not be granted where the law affords another specific remedy. Under a statute of Pennsylvania, authorizing the use of the writ of *quo warranto* “in case any question shall arise concerning the exercise of any office in any corporation created by authority of law,—it was held that a *professorship* in the Lewisburg University was not such an office, but was a mere *private employment*.” *Philips v. Com.*, 98 Pa. St. 394. In *Union County v. James*, 21 Pa. St. 525, it was held, with reference to the question of *taxation*, that a *professor* in the college was *not an officer* of the corporation, but merely an employé. One who has been fairly elected to a corporate office by a majority vote, will not be ousted therefrom, in such a proceeding, brought at the relation of a stockholder, who has acquiesced in the election by accepting his dividends and receiving a pass over the road, because of a mere *irregularity in the election*. *State v. McNaughton*, 56 Vt. 736. There is a conflict of opinion upon the question whether

this remedy is available in the case of contests over the office of member of a *municipal council*, whether called *alderman*, *supervisor*, or by some other name. In Pennsylvania and New York, the information in the nature of *quo warranto* has been used in such cases. *Com. v. Allen*, 70 Pa. St. 465; *People v. Hall*, 80 N. Y. 117. But the contrary has been held, in view of the provisions of municipal charters making each house of the municipal legislature the judge of the qualifications of its own members, which is held to exclude the jurisdiction of the ordinary courts. *People v. Metzker*, 47 Cal. 524. That this is the rule in regard to contests over the title to the office of *member* of one of the houses of a *State legislature*, was held in *State v. Tomlinson*, 20 Kan. 692. The court cited *O’Ferrall v. Colby*, 2 Minn. 180; *Hiss v. Bartlett*, 3 Gray (Mass.), 468; s. c. 63 Am. Dec. 768; *People v. Mahaney*, 13 Mich. 481; *McCrary on Elections*, § 515.

<sup>1</sup> *Cochran v. McCleary*, 22 Iowa, 75.

claims the right to vote with the aldermen.<sup>1</sup> So, an information in the nature of *quo warranto* would lie at common law, for illegally holding a court of record within a charter borough and proceeding therein in the absence of the bailiffs, the defendant not being one of them,—the reason being that this was a usurpation of the *franchise* of holding the court.<sup>2</sup> Mr. Willcock, speaking of the cases in which the Attorney-General or public prosecutor may file an information in the nature of *quo warranto*, says, with reference to what is now under consideration: “He may file it against a person who has attempted to be a local corporate officer, to show by what title he holds a franchise and which he assumes to exercise in his official capacity,—as if the mayor assumed the right to admit freemen without the assent of the rest of the body corporate.”<sup>3</sup>

**§ 6810. In Case of a Pretended Corporation not Legally Organized.**—Where a number of individuals assume the functions of a corporation, in a case where the law does not permit the formation of a corporation without taking the essential steps prescribed by the governing statute to become incorporated, the proper remedy to oust them of their franchises, and incidentally to determine the question of the legality of the assumed or pretended corporation, is an information in the nature of a *quo warranto*, prosecuted by the State.<sup>4</sup> Thus, it was held that a *quo warranto* against the *officers* of a supposed *township* is the proper remedy to procure an adjudication of the question of the legality of the creation of the township, by dividing one already in existence.<sup>5</sup> So, if a number of persons assume to act as *trustees* of a *school district*, claimed by them to be legally organized, the question as to

<sup>1</sup> Reynolds v. Baldwin, 1 La. An. 162; State v. Ramos, 10 La. An. 420.

<sup>2</sup> Rex v. Williams, 1 Burr. 402; s. c. 1 W. Black. 93; 2 Ld. Raym. 68.

<sup>3</sup> Willc. Mun. Corp. 456, pl. 337; citing Rex v. Hertford, 1 Salk. 374; s. c. Ld. Raym. 426. Compare Com. v. Arrison, 15 Serg. & R. (Pa.) 127, 130; s. c. 16 Am. Dec. 531.

<sup>4</sup> Greene v. People (Ill.), 21 N. E. Rep. 605; Elizabethtown Gaslight Co. v. Green, 46 N. J. Eq. 118; s. c. 18 Atl. Rep. 844. See also State v. Foulkes, 94 Ind. 493; State v. Independent School District, 29 Iowa, 264; State v. Bradford, 32 Vt. 50.

<sup>5</sup> Territory v. Armstrong, 6 Dak. Ter. 226.

the legal existence of such district can only be tested by an information in the nature of a *quo warranto*;<sup>1</sup> and the same principle would equally apply in the case of private corporations. But the fact that the *Secretary of State*, in filing the *articles* of incorporation of a projected company, unlawfully *antedates* them, will not support an information to oust the adventurers of their franchise.<sup>2</sup>

**§ 6811. Discretion in Granting or Refusing Judgment of Ouster.**—The principle that the court has a *discretion* in the first instance in allowing the information to be filed,<sup>3</sup> carries with it, by parity of reasoning, the conclusion that it has a similar discretion, after hearing the evidence finally submitted under the issues as made up, in granting or refusing the judgment prayed for on behalf of the State or the people; and such, we have seen, is the view taken by some of the courts.<sup>4</sup> In an original proceeding in the Supreme Court of Pennsylvania, by information in the nature of *quo warranto*, although the practice requires the court to exercise a discretion on the preliminary motion for leave to file the information, — yet it is held that the issuing of the writ does not end the discretion of the court, but that the court will deny relief under it, if, in their opinion, it was improvidently issued.<sup>5</sup> The Supreme Court of Ohio have, according to their official syllabus, in an original proceeding commenced in that court, ruled that “in *quo warranto* against a corporation, where it has assumed franchises not granted, and it appears that the certificate of incorporation does not comply with the requirements of the statute under which it is organized, the court, *in the exercise of its discretion*, will oust it of the franchise to be a corporation.”<sup>6</sup> An earlier decision of the same

<sup>1</sup> *Renwick v. Hall*, 84 Ill. 162. To the same effect, see *State v. Independent School District*, 29 Iowa, 264.

<sup>2</sup> *State v. Foulkes*, 94 Ind. 493. The filing of such articles is the act of depositing them in the secretary's office,

and not the act of placing the file-mark upon the document. *Ibid.*

<sup>3</sup> *Ante*, § 6783.

<sup>4</sup> *Ante*, § 6817.

<sup>5</sup> *Com. v. Cluley*, 56 Pa. St. 270; *s. c.* 94 Am. Dec. 75.

<sup>6</sup> *State v. Central Ohio &c. Asso.*, 29 Ohio St. 399.

court is that where a corporation has incurred a forfeiture of its franchises under the terms of its charter, the court has *no discretion* to refuse judgment of ouster.<sup>1</sup> The Supreme Court of Kansas have reasoned that, as in the case of *mandamus*, injunction, and other extraordinary remedies, a court is vested with a discretion to refuse relief by *quo warranto*, and it will refuse it in a case where, to grant it, would be to *enable the relator to violate the law*. Accordingly, where one had been elected to the office of school director, and applied for a *quo warranto* against the previous incumbent of the office, and it appeared that the relator had a subsisting contract with the school board for the building of a school-house, and that it would become his duty in the office to supervise, control, and pay for the materials furnished and labor done under that contract, and a statute, providing that public officers should be prohibited from taking such contracts, was in existence,—the remedy was refused.<sup>2</sup>

§ 6812. **Further of This Subject.**—If it is a sound view that the court may give or refuse judgment of ouster, in the exercise of a sound *discretion*, under all the circumstances disclosed by the evidence, and according to *justice and equity*,—then it must equally follow that *evidence* is admissible, having no other tendency than to enlighten the court in the exercise of this discretion; and it should seem that, for this reason, the *evidence should be allowed to take a wide range*. In such a proceeding, brought on the relation of the prosecuting attorney, against persons who assume to exercise the franchises of a corporation, to oust them of such franchises, it has been held competent for the court to take into consideration any evidence which may be offered as to circumstances tending to show the character of the proceeding; and if such evidence makes it appear that the prosecution has been instituted for private purposes merely, judgment ought to be rendered for the defendant; for, “a private person is not al-

<sup>1</sup> State v. Pennsylvania &c. Canal Co., 23 Ohio St. 121.

<sup>2</sup> Weston v. Lane, 40 Kan. 479; s. c. 10 Am. St. Rep. 224.

lowed to institute proceedings for a forfeiture in a matter concerning the public alone.”<sup>1</sup>

§ 6813. **Theory that Corporation Continues to Exist until Execution of the Judgment.**—It is stated in some of the earlier cases, in substance, that the judgment of forfeiture against a corporation does not, of itself, work its dissolution, but there must also be an *execution* for the seizure of the franchises, before the penalties of forfeiture take place, and that until the franchises are thus seized on execution, the corporation continues to exist in contemplation of law.<sup>2</sup> But this does not seem to be sound, for two reasons: First, we have already seen<sup>3</sup> that it is not a necessary part of the judgment that there should be a seizure of franchises; secondly, if a seizure of franchises is necessary, then it is to be added that franchises are something intangible, which are not capable of manual seizure; so that the issue of an execution, for the purpose of seizing them, would at most be an idle ceremony, which could not give any additional effect to the judgment of the court rendered against parties who are before it and in its presence, in contemplation of law.

<sup>1</sup> *State v. Wood*, 13 Mo. App. 139, 144.

*State*, 1 Blackf. (Ind.) 267; *s. c.* 12

<sup>2</sup> *Nevitt v. Bank of Port Gibson*, 6

*Am. Dec.* 234.

*Smedes & M. (Miss.)* 513; *Bank v.*

<sup>3</sup> *Ante*, § 6806.

# **TITLE SEVENTEEN.**

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**RECEIVERS OF CORPORATIONS.**





# TITLE SEVENTEEN.

## RECEIVERS OF CORPORATIONS.

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### CHAPTER CLVIII.

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6848. Not appointed where there are no assets to administer.

6849. Appointment of receivers of companies in England.

§ 6823. **Appointment of Receivers Largely Discretionary.** — We may commence the discussion with the proposition that, unless there is a statute giving the right to a receiver in a given state of facts, no one can demand the appointment of a receiver *ex debito justitiæ*; but the question whether or not a receiver will be appointed in a given case, is addressed to the sound discretion of the Chancellor, under all the circumstances.<sup>1</sup> The *discretionary* power possessed by courts of equity of appointing receivers, or refusing applications for such appointment, will not be interfered with on *appeal*, except in cases where the discretion has been manifestly abused,<sup>2</sup>—this being the general rule as to the appellate review of discretionary action.

§ 6824. **Court may Impose Equitable Conditions as a Condition Precedent to the Appointment.** — It must follow that the court to whom the application is made may impose upon the applicant such *conditions* as appear to be just and equitable, which conditions will be binding upon him and those represented by or claiming under or through him,<sup>3</sup> and also upon the conscience of the court.<sup>4</sup> This principle is constantly

<sup>1</sup> Milwaukee &c. R. Co. v. Soutter, 2 Wall. (U. S.) 510; Verplank v. Caines, 1 Johns. Ch. (N. Y.) 57; Rider v. Bagley, 84 N. Y. 461; Lowell v. Doe, 44 Minn. 144; Myers v. Estell, 48 Miss. 372; Jacobs v. Gibson, 9 Neb. 380; Cone v. Paute, 10 Heisk. (Tenn.) 506; Morrison v. Buckner, Hempst. (U. S.) 442; Sales v. Lusk, 60 Wis. 490.

<sup>2</sup> Gardner v. Howell, 60 Ga. 11;

Jones v. Johnson, 60 Ga. 260; Augusta Ice Man. Co. v. Gray, 60 Ga. 344.

<sup>3</sup> Fosdick v. Schall, 99 U. S. 235; Union Trust Co. v. Souther, 107 U. S. 591; Farmers' Loan & Trust Co. v. Kansas City &c. R. Co., 53 Fed. Rep. 182.

<sup>4</sup> Kneeland v. Luce, 141 U. S. 491, 509; Farmers' Loan & Trust Co. v. Kansas City &c. R. Co., 53 Fed. Rep. 182, 191.

acted upon in the courts of the United States, and in many of the State courts, in actions brought by the *trustees in railway mortgages*, where an application is made for a receiver *pendente lite*; and the condition which is generally imposed is the payment of claims for labor and supplies furnished in building and operating the road, and which have been necessary to create it and keep it a going concern. The ground which justifies the imposition of such a condition is thus clearly and forcibly stated by Mr. Chief Justice Waite: "The mortgagee has his strict rights, which he may enforce in the ordinary way. If he asks no favors, he need grant none. But if he calls upon a court of chancery to put forth its extraordinary powers, and grant him purely equitable relief, he may, with propriety, be required to submit to the operation of a rule which always applies in such cases, and do equity in order to get equity. The appointment of a receiver is not a matter of strict right. Such an application always calls for the exercise of judicial discretion, and the chancellor should so mould his order that, while favoring one, injustice is not done to another. If this cannot be accomplished, the application should ordinarily be denied."<sup>1</sup>

**§ 6825. An Example of an Order Imposing Such Conditions.**—The following is an example of an order appointing a receiver of a railway property and imposing equitable conditions upon the applicant, which order was made by one of the most experienced, learned, competent, firm, and just-minded judges on the Federal bench:—"The foregoing order, appointing a receiver in this cause, is made upon this express condition: That the said plaintiff, as trustee and mortgagee, representing the mortgage bondholders whose bonds are secured by the said mortgage, consents and agrees that the debts due from the railroad company for ticket and freight balances, and for work, labor, materials, machinery, fixtures, and supplies of every kind and character, done, performed, or furnished in the construction, extension, repair, equipment, or operation of said road and its branches in the State of Kansas, and liabilities incurred by said company in the transportation of freight

<sup>1</sup> *Fosdick v. Schall*, 99 U. S. 235.

and passengers, including damage to person and property, which have accrued since the execution of the mortgage set out in the bill of complaint, being the second day of January, 1888, together with all debts and liabilities which the said receiver may incur in operating said road, including claims for injury to person and property, — shall constitute a lien on said railroad, and all property appurtenant thereto, superior and paramount to the lien of the mortgage set out in the bill, and said railroad shall not be released or discharged from said lien until said debts and liabilities are paid. The receiver is authorized and directed to pay all such debts and liabilities out of the earnings of the road or out of any funds in his hands applicable to that purpose, and, if not sooner discharged, then the same shall be paid out of the proceeds of the sale of the road.”<sup>1</sup>

**§ 6826. Circumstances under Which Receivers Appointed.\***—This discretionary power, like other extraordinary equity powers, is exercised only on a principle of *necessity*. Before a court possessing this power will take the property of an individual or of a corporation out of the hands of its lawful and proper custodian and commit it to its own officer, there must be a clear and well-grounded apprehension of *impending mischief*. Such an application was therefore properly denied where the misconduct on which it was grounded took place, if at all, some years before.<sup>2</sup> It may be collected from careful and authoritative adjudications that this power is a delicate one, to be exercised with great circumspection; that, to justify its exercise, it must appear not only that the complainant has

<sup>1</sup> Farmers' Loan & Trust Co. v. Kansas City &c. R. Co., 53 Fed. Rep. 182, 184, Mr. Circuit Judge Caldwell.

<sup>2</sup> Kean v. Colt, 5 N. J. Eq. 365. In this connection it may be stated that here, as in other cases where equitable relief is sought, the *laches* of the complainant will in many cases debar him from the relief, especially where

his right is not clear. High on Receivers, § 14; citing and explaining Brown v. Chase, Walk. Ch. (Mich.) 43; Gould v. Tryon, Walk. Ch. (Mich.) 353; Gray v. Chaplin, 2 Russ. 126; Fogarty v. Bourke, 2 Drury & War. 580; Skinners' Company v. Irish Society, 1 Mylne & Cr. 162.

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\* The general principles upon which courts of equity proceed in appointing receivers, and the grounds on which they deny such appointments, are admirably stated by Mr. High in his first chapter. High on Receivers, § 1, *et seq.* In addition to being a careful and authoritative writer on several topics of the law, Mr. High is a very competent chancery lawyer.

either a title to, a lien upon, an interest in, or a right to an equitable charge against, the property sought to be impounded, but the court must also be satisfied that a receiver is necessary to preserve it; and that the fact that fraud or imminent danger is likely to supervene, if intermediate possession is not taken by the court, must be clearly established by proof.<sup>1</sup>

**§ 6827. Circumstances under Which not Appointed.**—It seems scarcely necessary to say that the non-performance by a delinquent director of his obligation to his corporation is no ground for the appointment of a receiver, where the corporation is solvent and doing a good business.<sup>2</sup> It has been held that a receiver will not be appointed for a *railway relief association*, which has been dissolved by the legislature, and which has transferred all its assets to a railroad company which has guaranteed its obligations, where a new association has been formed to take the place of the old, into which the great majority of the members have entered for the purpose of saving their interests, and where the railroad company acknowledges itself to be a trustee of the assets, ready to account for the same as the court shall order, and ready and able to give ample security for the payment of any sum the complainants may be entitled to.<sup>3</sup> It has also been held that a receiver of a railway property will not be appointed at the suit of mortgage creditors, on allega-

<sup>1</sup> See *Blondheim v. Moore*, 11 Md. 374; *Baltimore & C. R. Co. v. Cannon*, 72 Md. 493; *s. c.* 20 Atl. Rep. 123; 8 Rail. & Corp. L. J. 358; *Railroad Co. v. Howard*, 131 U. S. Append. L. xxxi; *Fosdick v. Schall*, 99 U. S. 235, 253; *Sage v. Memphis & C. R. Co.*, 125 U. S. 361, 376; *Chicago & C. R. Co. v. Cason*, 133 Ind. 49; *s. c.* 32 N. E. Rep. 827. It has been held that a receiver cannot be appointed to take charge of the assets of a solvent corporation upon the bill of a *minority stockholder* before the time to answer has expired, because of abuse of authority by the president, or his refusal to account for moneys in his hands or to allow the complainant to inspect the books, where his acts are

approved by a *majority* of the stockholders. *Ranger v. Champion Cotton Press Co.*, 52 Fed. Rep. 609. That a court will not interfere with the directors in disposing of the property of the corporation as a whole, where there is no fraud and no violation of the charter or by-laws of the company, and the directors are sustained by a large majority of the stockholders,—see *Sewell v. East Cape May Beach Co.*, 50 N. J. Eq. 717; *s. c.* 25 Atl. Rep. 929.

<sup>2</sup> *Hyde Park Gas Co. v. Kerber*, 5 Ill. App. 132.

<sup>3</sup> *Baltimore & C. R. Co. v. Cannon*, 72 Md. 493; *s. c.* 8 Rail. & Corp. L. J. 358; 20 Atl. Rep. 123.

tions of mismanagement and misappropriation of earnings and of default in the payment of interest, where these allegations are met by counter-charges of bad faith; nor on a bill to foreclose a mortgage where the company claims, on reasonable grounds, that it is not in default, or that circumstances exist precluding the plaintiffs from insisting upon the default. In such a case the court will at least delay the appointment until it shall have determined that a right to foreclose exists.<sup>1</sup>

**§ 6828. Where a Business Corporation is Dissolved.—**

Where a corporation becomes dissolved in any way, and there is no other mode provided by the governing statute for winding up its affairs and distributing its assets, it is proper, and in many cases it may be necessary, for a court, having equity powers, to intervene *on the application of a creditor or a stockholder*, by the appointment of a receiver.<sup>2</sup> But this intervention can only take place on the application of a party having an interest in the proper distribution of the assets, and such a party can only be a creditor or a stockholder, unless there is a statute otherwise providing, or unless the principles of the ancient common law obtain which allow an escheat to the State of the personal property of the defunct corporation.<sup>3</sup> *The State, as a party*, can have no interest in the *distribution*, other than the interest which it can have in any private litigation; and consequently, the State cannot, through its Attorney-General or otherwise, demand the appointment of a receiver, unless there is a statute so providing.<sup>4</sup> - Therefore, where a proceeding has been commenced by the Attorney-General, under the statutes of New York, to dissolve a corporation, on the ground that it has been insolvent for more than a year,<sup>5</sup> and an *interim receiver* is appointed in the action, and subsequently the mortgage bondholders are permitted to

<sup>1</sup> American Loan &c. Co. v. Toledo &c. R. Co., 29 Fed. Rep. 416.

<sup>2</sup> Western N. C. R. Co. v. Rollins, 82 N. C. 523.

<sup>3</sup> See Hall v. Carey, 5 Ga. 239, 249.

<sup>4</sup> Havemeyer v. Superior Court, 84

Cal. 327; s. c. 18 Am. St. Rep. 192; 24 Pac. Rep. 121; able opinion by Beatty, C. J., overruling the opinion of Wallace, J., in the court below, reported 8 Rail. & Corp. L. J. 128.

<sup>5</sup> Ante, § 6638.

bring an action to foreclose their mortgage in the same court, — it is not necessary to make the receiver a party to the foreclosure suit, and the people are in no sense a party to it, though it is in the discretion of the court to allow either the Attorney-General or the receiver to intervene in the action.<sup>1</sup> Even where the court having jurisdiction of the proceeding by *quo warranto* has the statutory power, on motion of the State's attorney, to appoint a receiver upon rendering a judgment of dissolution, this power is not to be exercised merely where the judgment ousts the corporation of the possession of a *particular franchise* without dissolving it as a corporation, — as, for instance, where it ousts it of the franchise of building and operating a *railroad*, but leaves it in the possession of the franchise of a *banking* corporation.<sup>2</sup>

**§ 6829. Where the Statute Makes the Directors Trustees to Wind up.** — Statutes exist in many States providing for the winding up of dissolved corporations without the intervention of a receiver or of any proceeding in court. In Missouri the *directors* become *trustees* of the assets of the corporation for this purpose.<sup>3</sup> In California there is a similar statute reciting that “unless other persons are appointed by the court, the directors or managers of the affairs of such corporation at the time of its dissolution are trustees of the creditors and stockholders or members of the corporation dissolved, and

<sup>1</sup> *Herring v. New York &c. R. Co.*, 105 N. Y. 340.

<sup>2</sup> *State v. Commercial &c. Bank*, 24 Miss. 144. In Wisconsin, where a corporation is dissolved by the judgment of the Supreme Court in an original proceeding upon an information in the nature of a *quo warranto*, the court cannot appoint a receiver; because it has, under the constitution, no *original equity jurisdiction*, except to issue the writ of injunction (*State v. Waupaca County Bank*, 20 Wis. 640); and the legislature cannot confer such jurisdiction, because the jurisdiction

of the court is defined by the constitution. But in such a case the personal property of the corporation will not escheat to the State, nor will its real property revert to its original owners, leaving its creditors without a remedy, according to the course of the ancient common law; but the mode of proceeding will be the same as in the case of a *voluntary dissolution* which is provided for by the statute. *State v. West Wisconsin R. Co.*, 34 Wis. 197. The statute referred to is Wis. Rev. Stat., ch. 78, §§ 8, 9.

<sup>3</sup> Rev. Stat. Mo. 1889, § 2513.



have full power to settle the affairs of the corporation.”<sup>1</sup> It is held by the Supreme Court of California that this section refers to *involuntary* as well as to *voluntary* dissolutions; and this is obvious, because it uses the words “such corporation,” which actually connects the section with the preceding one, and the preceding section refers in terms both to involuntary and voluntary dissolutions.<sup>2</sup> Where such a statute exists, the obvious rule is that the affairs of a dissolved corporation are to be wound up under its provisions; and the exception to the rule is that it may be wound up by a receiver appointed by a court, on the application of a party interested, and upon good cause shown for taking the liquidation out of the hands of the statutory trustees.<sup>3</sup>

**§ 6830. No Such Appointment unless on Application of a Party in Interest.** — A statute giving to the court in which the action is pending the power to appoint a receiver “in cases when the corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights,”<sup>4</sup> is to be read in connection with other provisions of the statute; but where the next succeeding section provides that “upon the dissolution of any corporation, the Superior Court of the county in which the corporation carries on its business or has its principal place of business, *on application of any creditor of the corporation, or of any stockholder or member thereof*, may appoint one or more persons to be receivers of the assets of the corporation,”<sup>5</sup> etc., — it is not a just conclusion that, in the statutory provision first quoted, the word “*may*” is to be construed so as to make it read “*must*” where the public rights are involved, so that on the judicial dissolution of a corporation for engaging in a “*trust*” to keep

<sup>1</sup> Cal. Civ. Code, § 400.

<sup>2</sup> *Havemeyer v. Superior Court*, 84 Cal. 327, 366; s. c. 18 Am. St. Rep. 192; 24 Pac. Rep. 121; overruling on this point the decision of Wallace, J., in the court below, reported in 8 Rail. & Corp. L. J. 128.

<sup>3</sup> This is very clearly brought out in the opinion of Beatty, C. J., in *Havemeyer v. Superior Court*, *supra*.

<sup>4</sup> Cal. Code Civ. Proc., § 564, subsec. 5.

<sup>5</sup> *Ibid.*, § 565.

down the production and enhance the price of one of the necessities of life, the court is to appoint a receiver on the application of the Attorney-General, without the intervention of any creditor or stockholder, to collect and distribute its property, by way of an additional punishment for its wrong-doing; but, on the other hand, the jurisdiction to appoint a receiver is restrained to cases where the application to that end is made by a creditor, stockholder, or member; and where the court entering the judgment of forfeiture assumes to appoint a receiver on the motion of the Attorney-General, a writ of *prohibition* may be issued by the Supreme Court to restrain it from such a usurpation of jurisdiction.<sup>1</sup> On the contrary, it seems to be the construction of somewhat similar statutes in New York that a receiver is to be appointed by the court in a proceeding in the nature of *quo warranto* in which the franchises of the company are forfeited.<sup>2</sup>

**§ 6831. Attitude of Stranger to Litigation Who Procures Himself to be Appointed Receiver.**—If a stranger to a litigation interferes therein, and, by practicing a *fraud* upon the

<sup>1</sup> *Havemeyer v. Superior Court*, 84 Cal. 327, 366; *s. c.* 18 Am. St. Rep. 192; 24 Pac. Rep. 121. A writ of *prohibition* went against Hon. William T. Wallace, judge of the Superior Court of San Francisco,—speaking roughly,—prohibiting him from enforcing an order appointing a receiver, the propriety of which order he had defended in an opinion quoted by the Supreme Court of California in its opinion, and also published in 8 Rail. & Corp. L. J. 128. In this action Judge Wallace held that the word “*may*,” in the statutory provision above quoted, should be construed so as to make it read “*must*.”

<sup>2</sup> See *People v. Washington Ice Co.*, 18 Abb. Pr. (N. Y.) 382, decision by Ingraham, J., at special term. See comments on this case by Beatty, C. J., in *Havemeyer v. Superior Court*,

84 Cal. 327, 363; *s. c.* 18 Am. St. Rep. 192; 24 Pac. Rep. 121. Compare *Herring v. New York & C. R. Co.*, 105 N. Y. 340, where in such a proceeding a temporary receiver was appointed. The New York statute recited that it should “be the duty of the Attorney-General, immediately after the rendition of such judgment [of forfeiture], to institute proceedings for that purpose,” that is, for the appointment of a receiver. New York Code Civ. Proc., § 444. In the absence of any such statute in California, it was held that the Attorney-General could not institute a proceeding for the appointment of a receiver except in the possible case where the State might have a pecuniary interest as a creditor or distributee. *Havemeyer v. Superior Court*, 84 Cal. 327, 364; *s. c.* 18 Am. St. Rep. 192; 24 Pac. Rep. 121.

court, procures himself to be appointed a receiver of moneys coming into the custody of the court in the litigation, he will not be entitled to the protection of a receiver, but he will be treated as a *trespasser*;<sup>1</sup> for, although it is competent for a court to appoint a receiver *on its own motion* where the case requires it, yet a person having no interest in the controversy cannot propose a receiver, and it is contrary to the regular and ordinary proceedings of a court of justice to allow a stranger to participate in a motion for such an appointment.<sup>2</sup> The *attorney* who represents the intruder in procuring his appointment as receiver, will also be held responsible, on the footing of being a *co-trespasser*.<sup>3</sup> In addition to what was decided in the case referred to, it is absolutely clear on principle that such an intruder and his attorney are amenable to punishment for *contempt of court*.

**§ 6832. Appointment where a Church Corporation is Dissolved.** — Where a church corporation, holding real and personal property in violation of law, is *dissolved*, and it, with others, is holding and using such real estate, and applying to its and their own use the rents, issues, and profits, and there is no person lawfully authorized to take charge of the property, which is subject to irreparable loss and destruction, the appointment of a receiver has been held proper.<sup>4</sup>

<sup>1</sup> O'Mahoney v. Belmont, 62 N. Y. 133.

<sup>2</sup> Attorney-General v. Day, 2 Mad. 246; O'Mahoney v. Belmont, 62 N. Y. 133, 143.

<sup>3</sup> O'Mahoney v. Belmont, 62 N. Y. 144.

<sup>4</sup> United States v. Church of Jesus Christ of Latter Day Saints, 5 Utah, 361; s. c. 15 Pac. Rep. 473. It is to be noted in this case that a receiver was appointed at the suit of the United States. The suit was a suit brought in the Supreme Court of Utah, by a bill in chancery, under an act of Congress (Act of March 3, 1887),

praying that the court forfeit the charter and dissolve the corporation known as the Church of Jesus Christ of Latter Day Saints, and also that the court appoint a receiver of the assets of the corporation until a disposition thereof could be made according to law. There was a statute, enacted as early as 1862 (act of Congress, July 1, 1862, § 3), providing that no corporation or association for religious purposes should acquire or hold, in any territory of the United States, real estate of greater value than \$50,000. It appeared that the defendant corporation held real estate

§ 6833. **In Suits in Equity to Foreclose Mortgages.**—The appointment of a *receiver pendente lite*, in an action to foreclose a mortgage upon the property of a corporation, may rest upon somewhat different principles, where the corporation, like a railway company, has *public duties to perform*, which must go on, and the case of a mere private manufacturing or mercantile corporation having no public duties to perform.<sup>1</sup> In actions to foreclose railway mortgages, it has come to be the fact that receivers are appointed, especially in the Federal courts, almost as a matter of course; and in these and other cases courts have often shown a discreditable eagerness to possess themselves of so much jurisdiction and power, and a corresponding disinclination to relinquish it when once acquired. The question is one which addresses itself in a very large sense to the *sound discretion* of the court; and where in such a case a receiver was asked on the ground that the default in payment of debts secured by the mortgage had been caused by wasteful and corrupt mismanagement of the corporation, and the mortgage itself provided that the corporation should remain in possession unless it was shown affirmatively that the default resulted from other causes than failure of the business, it was held that the complainant was bound to show, beyond question, that the default had arisen from mismanagement, and that the safety of the property, if left in the possession of the corporation, was threatened by reason of the misconduct of its officers, and also that the appointment of a receiver would probably result in effectual relief; but under the circumstances of the case, the court held that it would retain the bill, treat the corporation as a trustee of its property for its creditors, and require it to render stated accounts of its receipts and

greatly in excess of the limit; and this, in the opinion of the court, was a sufficient ground, the corporation being dissolved, to warrant the appointment of a receiver. But the court, in ordering the appointment,

did not feel called upon to determine any rights in respect to the property, but held that such rights would be decided as they should ultimately appear. *Ibid.*

<sup>1</sup> *Post*, § 7202, *et seq.*

disbursements.<sup>1</sup> Another case, where the temptation to grasp the jurisdiction of managing a great railway property was repelled by two able and upright judges, is found reported in an early volume of the *Central Law Journal*. The syllabus, written by Judge Dillon, is as follows: "A court of equity will not appoint a receiver of a railroad merely upon a showing that there has been a default in the payment of interest, secured by a mortgage of the properties and income of the company, that upon such default the trustees under the mortgage were entitled to immediate possession, that they have demanded possession and that the same has been refused. It is necessary, in addition to this, to show that ultimate loss will happen to the beneficiaries under the mortgage, by permitting the property to remain in the hands of its owners until final decree and sale, if such decree and sale be made." The opinions consist chiefly in an examination of the facts, from which the learned judges concluded that the facts did not exhibit such danger to the bondholders as would warrant the appointment of a receiver.<sup>2</sup>

<sup>1</sup> *Stewart v. Chesapeake &c. Canal Co.*, 5 Fed. Rep. 149.

<sup>2</sup> *Union Trust Co. v. St. Louis &c. R. Co.*, 4 Dill. (U. S.) 114; s. c. 4 Cent. L. J. 585. Mr. Justice Miller, in the concluding paragraph of the opinion, said: "If authorities are necessary to support a decision, which must largely rest in the discretion of the court, and which in every case must be founded on its own special circumstances, the case of *Williamson v. New Albany R. Co.*, 1 Biss. (U. S.) 198, decided by the late Justice McLean, will be found to be almost perfect in its analogy to this, and quite so in the principles on which we decide it." The event seems to have justified the conclusion at which the learned judges arrived. The common stock of the corporation immediately advanced from \$4.00 to \$54.00 a share. The corporation was reorganized by the voluntary act of

its stockholders and bondholders, and has become one of the most valuable railroad properties in the West. *Statutes* exist in some of the States, attempting to define the cases in which a receiver may be granted pending a suit to foreclose a mortgage; but, so far as the writer knows, they go no farther than to define in general terms the principles on which courts of equity usually act. Such a statute, found in the code of Kansas, reads as follows: "A receiver may be appointed in an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt, and in all other cases where receivers

§ 6834. **How Far a Court of Equity will Assume the Management of a Business by a Receivership.**—The general rule is, that a court of equity will not assume the management of a business by appointing a receiver, but that it will appoint a receiver only for the purpose of *winding it up* and distributing its assets. But there are exceptions to this rule, and for the most part they have been admitted in two cases: 1. In the case of *insolvent railway companies* where actions are brought to *foreclose mortgages*. Here, from the very necessity of the case, the property must continue to be operated for the benefit of the public, and must be kept in such a state of repair that it may be operated safely. This cannot be done if attachments and executions are allowed to be levied upon it, or upon various portions of it, at the suit of various creditors. Nor can a court of equity settle and adjust the rights and priorities of different classes of creditors, or afford them an opportunity for a judicial sale under a decree of foreclosure and a *reorganization* by the purchasers, unless it can lay hold of the whole property by means of its receiver and administer it pending the litigation. This is so obvious as not to require extended discussion; and while great abuses have undoubtedly attended railway receiverships, and particularly those in the Federal courts, which courts are in no way accountable to public opinion,—yet the necessity of such receiverships is so obvious that the public have generally acquiesced in it, and, so far as the writer knows, lawyers have seldom disputed it.<sup>1</sup> 2. The other exceptional case will

have heretofore been appointed by the usages of the courts of equity.” Civ. Code Kan., § 254. Proceeding under this statute, it has been held that where a corporation is greatly embarrassed by its debts, and there are dissensions between its officers likely to materially injure the value of its property, a receiver may be appointed in an action by a mortgagee for the foreclosure of his chattel mortgage and sale of the property, where it appears that the condition

of the mortgage has not been performed. *State Journal Co. v. Commonwealth Co.*, 43 Kan. 93; *s. c.* 28 Am. & Eng. Corp. Cas. 433; 22 Pac. Rep. 982. The circumstances under which a receiver of mortgaged property other than railroad property will be appointed,—commonly called a *receiver of rents and profits*,—are considered in an elaborate note in 27 Am. St. Rep. 794, *et seq.*

<sup>1</sup> See, however, the memorial of the Legislature of South Carolina to

generally be found to be a case where a large *industrial corporation* becomes insolvent, and its creditors are about to levy executions and attachments, and its mortgagees are proceeding to foreclose, and there are *numerous conflicting claims* among creditors, and charges of fraudulent misappropriation of its assets by its directors and officers. In such a case, although there is no public necessity for its operations to be carried on, as in the case of a railway company, — yet, in order to avoid a multiplicity of suits, to settle the rights and priorities of the different claimants, to prevent some from getting unjust advantages over the others, and if possible to afford an opportunity for a *reorganization* on an equitable basis, thereby, while preserving the rights of creditors, preventing a total destruction of the interests of the stockholders, — a receivership *pendente lite* is obviously necessary and proper. It may be added that such receiverships have often proved more satisfactory to all classes of creditors than any other method of dealing with the property of the insolvent corporation.<sup>1</sup> Outside of these and other possible exceptions, the general rule is that first stated, that a court of equity will not appoint a receiver for the mere purpose of carrying on a business which is being conducted by a corporation but not to the profit or satisfaction of its stockholders, — and this for the obvious reason that the sovereign does not furnish public agencies for the carrying on of private enterprises.<sup>2</sup>

Congress: 28 Am. Law Rev. 161. See also *Ibid.* 283.

<sup>1</sup> An example of this in the mind of the author was the case of a receivership, in the Circuit Court of the United States for the Eastern District of Missouri, of a very extensive iron-works owned by the St. Louis Ore and Steel Company. The receivership lasted two or three years; but the vast properties of the company were saved from a judicial sale at a destructive sacrifice, the creditors were satisfied, and the corporation was reorganized on a basis equitable alike to the creditors and

stockholders. The result was due to the rare concurrence of a conscientious and large-minded lawyer in charge of the interests of the principal creditors, and of a conscientious and large-minded judge in charge of the administration through his receiver. Hon. Henry Hitchcock was counselor for the creditors, and Hon. Amos M. Thayer was the judge who presided and made most of the orders in the course of the administration.

<sup>2</sup> See the learned note of Mr. Hovenden to Ex parte O'Reilly, 1 Ves. 112, 130, where the following

§ 6835. **Where the Corporation has Made a Voluntary Assignment for its Creditors.** — It may be stated that, as a general rule, the fact that the corporation may have made a *voluntary assignment of all its assets for the benefit of its creditors* will not have any influence, one way or the other, upon the *power* of a court of equity to appoint a receiver of the property of the corporation, — though it may in particular cases render such an appointment more appropriate than if such an assignment had not been made. Such a voluntary assignee, unlike a receiver, holds *under the corporation*, and cannot, unless so empowered by statute, impeach its acts nor the acts of its directors done in its name. He cannot, for instance, maintain an action to recover property which has been spirited away through breaches of trust committed by the directors, because he has no title to any property except such as has passed to him under the deed of assignment.<sup>1</sup> The receiver, on the other hand, especially where he is appointed in a suit brought by creditors, is the *representative of the creditors*, and may impeach acts of the corporation, and may maintain actions to redress breaches of trust committed by its directors, and may prosecute actions against the directors themselves, when necessary.<sup>2</sup> Now, it is within the experience of lawyers and judges that very few cases of insolvency,

cases are collected in general support of the rule stated in the above text: — *Ex parte Ford*, 7 Ves. 617; *Waters v. Taylor*, 15 Ves. 10, 29; *s. c.* 2 Ves. & B. 299, 304; *Morris v. Colman*, 18 Ves. 437; *Lewis v. Madocks*, 8 Ves. 150, 157; *Radnor v. Shafto*, 11 Ves. 448, 455; *Adley v. Whitstable Co.*, 19 Ves. 304; *Carlen v. Drury*, 1 Ves. & B. 154, 158; *Crawshay v. Maule*, 1 Swanst. 528; *Goodman v. Whitcomb*, 1 Jac. & Walk. 592. Note also the observations of Lord Eldon in *Wilson v. Greenwood*, 1 Swanst. 471, 480, — as to the circumstances under which a receiver of a *partnership* will be appointed.

<sup>1</sup> *Estabrook v. Messersmith*, 18

Wis. 545; *Hawks v. Pritzlaff*, 51 Wis. 160; *Powers v. Hamilton Paper Co.*, 60 Wis. 23, 30.

<sup>2</sup> *Edwards on Receivers*, 365; 2 Story Eq. Jur., § 829; *Powers v. Hamilton Paper Co.*, 60 Wis. 23, 29; *post*, § 6946. Statutes exist affirming this power of receivers, such as that of Wisconsin, which enacts that, “if it appear that any person alleged to have property of the judgment debtor, or to be indebted to him, claims an interest in the property adverse to him, or denies the debt, such interest or debt shall be recoverable only in an action against such person by the receiver.” Rev. Stat. Wis. 1875, § 3035.



whether of individuals or corporations, pass under judicial scrutiny, in which wrong-doing by the insolvent debtor is not detected. The conclusion is, that individuals who will act honestly under prosperous circumstances will, with few exceptions, when driven to the wall, commit acts which the principles of the law will not justify. It is also within such experience that the voluntary assignees selected by insolvent debtors are generally the friends, stakeholders, or tools of the debtor, who work for his interest and struggle to cover up his tracks where he has dealt with his estate dishonestly toward his creditors. The insolvency of corporations furnishes no exception to this rule; and such has been the wretched experience with the voluntary liquidation of insolvent companies in England, that that system has been discontinued by act of Parliament. Voluntary assignments made by failing debtors also in many cases amount to *conveyances in fraud of their creditors*, as where they give *preferences* which the law does not sanction. It follows from what is here said, that the fact that a corporation has made a voluntary assignment for the ostensible benefit of its creditors not only does not disable a court which would otherwise have the power to appoint a receiver of its assets from making such an appointment, but rather increases the propriety of making it.<sup>1</sup> On the other hand, where it appears that such an assignment has been openly and fairly made, for the equal benefit of all creditors, and with the advice of a large number of them, and there is no evidence of mismanagement, breach, or neglect of the trust on the part of the assignees, nor of any unfavorable change in their circumstances since their appointment, nor any cause to apprehend any such change,—a court of chancery will, with clear propriety, refuse to interfere, by the ap-

<sup>1</sup> See, for discussion and illustration, *Powers v. Hamilton Paper Co.*, 60 Wis. 23, 30. That an assignment by a debtor of his property, in fraud of his creditors, will furnish ground for the appointment of a receiver on

the application of a judgment creditor, see *High on Receivers*, § 411; *Connah v. Sedgwick*, 1 Barb. (N. Y.) 210; *Goodyear v. Betts*, 7 How. Pr. (N. Y.) 187; *Shainwald v. Lewis*, 7 Sawy. (U. S.) 148.

pointment of a receiver or otherwise.<sup>1</sup> But, even where an assignment has been made in good faith for the benefit of creditors, where the assignee *refuses to accept the trust*,<sup>2</sup> or, being a *non-resident*, fails for a number of years to make any dividend to the creditors out of the property conveyed to him,<sup>3</sup> or is guilty of *bad faith*,<sup>4</sup> or *gross mismanagement* in the execution of the trust,<sup>5</sup>— a receiver may properly be appointed at the suit of judgment creditors.<sup>6</sup>

**§ 6836. Where the Corporation is being Wound up by its Directors.** — Where a corporation is dissolved for reasons which do not impeach the good faith of the directors towards its creditors and stockholders, or where its charter has expired by limitation, or where it is being voluntarily wound up, the *directors* are, in the absence of any statute, the proper persons to conduct the liquidation; and statutes exist in many of the States devolving this trust upon them in express terms. Whether such a statute exists or not, the mere fact that the corporation is undergoing liquidation in the hands of its directors will not determine, one way or the other, the *power* of a Chancellor to take charge of the liquidation by means of a receiver, unless in possible cases the statute should be so drawn as to exclude such a power. And where there is such a statute, and it empowers the Chancellor either to continue the directors as trustees or to appoint a receiver, the power of the chancellor to make such an appointment is said to be a *discretionary power*, to be exercised only on good cause shown, and upon circumstances, disclosed by the proofs, which show the need of the interference of the court for the protection of creditors or stockholders from breaches of trust by the directors, in conducting the liquidation or otherwise. Mere *insolvency*, indebtedness to many different persons, and a sus-

<sup>1</sup> Bank of Maryland v. Ruff, 7 Gill & J. (Md.) 448.

<sup>2</sup> Suydam v. Dequindre, Harr. (Mich.) 347.

<sup>3</sup> Malcolm v. Montgomery, 2 Molloy, 500.

<sup>4</sup> Suydam v. Dequindre, *supra*.

<sup>5</sup> Jones v. Dougherty, 10 Ga. 273.

<sup>6</sup> High on Receivers (2d ed.), § 412.

pension of business, do not present a state of facts warranting such interference.<sup>1</sup>

§ 6837. **Appointment to Sequester Earnings of a Corporation having Public Duties to Perform.**—While the property of strictly private corporations is subject to *execution*, to the same extent as the property of natural persons,<sup>2</sup> yet the property of *quasi-public corporations*, which have public duties to perform, and which property is necessary to the performance of such public duties,—cannot be taken in execution,—such as the property of *railroad* companies, *canal* companies, *turnpike* companies, *bridge* companies, and the like.<sup>3</sup> The only remedy of the judgment creditor of such a corporation, where he cannot find property belonging to it on which to levy which is not essential to the carrying out of its public duties, is to obtain the appointment of a receiver and the sequestration of its earnings.<sup>4</sup>

§ 6838. **In Proceedings to Enforce Judgments.**—Under the principles on which courts of chancery proceed, where a judgment creditor has exhausted his remedy at law, he may file what is called a *creditor's bill*, the object of which is to

<sup>1</sup> Newfoundland R. &c. Co. v. Schack, 40 N. J. Eq. 222. It has been held by Pratt, J., in the Supreme Court of New York at special term, that where the *directors* of a corporation find the corporation on the brink of insolvency, its affairs growing worse, and are satisfied that they cannot keep it afloat, they are justified in *resigning*; and thereupon a receiver may be appointed, in an action brought by a stockholder, to the end that there may be a ratable and equitable distribution of the corporate property among its creditors, and that some shall not be allowed to get undue preferences over the others. Smith v. Danzig, 64 How. Pr. (N. Y.) 320.

<sup>2</sup> Post, ch. 192, art. I.

<sup>3</sup> Overton Bridge Co. v. Means, 33 Neb. 857; s. c. 29 Am. St. Rep. 514; Susquehanna Canal Co. v. Bonham, 9 Watts & S. (Pa.) 27; s. c. 42 Am. Dec. 315, and n.; Ammant v. New Alexandria &c. Turnp. Road, 13 Serg. & R. (Pa.) 210; s. c. 15 Am. Dec. 593, and n.; Gooch v. McGee, 83 N. C. 59; s. c. 35 Am. Rep. 558; Baxter v. Nashville &c. Turnp. Co., 10 Lea (Tenn.), 488; Louisville Water Co. v. Hamilton, 81 Ky. 517; Palestine v. Barnes, 50 Tex. 538; Gue v. Tide Water Canal Co., 24 How. (U. S.) 257; Seymour v. Milford &c. Turnp. Co., 10 Ohio, 476; Foster v. Fowler, 60 Pa. St. 27. Compare ante, § 6571.

<sup>4</sup> Overton Bridge Co. v. Means, 33 Neb. 857; s. c. 29 Am. St. Rep. 514; citing Moraw. Priv. Corp., § 1125.

reach what are called *equitable assets*;<sup>1</sup> and in such a suit he may undoubtedly have a receiver, provided the appointment of such a functionary is necessary to effectuate his remedy.<sup>2</sup> Statutes provide for the appointment of receivers in such cases, and under such a statute in New York a receiver may be appointed to enforce a decree against a corporation, requiring its officers to surrender all its property and franchises to the equitable and lawful owners.<sup>3</sup> And so in England, although the rolling stock and plant of railway companies<sup>4</sup> are protected from seizure by statute,<sup>5</sup> as pointed out by Sir N. Lindley, citing the authorities in the margin,<sup>6</sup> "a judgment creditor of such a company can obtain a receiver of the earnings of the company,<sup>7</sup> and can issue execution against its unprotected property and obtain a sale of its surplus lands."<sup>8</sup> One of the most common species of relief granted under this kind of a bill is the appointment of a receiver to *enforce*, by actions at law or otherwise, *assessments against the stockholders* in respect of their unpaid subscriptions or their superadded individual statutory liability,<sup>9</sup>—a subject already much considered.<sup>10</sup> A cor-

<sup>1</sup> Lane's Appeal, 105 Pa. St. 49; s. c. 51 Am. Rep. 166; Bell's Appeal, 115 Pa. St. 88; s. c. 2 Am. St. Rep. 532; Bailey v. Pittsburgh Coal R. Co., 139 Pa. St. 213.

<sup>2</sup> High on Receivers (2d ed.), § 399, *et seq.*

<sup>3</sup> King v. Barnes, 113 N. Y. 476; s. c. 21 N. E. Rep. 182; 51 Hun (N. Y.), 550; 22 N. Y. St. Rep. 47, 51, 54; s. c. affirmed in 113 N. Y. 655, *mem.*; 23 N. Y. St. Rep. 263.

<sup>4</sup> The term, as Sir N. Lindley points out (Lind. Comp. Law (5th ed.), 278, note), includes *railway* and *dock* companies: See Re East & West India Docks Company, 38 Ch. Div. 576; Great Northern R. Co. v. Tahourdin, 13 Q. B. Div. 320. Compare Re Exmouth Docks Co., L. R. 17 Eq. 181. As to *tramway* companies, see Re Brentford &c. Tramway Co., 26 Ch. Div. 527.

<sup>5</sup> Stat. 30 & 31 Vict., ch. 27, § 4;

made perpetual by Stat. 38 & 39 Vict., ch. 31.

<sup>6</sup> Lind. Comp. Law (5th ed.), pp. 278, 279.

<sup>7</sup> Re Manchester &c. R. Co., 14 Ch. Div. 645; Re Southern R. Co., 5 L. R. Ir. 165. That the line must have been begun, see Re Birmingham &c. R. Co., 18 Ch. Div. 155. Only one receiver will be appointed: Re Mersey R. Co., 37 Ch. Div. 610, which see as to priorities.

<sup>8</sup> Re Hull, Barnsley &c. R. Co., 40 Ch. Div. 119. See as to debenture-holders, where one sues on behalf of himself and others, Re Hope v. Croydon &c. Tramways Co., 34 Ch. Div. 730.

<sup>9</sup> Bailey v. Pittsburg Coal R. Co., 139 Pa. St. 213; s. c. 21 Pitts. L. J. (N. S.) 309; 21 Atl. Rep. 72; Lane's Appeal, 105 Pa. St. 49; s. c. 51 Am. Rep. 166; Bell's Appeal, 115 Pa. St. 88; s. c. 2 Am. St. Rep. 532.

<sup>10</sup> Ante, §§ 2961, 3550, *et seq.*, and 6570.

poration can never dissolve itself so as to defeat the just rights of its creditors. On a principle already considered, that the assets of a corporation are a *trust fund* for its creditors, whenever a corporation suffers its powers to lapse and ceases to be a going concern, as by failing to elect or appoint officers, a court possessing equity powers, or proceeding according to the course of the civil law in Louisiana, will appoint a trustee to wind it up.<sup>1</sup>

**§ 6839. Creditor must be either a Judgment or Lien Creditor.**— Unless there is a statute extending this remedy to creditors at large, the only creditors who can maintain such an action must be either *judgment* or *lien* creditors; they must either have exhausted their remedies at law by reducing their demands to a judgment, or else they must have, under contract or otherwise, a specific lien upon the property of the corporation, to enforce which they are entitled to call upon the aid of a court of equity.<sup>2</sup> This is the general rule in regard to creditor's bills in equity; and in general it makes no difference in its application whether the defendant is a natural person or a corporation.<sup>3</sup> Special statements of

<sup>1</sup> *Brown v. Union Ins. Co.*, 3 La. An. 177, 182. The official to be appointed in this case was designated as a "manager," and Rost, J., said: "This appointment would in no wise differ from that of receiver, which our courts frequently make to settle the affairs of insolvent banks and partnerships." *Ibid.* 182.

<sup>2</sup> Thus, in New York, the Supreme Court has no power to appoint a receiver of the property of any corporation, whether domestic or foreign, upon the filing of a bill by a creditor-at-large on behalf of himself and all others similarly situated. *Lehigh Coal & Nav. Co. v. Central New Jersey R. Co.*, 43 Hun (N. Y.), 546; *s. c.* 7 N. Y. St. Rep. 270.

<sup>3</sup> The rule is very clearly stated by

Mr. High in his work on Receivers (2d ed.), § 406, citing the following cases: *Uhl v. Dillon*, 10 Md. 500; *s. c.* 69 Am. Dec. 172; *Nusbaum v. Stein*, 12 Md. 315; *Hubbard v. Hubbard*, 14 Md. 356; *Rich v. Levy*, 16 Md. 74; *Hulse v. Wright*, *Wright* (Ohio), 61; *McGoldrick v. Slevin*, 43 Ind. 522; *Bayaud v. Fellows*, 28 Barb. (N. Y.) 451; *May v. Greenhill*, 80 Ind. 124; *Adee v. Bigler*, 81 N. Y. 349; *Johnson v. Farnum*, 56 Ga. 144; *Dodge v. Pyrolusite Manganese Co.*, 69 Ga. 665; *Blondheim v. Moore*, 11 Md. 365; *Wiggins v. Armstrong*, 2 Johns. Ch. (N. Y.) 144; *Holdrege v. Gwynne*, 18 N. J. Eq. 26; *Young v. Frier*, 1 N. J. Eq. 465; *Phelps v. Foster*, 18 Ill. 309; *Bigelow v. Andress*, 31 Ill. 322; *Rhodes v. Cousins*,

the rule are sometimes made, like the following in the official syllabus of a case in Georgia: "While unwise and improper management of the affairs of a corporation might furnish ground for complaint by its *stockholders*, it does not furnish any reason for equitable interference at the instance of *general creditors*, who have not reduced their claims to judgment, and who do not allege any fraud or concealment."<sup>1</sup> *Exceptions* to the rule exist, like that already noted under a statute of Wisconsin, which is held to extend to creditors at large as well as to judgment creditors.<sup>2</sup>

§ 6840. **Further of This Rule.**—Other cases may be found in which the rule that a general creditor must have advanced his claim to judgment before demanding this species of equitable relief, has been either denied or disregarded; but the general rule, supported by the great weight of authority, is as above stated,<sup>3</sup>—though it seems to have no just application where the creditor proceeds upon a written acknowledgment of indebtedness by the debtor. On the one hand, it is stated in some of the cases, that *special circumstances* may take the case out of the rule and entitle a *creditor-at-large* to this species

6 Rand. (Va.) 188; s. c. 18 Am. Dec. 715. Many other cases support the rule, among them, *Peyton v. Lamar*, 42 Ga. 131; *Johnson v. Farnum*, 56 Ga. 144; *Bessman v. Cronan*, 65 Ga. 559.

<sup>1</sup> *Dodge v. Pyrolusite Manganese Co.*, 69 Ga. 665.

<sup>2</sup> In that State a general creditor may bring an action under certain statutory provisions (Wis. Rev. Stat., §§ 3218, 3226), on behalf of all the creditors, for the purpose of closing up the business of a banking corporation and enforcing the respective liabilities of the officers, directors, and stockholders, including not only the liabilities specially created by statute, but also those arising at common law for misappropriation and embezzlement of the corporate

funds, and for negligence in permitting such misappropriation and embezzlement, and for the repayment of dividends unlawfully declared and received. *Hurlbut v. Marshall*, 62 Wis. 590. In this case the creditor was not a judgment creditor. It was held to be immaterial that he was not a creditor of the corporation when the unlawful dividends were declared. *Ibid.*

<sup>3</sup> *Haggarty v. Pittman*, 1 Paige (N. Y.), 298; s. c. 19 Am. Dec. 434; *Cohen v. Meyers*, 42 Ga. 46; *Thompson v. Diffendorfer*, 1 Md. Ch. 489; *Rosenberg v. Moore*, 11 Md. 376; *Wachtel v. Wilde*, 58 Ga. 50; *Morrison v. Shuster*, 1 Mackey (D. C.), 190; *Kehler v. Jack Man. Co.*, 55 Ga. 639. See also *ante*, § 6559, *et seq.*

of equitable relief.<sup>1</sup> At the same time, it is held that this species of relief will not be accorded, even to a judgment creditor, unless he exhibits special circumstances requiring it.<sup>2</sup> As the enforcement of *liens* is one of the ordinary heads of equity jurisdiction, one who has acquired a specific lien upon the property of a debtor, be it a corporation or an individual, by *mortgage* or otherwise, seems to stand at least in as good a position, for the purpose of invoking the aid of a court of equity by the appointment of a receiver, as does a judgment creditor. For instance, an insolvent railroad corporation, which has defaulted in the payment of the interest or principal of its bonds, secured by a mortgage, may be placed, at the instance of the bondholders, in the hands of a receiver,<sup>3</sup>—a jurisdiction the exercise of which is seen every day. And where the petition for a receiver is filed by the bondholders under a *second mortgage*, it may be extended for the protection of the *first mortgage* bondholders, upon their petition.<sup>4</sup>

§ 6841. At the Suit of Sureties or Guarantors.—It has been held in Ohio that a receiver of the property of an insolvent corporation may be appointed at the instance of one who stands liable as a surety for the corporation, although he has not paid the debt.<sup>5</sup> We gain little by the statement of this naked fact, without inquiring into the ground on which the jurisdiction is exercised. It has been made to rest upon the well-known jurisdiction of courts of equity to entertain *bills for the exoneration of sureties*, even before they have paid the debt of the principal. This jurisdiction rests upon the ground that it would, in many cases, be onerous to compel the surety first to pay the debt, which he must do before he can have

<sup>1</sup> Such was the concession in *Dodge v. Pyrolusite Manganese Co.*, 69 Ga. 665.

<sup>2</sup> See, for instance, *Bessman v. Cronan*, 65 Ga. 559. See also *High on Receivers*, § 406, *et seq.*, 2d ed., for a very clear discussion of the subject.

<sup>3</sup> *Taylor v. Philadelphia & c. R. Co.*, 14 Phila. (Pa.) 451.

<sup>4</sup> *Farmers' & c. Bank v. Philadelphia & c. R. Co.*, 14 Phila. (Pa.) 456.

<sup>5</sup> *Barbour v. National Exch. Bank*, 45 Ohio St. 133; *s. c.* 12 N. E. Rep. 5; 10 West. Rep. 453.

any remedy against his principal *at law*; since the surety might not be able, in particular cases, to raise the money without great sacrifices, and he might be compelled, before he could do so, to see his principal waste his assets before his eyes.<sup>1</sup> In such a case the very purpose of the bill is to have a court of equity *charge the debt upon the property* of the principal debtor, and subject that property to its payment. "A security," said the Supreme Court of Ohio, "might ask a court of chancery to aid in subjecting the estate of the principal to the payment of the debt, without first advancing or paying the money, as he must do before he could sue an action at law."<sup>2</sup> As the same court has said in a later case: "It will be observed that this was not a mere right to recover a judgment and have an execution go out against the property of the principal. Indeed, it was because there was no such remedy at law that a court of chancery would lend its aid. It was necessarily a proceeding to subject the property of the principal to the payment of the debt for which the surety had become collaterally liable."<sup>3</sup>

<sup>1</sup> As to the nature and extent of the jurisdiction, see Adams Eq. 270; 1 Story Eq. Jur., § 327; 2 Story Eq. Jur., § 849; Stump v. Rogers, 1 Ohio, 533; McConnell v. Scott, 15 Ohio, 401; s. c. 45 Am. Dec. 583; Polk v. Gallant, 2 Dev. & Bat. Eq. (N. C.) 395, 397; s. c. 34 Am. Dec. 410; Washington v. Tait, 3 Humph. (Tenn.) 543; Bishop v. Day, 13 Vt. 81; s. c. 37 Am. Dec. 582; Taylor v. Heriot, 4 Desaus. Eq. (S. C.) 227; Hale v. Wetmore, 4 Ohio St. 600; Grant v. Ludlow, 8 Ohio St. 1, 81; Shaffner v. Folgeman, Winst. (N. C.) 12; Freeman v. Mebam, 2 Jones Eq. (N. C.) 44; Egerton v. Alley, 6 Ired. Eq. (N. C.) 188; Smith v. Smith, 5 Ired. Eq. (N. C.) 34; Barnes v. Morris, 4 Ired. Eq. (N. C.) 22. Compare Miller v. Miller, 1 Phil. Eq. (N. C.) 85.

<sup>2</sup> Stump v. Rogers, 1 Ohio, 533; approved and followed in McConnell

v. Scott, 15 Ohio, 401; s. c. 45 Am. Dec. 583.

<sup>3</sup> Barbour v. National Exch. Bank, 45 Ohio St. 133, 138. Such being the nature of the proceeding, a statute of Ohio stepped in and authorized the appointment of a receiver, as the appropriate mode of effecting the object of the suit. This statute authorized the appointment of a receiver in the following, among other, cases: "In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or



§ 6842. **At the Suit of a Minority Stockholder.** — In considering this question, a distinction must be taken between a case where a minority stockholder files a bill in equity to restrain and redress a breach of trust on the part of the managers of the corporation, and where the circumstances may be such that a receiver *pendente lite* may be necessary to preserve the property; and the case where the object is to put an end to the affairs of the corporation, *wind up* its business, and distribute its assets. In the latter case, in conformity with what has already been stated,<sup>1</sup> it is a sound conclusion that the fact that the corporation is embarrassed, that some judgments have been recovered against it, and that the stockholders refuse to come to its aid by advancing means to relieve it, or by paying the amounts assessed against them in respect of their shares, furnishes no ground for appointing a receiver at the suit of a single minority stockholder; since it may be supposed to be in the power of the trustees, by selling the stock of the delinquents, to raise money to relieve the corporation from its embarrassments.<sup>2</sup> The governing principle here, as in other cases, is that the power to appoint a receiver is limited to cases where it is necessary either to prevent fraud, to save the subject of the litigation from material injury, or to rescue it from threatened destruction.<sup>3</sup> Even in case of proceedings to *wind up* an insolvent corporation, a receiver should not be appointed if the directors are closing up the affairs of the corporation, and are in all respects trust-

materially injured." *Ibid.*; citing Rev. Stat. Ohio, § 5587. Under the New Jersey "act respecting railroads and canals," which provides that whenever any railroad company has failed, for ninety days after the same has become due, to pay principal or interest on any mortgage on the property or franchises of the company, a receiver of its property may be appointed on the application of any creditor, etc., of the company,—*guarantors* of the payment of a debt

of such a company are its *creditors* in respect of such debt, within the meaning of the statute. In making such application, they do not seek *subrogation as sureties*, but claim as *creditors* merely. *Pennsylvania R. Co. v. Pemberton &c. R. Co.*, 28 N. J. Eq. 308.

<sup>1</sup> *Ante*, §§ 4539, 6696.

<sup>2</sup> *Baker v. Backus*, 32 Ill. 79.

<sup>3</sup> *Ante*, § 6826; *Hugh v. McRae*, Chase Dec. (U. S.) 466.

worthy.<sup>1</sup> So where, under a clause of their charter, the stockholders, upon the expiration of the life of the corporation, had elected three of their numbers to act as *liquidators*, and their election had not been set aside, and no ground was shown for fearing fraudulent action on their part,—it was held improper to displace them and appoint a receiver in their stead.<sup>2</sup>

§ 6843. On the Application of the Corporation Itself. — “We are aware of no case where a corporation, in its corporate capacity and name, can apply to be put in the custody of a receiver.”<sup>3</sup> In another case where a bill had been brought by a stockholder and another by the corporation, and the two were consolidated, and both appeared to have been framed upon the theory of obtaining a decree substantially winding up the corporation,—it was said that no case had been cited to show that such a suit could be maintained in equity by the corporation.<sup>4</sup> It remained for a court of the United States to set the precedent that a corporation can bring a suit in equity against its mortgage creditors, setting up the equity that it is unable to pay them and is about to default in making a payment to them; that it has a collection of property which ought to be kept together and operated as a unit, and that for this purpose a receiver ought to be appointed to hold its creditors at arm’s length; and for the court, upon such a bill, to appoint a receiver upon the *ex parte* application of the corporation,<sup>5</sup> and afterwards to refuse to transfer the receivership to a cross-action brought by the mortgage creditors.<sup>6</sup> But where a receiver is appointed on the petition of the corporation, the appointment will be merely *erroneous*, and the proceedings of

<sup>1</sup> City Pottery Co. v. Yates, 37 N. J. Eq. 543.

<sup>2</sup> Follett v. Field, 30 La. An., pt. 1, 161.

<sup>3</sup> Kimball v. Goodburn, 32 Mich. 10, *per* Mr. Justice Campbell. That a receiver should not be appointed to take charge of the assets of a corporation on its own petition,—see Hugh

v. McRae, Chase Dec. (U. S.) 466; McIlhenny v. Binz, 80 Tex. 1; s. c. 26 Am. St. Rep. 705.

<sup>4</sup> Hinckley v. Pfister, 83 Wis. 64; s. c. 53 N. W. Rep. 21.

<sup>5</sup> Wabash &c. R. Co. v. Central Trust Co., 22 Fed. Rep. 272.

<sup>6</sup> Central Trust Co. v. Wabash &c. R. Co., 23 Fed. Rep. 863.

the court consequent upon the appointment will not be thereby rendered *void*, so as to be assailable in a collateral proceeding;<sup>1</sup> though a majority of another have held that the proceeding is void for want of jurisdiction, and have sent a writ of *prohibition* to the court making the appointment.<sup>2</sup>

§ 6844. **On the Application of the Defendant.**—It was held by Lord Langdale, in a case where the plaintiff had filed a bill for a receiver, but had afterwards declined to move for the appointment, and the defendant had thereupon applied for it, that the appointment could not be made *on the defendant's application*.<sup>3</sup> In an early American case a bill had been filed by a junior mortgagee to foreclose a mortgage, and he had joined a prior mortgagee as defendant with the mortgagor, and sought to be subrogated to his rights and to have the court compel him to enforce all his rights against the mortgagor. It was held that a receiver might be appointed on the application of the prior mortgagee thus joined as defendant; but the court carefully pointed out that this could be done only in a case where the moving defendant was seeking some relief against his co-defendant.<sup>4</sup> It is said by Chancellor Zabriskie, referring to the appointment of a receiver on the petition of a defendant: "I find no precedent anywhere to sustain such practice. The whole theory upon which relief is granted in equity is against such practice. No positive relief is ever granted to a defendant, except on cross-bill; and no relief, except it be founded on allegations in the bill, or other pleadings in the cause."<sup>5</sup>

§ 6845. **At the Suit of Directors.**—If the doctrine that the assets of a corporation, as soon as it becomes insolvent, become impressed with the character of a *trust fund* for its creditors, and that the *directors*, in dealing with it, can only

<sup>1</sup> *McIlhenny v. Binz*, 80 Tex. 1; s. c. 26 Am. St. Rep. 705.

<sup>2</sup> *State v. Ross*, 122 Mo. 435; s. c. 25 S. W. Rep. 947. See 28 Am. Law Rev. 925.

<sup>3</sup> *Robinson v. Hadley*, 11 Beav. 614.

<sup>4</sup> *Henshaw v. Wells*, 9 Humph. (Tenn.) 568, 584.

<sup>5</sup> *Leddel v. Starr*, 19 N. J. Eq. 159, 164.

deal with it in the character of *trustees*, be more than mere verbiage,—then it would logically follow, according to the reasoning of the Supreme Court of Texas, that when a corporation becomes insolvent, and the appointment of a receiver becomes necessary for the preservation of its property and the distribution of its assets among its creditors, the *directors*, as trustees for the creditors first and the stockholders afterwards, and not the company itself, are the proper parties to institute a suit for the appointment of a receiver.<sup>1</sup>

§ 6846. **At the Suit of the State.**—Except in cases where the object of the proceeding is to wind up the corporation under the provisions of a statute, the cases where a receiver is appointed at the instance of the State will generally be found to rest upon special statutes. The State is, by reason of its sovereignty, a *preferred creditor*;<sup>2</sup> but whether this principle will relieve the State of the necessity, where it proceeds in its character of creditor, of reducing its demand to a judgment at law, may be a question; the author does not recall any case where it has arisen. Where the State is the creditor of a corporation, the conditions on which the credit is given, and the remedies of the State, will generally be found embodied in some statute. In a numerous class of cases where the State has loaned its aid to railway companies, the statute has reserved the right to the State to take possession, through a receiver appointed by the governor. In a case in Georgia, where the validity of the ap-

<sup>1</sup> *McIlhenny v. Binz*, 80 Tex. 1, 7; s. c. 26 Am. St. Rep. 705, 712. The language of Mr. Justice Gaines on this point is as follows: "A natural person, because of his inability to meet the demands of his creditors, has no right to place his property under the control of a court of equity for the purpose merely of preventing its sacrifice by its sale under execution. We see no reason why, as a general rule, a corporation does not stand upon the same footing. If a

railway corporation become insolvent, and a receivership be necessary for the preservation of its property and the distribution of its assets among its creditors, it would seem that the directors, as trustees for the stockholders and creditors, would be the proper parties to institute the suit." It is to be noted that in some States the directors themselves are made, by statute, trustees to wind up. *Ante*, § 6829.

<sup>2</sup> *Ante*, § 3837.

pointment of receivers of a banking corporation seems to have been challenged collaterally, it appeared that the bill under which they were appointed was brought by the Governor of the State against the bank, and against certain persons to whom the bank had made a voluntary assignment. It alleged that the bank was a State depository; that, on a day named, it refused to pay a check of the State treasurer, closed its doors, and made an assignment of all its property; that it was largely indebted to the State, had ceased to do business, and was unable to meet its liabilities; that the assignees had accepted the trust and would take an inventory of the assets with the intent to convert that into cash, and that they, ignoring the right of the State to priority, intended to pay the same to creditors *pro rata*; and that, unless the assignees were restrained from paying any debts due by the bank until the indebtedness to the State was first paid off and discharged, a great loss would be entailed upon the State. It was held that the court properly appointed receivers under this bill, and properly authorized them to institute actions for collecting the assets of the bank.<sup>1</sup>

**§ 6847. Where the Corporation Enters a Combination called a "Trust."**—That the corporation is committing a wrong against the general public, as where it has engaged in a trust to monopolize the trade in an article of food, such as *sugar*,<sup>2</sup> or *bread*,<sup>3</sup> does not of itself afford ground for appointing a receiver of its assets; though such a receiver may or may not, under statutes, be appointed where the corporation has been, for such a cause, *dissolved* in a proceeding at law.<sup>4</sup> In one case, where such an application was denied, the "trust" itself was the petitioner; and the court held that, while a case had been made for a receiver pending litigation between ordinary parties, yet the relief would not be granted in that case; because equity would not lend its aid to a combination in

<sup>1</sup> Hill v. Western &c. R. Co., 86 Ga. 284; s. c. 12 S. E. Rep. 635.

<sup>2</sup> Havemeyer v. Superior Court, 84 Cal. 327; s. c. 18 Am. St. Rep. 192.

<sup>3</sup> American Biscuit &c. Co. v. Klotz, 44 Fed. Rep. 721; s. c. 9 Rail. & Corp. L. J. 316.

<sup>4</sup> *Ante*, §§ 6828, 6830.

restraint of trade, and probably illegal under Federal and State legislation.<sup>1</sup> But it was held in the Supreme Court of New York, under the applicatory statutes in that State, that a receiver must be appointed, upon the demand of a certificate-holder, to wind up the affairs of a "trust" which has been declared illegal, although a plan of organization on a legal basis was in process of execution by the trustees, and the property was in the hands of a man of the highest standing.<sup>2</sup>

**§ 6848. Not Appointed where there are No Assets to Administer.**—It is scarcely necessary to say that a receiver of a corporation will not be appointed where there are no assets to collect and distribute. It has been so held, with reference to a building association, where it appeared that the shareholders all agreed that the members who took the money and paid dues and interest, and agreed to take the money advanced to them in full for their stock, should not be required to pay back the money advanced.<sup>3</sup> The same conclusion was reached with reference to such an association, where there were no assets for distribution, except the money in the treasury, which the association proposed to distribute.<sup>4</sup> So, where, in a creditors' suit in equity, it appeared that the corporation had made a voluntary assignment for the benefit of its creditors, but that there were no assets in the hands of the assignee which could be applied to the plaintiff's demand, it was held that the court was justified in ascertaining the respective liabilities of the stockholders, and enforcing such liabilities by judgment, without appointing a receiver, or staying proceedings until it could be ascertained whether there would be any dividend payable to creditors by the assignee.<sup>5</sup>

<sup>1</sup> *American Biscuit &c. Co. v. Klotz*, *supra*; referring to the act of Congress, July 2, 1890, and Act La., July 5, 1890. Compare *Hardon v. Newton*, 14 Blatchf. (U. S.) 376; *Einstein v. Rosenfeld*, 38 N. J. Eq. 309; *People v. State Treasurer*, 24 Mich. 468.

<sup>2</sup> *Cameron v. Havemeyer*, 25 Abb. N. Cas. (N. Y.) 438; *s. c.* 12 N. Y. Supp. 126.

<sup>3</sup> *Barton v. Enterprise &c. Asso.*, 114 Ind. 226; *s. c.* 5 Am. St. Rep. 608. See *Endlich Build. Asso.*, §§ 150, 440, 492.

<sup>4</sup> *Lister v. Log Cabin &c. Asso.*, 38 Md. 115.

<sup>5</sup> *Sleeper v. Goodwin*, 67 Wis. 577; *s. c.* 31 N. W. Rep. 335. See further, *Young v. Rollins*, 85 N. C. 485,—where the corporation had transferred all its assets to another.

§ 6849. **Appointment of Receivers of Companies in England.** — The English Judicature Act seems to confer the widest power in the appointment of a receiver, by authorizing the appointment whenever the court is of opinion that it is *just or convenient* to appoint one.<sup>1</sup> Since the passage of the Companies' Winding-up Act of 1890, section 4, the court has no power, after an order for the winding up of a company has been made, to appoint a provisional liquidator other than the official receiver.<sup>2</sup>

## ARTICLE II. JURISDICTION TO APPOINT.

### SECTION

6854. Jurisdiction to make the appointment.

6855. Jurisdiction to appoint as between Federal and State courts.

6856. Federal jurisdiction not ousted by dissolution of corporation in State court.

6857. Such jurisdiction as dependent upon venue.

6858. Appointment of receivers by the legislature.

### SECTION

6859. Further of this subject.

6860. Power to appoint receivers of foreign corporations.

6861. Further of this subject.

6862. How under statutes of New York.

6863. Effect of the pendency of a proceeding by the State to dissolve the corporation.

6864. Appointment presumed valid when collaterally attacked, etc.

<sup>1</sup> Judicature Act, 1873, § 25, cl. 8. Sir Nathaniel Lindley states that this general enactment is construed somewhat restrictively and with reference to the principles on which the court of chancery acted before the judicature acts came into operation. Lind. Comp. Law. (5th ed.), p. 602. To this statement he cites the case of *North London R. Co. v. Great Northern R. Co.*, 11 Q. B. Div. 30, where the words "*just or convenient*" in the statute were construed so as to make them read *just and convenient*." "Receivers of a company's property," continues the same learned author, "are seldom appointed unless there are conflicting claims to be adjusted, *e. g.*, disputes between secured and unsecured creditors, between debenture-holders and judgment creditors, between various classes of shareholders, etc. When a company is being

wound up, the liquidator is a receiver of its assets for the benefit of its shareholders and creditors; but this does not prevent persons having claims upon the assets in priority to the liquidator, from obtaining a receiver of them, so as to protect their preferential rights. The liquidator, however, is usually appointed the receiver in such cases." Lind. Comp. Law (5th ed.), pp. 602, 603; citing *Perry v. Oriental Hotel Co.*, L. R., 5 Ch. 420.

<sup>2</sup> *Re North Wales Gun Powder Co.* (1892), 2 Q. B. 220. Appointment at the instance of *debenture-holders* under English statutes: Lind. Comp. Law (5th ed.), pp. 196, 187, where the following cases are examined: *Ex parte Bradshaw*, 15 Ch. Div. 465; *English Channel Steam Co. v. Rolt*, 17 Ch. Div. 715; *Howard v. Patent Ivory Man. Co.*, 38 Ch. Div. 188; *Re*

§ 6854. **Jurisdiction to Make the Appointment.**—A discussion of the subject of the jurisdiction to make the appointment of a receiver, would involve a disquisition upon the *jurisdiction of courts*, rather than a discussion of a branch of the law of corporations. What is termed *jurisdiction* consists, in the proper sense, of the *power* to do an act judicial in its nature; but the word is often used with reference to the *propriety* of doing an act judicial in its nature. Thus, it is reasoned that a court possessing both law and equity powers, such as a Circuit Court of the United States, has no jurisdiction to entertain a bill by an individual to *forfeit franchises* of a corporation, since that right belongs to the State alone; yet, it is reasoned in some cases that if the bill prays also for a receiver and for general relief, it may be retained for the purpose of granting a receivership.<sup>1</sup> But, in this sense, it is believed that the word “jurisdiction” is merely used in the sense which implies freedom from error, and that if such a suit were entertained, and the corporation nevertheless took no steps by an appeal or writ of error to reverse the erroneous decision, it would be good as against a collateral attack. This may not, however, be clear. So, it has been held, but on grounds which seem to confuse the distinction between a *want* of power and an abuse of it, that a court possessing general equity powers has *no jurisdiction* to appoint a receiver of a railway property *on the petition of the corporation itself*.<sup>2</sup> But it is clear that a *proceeding at law to dissolve* a corporation is a totally different thing from a proceeding in equity to lay hold of its assets, and administer and distribute them as a trust fund for its creditors. Therefore, a judgment of a State court, dissolving a corporation, does not oust a court of the United States, which has already appointed a receiver of its

Pound, 42 Ch. Div. 402; *s. c.* 28 Am. & Eng. Corp. Cas. 500; *Re Stubbs* (1891), 1 Ch. 475; *McMahon v. North Kent Iron Works Co.* (1891), 2 Ch. 148; *Makins v. Ibotson*, (1891) 1 Ch. 133; *Re Portsmouth Tramways Co.*, (1892) 2 Ch. 362; *Strong v. Carlyle Press*, (1893) 1 Ch. 268.

<sup>1</sup> *Gaylord v. Fort Wayne & C. R. Co.*, 6 Biss. (U. S.) 286.

<sup>2</sup> *State v. Ross*, 122 Mo. 435; *s. c.* 25 S. W. Rep. 947. See 28 Am. Law Rev. 925. In this case a writ of *prohibition* was sent to the court making the appointment.



property, of jurisdiction to proceed with the administration of its assets, or render it necessary to revive the proceeding as against the receiver appointed by the State court.<sup>1</sup> This conclusion rests upon a very important principle touching the jurisdiction of co-ordinate courts, which is that where one of them has acquired jurisdiction, and especially in a proceeding *in rem*, or *quasi in rem*, its jurisdiction is not ousted by any proceeding which may take place in another court, which might, if the complainant had there first proceeded, have acquired the same jurisdiction.<sup>2</sup> There is a limited form of receivership, applicable to statutory *sequestration proceedings*, which are understood to be a statutory mode of laying hold of equitable assets for the purpose of satisfying a particular judgment. It has been held that the appointment of a receiver in such a proceeding is within the judicial discretion of the court, although a receiver of the property of the corporation has been previously appointed by another court.<sup>3</sup>

<sup>1</sup> *Lake Superior Iron Co. v. Brown*, 44 Fed. Rep. 539.

<sup>2</sup> When, therefore, an action for the appointment of a receiver of the assets of a corporation was brought by a stockholder, in behalf of himself and all others in interest who might become parties, and *subsequently* another action, in the same form and substantially for the same purpose, was begun in the same court in a different judicial department of the State, by another stockholder, and a decision therein had without the knowledge of the plaintiff in the first action,—it was held that the court in the department in which the first action was pending was not concluded by such decision, especially where the circumstances were such as to give rise to a suspicion of *collusion* between the parties to the second action. *McArdle v. Barney*, 16 Abb. Pr. (N. S.) 228.

<sup>3</sup> *Thau v. Bankers' &c. Tel. Co.*, 56 N. Y. Super. 588.; *mem.*; s. c. 16 N. Y. St. Rep. 581; 2 N. Y. Supp. 11. That the *Superior Court of the City of New York* has power to appoint a receiver of the corporation in sequestration proceedings, the statute which previously confined such jurisdiction to the Supreme Court (New York Laws 1870, ch. 151) having been repealed by New York Laws 1880, ch. 245,—see *Jelly v. Paraiso Reduction Co.*, 15 N. Y. Civ. Proc. 86; s. c. 1 N. Y. Supp. 111. That the *Supreme Court of Nebraska* has jurisdiction of an *original proceeding*, brought in the name of the State by the Attorney-General, to appoint a receiver to take charge of and wind up the affairs of a banking company organized under the laws of the State,—see *State v. Commercial State Bank*, 28 Neb. 677; s. c. 44 N. W. Rep. 998.

From what will follow,<sup>1</sup> it must be concluded that jurisdiction to make the appointment does not depend upon *notice of the application* being given to the adverse party in the litigation, whose property is to be wrested from it by the receiver, since such notice may be given after the seizure; but this rule cannot, probably, be stated without qualification, for we find it held that jurisdiction to appoint a temporary receiver of the property of a foreign corporation within the State of the forum, is obtained by personal service of the papers upon its managing agent within the State, although proof of such service may be defective.<sup>2</sup>

§ 6855. **Jurisdiction to Appoint as between Federal and State Courts.** — Where conflicts arise between a court of the United States and a court of the State, as to the right to hold possession of the property of a corporation, by a receiver, it seems that the governing principle is, to consider which court first acquired jurisdiction by making the appointment, which is tantamount to an actual judicial seizure of the property. It also seems that the doctrine of *relation* does not apply in determining this question of jurisdiction; so that it is not material in which court the action was first commenced, but the material question is, which court first appointed the receiver with an order to take possession of the property.<sup>3</sup> When, therefore, an amicable action had been brought in a State court by some of the creditors of a railroad company, for the purpose of nursing the corporation until it could be got upon a paying basis, and they did not apply for the appointment of a receiver, but took measures to prevent it; and other creditors, desiring to press their claims to payment, applied, in a court of the United States within that State, for the appointment of a receiver, and such appointment was made; and, two hours later, in the suit previously brought and still pending in the State court, a receiver

<sup>1</sup> *Post*, § 6880, *et seq.*

<sup>2</sup> *Glines v. Supreme Sitting of Or-* 281; *s. c.* 21 N. Y. Supp. 543; *affirm-*  
*der of Iron Hall*, 50 N. Y. St. Rep. *ing s. c.* 20 N. Y. Supp. 275.

<sup>3</sup> *Wilmer v. Atlanta & c. R. Co.*, 2 Woods (U. S.), 409, 427.

was appointed;—it was held, by the Federal court, that it had jurisdiction over the property, by reason of having made the seizure prior to the time when it was attempted by the State court, and that no principle of comity required it to surrender its possession to the State court, in an action brought by some of the creditors of the corporation, the apparent purpose of which was to stave off other creditors and prevent them from enforcing their demands against the property.<sup>1</sup> So, where a *stockholder* of a national banking association had filed a bill in a court of the United States, praying for a receiver to take charge of its assets and settle its affairs,—it was held by the Supreme Court of Georgia that this did not prevent a *creditor*, upon showing a state of facts demanding equitable interposition, from claiming the appointment of a receiver in a court of the State. The court reasoned that, until a receiver had been appointed by the Federal court, neither law nor comity required the State court to suspend its equitable power to reach the assets of the bank and enforce its own final process,—especially where, in the Federal court, the case was made by a stockholder and the judgment creditor was not a party.<sup>2</sup>

**§ 6856. Federal Jurisdiction not Ousted by Dissolution of Corporation in State Court.**—Where a proceeding has been commenced in a court of the United States to foreclose a mortgage upon the property of a corporation, and, pending the proceeding, a receiver is appointed and a scheme of reorganization entered upon among the creditors, the jurisdiction of the Federal court to deal finally with the property is not ousted by the fact that the corporation has been judicially dissolved by a proceeding in a State court,—especially where no receiver, appointed by a State court, claims possession of the property in the hands of the receiver appointed by the Federal court, and where the order of the State court disclaims

<sup>1</sup> East Tennessee &c. R. Co. v. Atlanta &c. R. Co., 49 Fed. Rep. 608, decision by Speer, J.

<sup>2</sup> Merchants' &c. Bank v. Masonic Hall, 63 Ga. 549.

the right to such possession. In such a case, creditors and stockholders, appealing from the final decree of the Federal court providing for a sale of the property and a reorganization of the corporation, cannot set up the proceeding in the State court to affect, in any way, the jurisdiction of the Federal court.<sup>1</sup>

**§ 6857. Such Jurisdiction as Dependent upon Venue.**— With reference to the jurisdiction of a court to appoint a receiver in so far as the question depends upon the territorial jurisdiction and the domicile of the corporation, it may be assumed that the subject will, in most cases except in those of foreign corporations, refer itself to some governing statute.<sup>2</sup>

<sup>1</sup> *Leadville Coal Co. v. McCreery*, 141 U. S. 475.

<sup>2</sup> See *post*, chs. 178, 197. A statute of Texas reads: "If the property sought to be placed in the hands of the receiver is that of a corporation whose property lies within this State, or partly within this State, then the action to have a receiver appointed shall be brought in this State, in the county in which the principal office of said corporation is located." Laws Texas 1887, ch. 131, § 13. Under this statute an appointment of receivers of a railway corporation, whose property lies wholly within the State of Texas, in proceedings in the District Court of a county other than that in which the principal office of the company is located, is not merely erroneous and hence valid until reversed in a direct proceeding, but is *coram non iudice and void*; so that the subsequent appointment of a receiver for the same property, in proceedings regularly commenced in the court of the county in which the principal office of the company is located, may be made without regard to the prior appointment. That court which alone has jurisdiction, by the terms

of the statute, to make the appointment, is not ousted of its jurisdiction by an unlawful attempt to make it elsewhere. *Osment v. International &c. R. Co.* (Dist. Ct. of Anderson Co. Tex., Apr. 15th, 1889), 5 Rail. & Corp. L. J. 510. In so holding, Williams, J., in a learned and well-reasoned opinion, proceeds upon the ground that this is one of a class of cases where judicial power is made to depend upon a statute fixing the venue. "It seems," says he, "to be settled that, for reasons of public policy, the legislature may make the rule of venue so imperative that the parties cannot waive it, nor the court render a valid judgment in opposition to it." Citing *Stewart v. Anderson*, 70 Tex. 588, 593; *Trust Co. v. Railroad Co.*, 67 How. Pr. (N. Y.) 390; *Central Bank v. Gibson*, 11 Ga. 453; *Raney v. McRae*, 14 Ga. 589; s. c. 60 Am. Dec. 660; *Suydam v. Palmer*, 63 Ga. 546; *Iowa Loan & Trust Co. v. Day*, 63 Iowa, 459. A statute of New York (New York Laws 1883, ch. 378) likewise provides that an application for a receiver of a corporation shall be made in the judicial district wherein the principal office of the corporation

## § 6858. Appointment of Receivers by the Legislature.—

An act of the legislature providing for the appointment of receivers of insolvent banking corporations, for the purpose of converting their assets into money to be distributed among their billholders and other creditors, has been challenged as *unconstitutional*, on the ground that it *impairs the obligation of the contract* subsisting in the charter of the bank. This so-called “obligation” was supposed to consist in the fact that, by the principles of the common law, when a banking corporation became insolvent its debts died with it, and all its personal estate vested in the people, who succeeded to the rights of the Crown at common law; but the court held that the statute providing for a receivership was *remedial*, and not subject to such a constitutional objection. This, and other of the earlier Georgia banking cases, show the silly propositions with which the courts of judicature had to wrestle in the earlier days of the jurisprudence of that and other American States.<sup>1</sup> Another such statute authorized the Governor to appoint a receiver to take charge of the assets of a particular bank, and clothed the receiver so appointed with the power to maintain all necessary actions at law and equity in his own name. The constitutionality of this statute was assailed on two grounds. The first was, that the appointment of a receiver is a *judicial act*, and that it was therefore not competent, under the constitution, for the legislature to devolve it upon the Governor. But the Supreme Court of Georgia held that it was *not a judicial act*. It was not a case or controversy between party and party; nor was there any decree or judgment affecting the title to property; nor did the appointment determine any right, legal or equitable. The receiver was merely appointed to collect, hold, and disburse the assets of the bank for the benefit of all concerned; it remained in the power of the courts to protect and control him in the proper

is located; but it has been held that this statute has no application to the appointment of a receiver to hold the mortgaged property pending a foreclosure. *United States Trust Co. v.*

*New York, West Shore &c. R. Co.*, 35 Hun (N. Y.), 341.

<sup>1</sup> *Hall v. Carey*, 5 Ga. 239. Compare *ante*, § 5437.

execution of his duties. The other ground on which the constitutionality of this statute was assailed was that it *impaired the obligation of the contract* subsisting in the charter of the bank, by taking from the bank the right thereby secured of suing and being sued in its corporate capacity. But it was held that this objection was not tenable, even if the defunct corporation could be revived so as to organize a board of directors; since the appointment of a receiver did not in any manner interfere with the rights of the corporation to exist as such, the act repealing its charter and providing for the appointment of a receiver having preserved that right. The court made a long and doubtful argument upon the constitutionality of the act in so far as it involved a dissolution of the charter by the bank, which will not be further considered, because it is not germane to the present discussion.<sup>1</sup>

§ 6859. **Further of This Subject.**—In Louisiana, there were statutes empowering *the Governor*, in like manner, to appoint receivers of corporations.<sup>2</sup> The National Banking Act has an analogous provision empowering *the Comptroller of the Currency* to appoint receivers to wind up insolvent national banks.<sup>3</sup> The appointment of a receiver of a corporation being not necessarily a judicial act, the legislature of a State has the power, unless some other constitutional restriction stands in the way, to appoint a trustee, as an *administrative measure*, to take charge of and administer the assets of a corporation whose charter has been repealed, in conformity with such general and just rules as it may prescribe, or with the rules of a court of equity where it prescribes no other rules.<sup>4</sup> So, where the public interest and the rights of the creditors, in the judgment of the legislature, require it, that body may take away the custody of the assets of a corporation from its directors and commit them to an officer of the State,—in the particular case, the *Insurance Commissioner*,—

<sup>1</sup> *Carey v. Giles*, 9 Ga. 253. See *ante*, § 5392.

<sup>2</sup> See *State v. Haynes*, 12 La. An.

<sup>3</sup> Rev. Stats. U. S., § 5234.

285.

<sup>4</sup> *Lothrop v. Stedman*, 42 Conn. 583.

pending an investigation into the solvency of the company. The *inquiry by the legislature* into the affairs of a corporation with a view to the repeal of its charter, and the future administration of its assets for the benefit of its creditors and stockholders, is held not to be a judicial act.<sup>1</sup> And although a general law provides that, on the dissolution of a corporation, the directors shall be the trustees, and hold the property and rights of the corporation, yet the legislature may, on dissolving a corporation, appoint *other trustees*.<sup>2</sup> Where the power to repeal the charter of a corporation has not been reserved in the charter itself, or in the constitution of the State, or in some other act of the legislature, then it must be conceded, under principles already stated,<sup>3</sup> that the legislature has no power to repeal the charter of a corporation before the expiration of the time for which it is granted, no matter what acts of misuser or non-user the corporation may have committed; since this would impair the obligation of the contract between the State and the corporators involved in the grant and acceptance of the charter, under the principles of the Dartmouth College decision.<sup>4</sup> But where the *power to repeal or dissolve the corporation is reserved* to the legislature and is exercised, the obligation of no contract is impaired by the act of the legislature appointing, or providing for the appointment of, a receiver or trustee to lay hold of the assets of the corporation and administer them for the benefit of its creditors. It does not impair the obligation of the contract subsisting between the corporation and its creditors; but, on the contrary, gives to the creditors, if the administration is properly conducted, as much as they might rightfully obtain out of the assets of the corporation toward the satisfaction of their respective demands. Such, in substance, is the doctrine of several of the preceding cases. And even where acts of the legislature are of such a character as to put an end to the existence of the corporation as a going concern, but without

<sup>1</sup> Lothrop v. Stedman, 42 Conn. 583; s. c. 13 Blatchf. (U. S.) 134.

<sup>2</sup> McLaren v. Pennington, 1 Paige (N. Y.), 102.

<sup>3</sup> Ante, § 5380, et seq.

<sup>4</sup> Ante, § 5385.

the appointing of a receiver or trustee to wind up its affairs and distribute its assets among its creditors and stockholders, a court of equity will never allow the trust to fail for want of a trustee, but will lay hold of those assets by a trustee of its own appointment,—that is to say, by its receiver, and so administer them.<sup>1</sup>

§ 6860. **Power to Appoint Receivers of Foreign Corporations.**—There seems to be no obstacle in the way of appointing a receiver of the assets of a *foreign corporation*, provided the assets are situated within the State of the forum; and it has been held that such an appointment is not void because the court, at the time of making it, had not acquired personal jurisdiction of the defendant, where it had jurisdiction of the subject-matter, there being an immediate necessity for such appointment.<sup>2</sup> It was held, in substance, by the Supreme Judicial Court of Massachusetts, in 1842, that no jurisdiction existed, under the insolvency law of that State,<sup>3</sup> to appoint an assignee, whose functions were merely that of a statutory receiver, of the estate of a debtor who was a resident of another State; but the case turned merely upon the construction of the statute.<sup>4</sup> A statute of Rhode Island<sup>5</sup> provided for a proceeding in equity in the nature of an attachment, and for an impounding of the property of the debtor by the receiver, where he should make fraudulent conveyances of his property. It was held by the Supreme Court of that State, in a *per curiam* opinion, — no reason for its decision being given, but merely following the Massachusetts decision last quoted, — that, under the statute, the courts of Rhode Island had no jurisdiction to appoint a receiver of the property and effects of a non-resident debtor.<sup>6</sup> At a later day the same court held,

<sup>1</sup> Curran v. State, 15 How. (U. S.) 304. As to the construction and effect of legislation authorizing the Savannah & Charleston railroad to be operated by a receiver and advisory board, see *Ex parte Dunn*, 8 S. C. 207.

<sup>2</sup> Glines v. Supreme Sitting of Order of Iron Hall, 50 N. Y. St. Rep.

275; *s. c.* 21 N. Y. Supp. 543; affirming *s. c.* 20 N. Y. Supp. 275.

<sup>3</sup> Mass. Stat. 1838, ch. 163, § 19.

<sup>4</sup> Claffin v. Beach, 4 Met. (Mass.) 392.

<sup>5</sup> Pub. Laws R. I., ch. 723, § 2.

<sup>6</sup> Phillips v. Newton, 12 R. I. 489.



following its previous decision, that, a corporation created under the laws of another State being a non-resident of Rhode Island for the general purposes of jurisdiction,<sup>1</sup> a receiver of such a corporation could not be appointed in Rhode Island in a proceeding under the same statute. All of these decisions involved the construction of local statutes; and while the writer believes that they were all misconceived, they do not afford authority for the conclusion that it is not competent for a court of chancery, which has the general power of appointing receivers, to appoint a receiver of the assets, found within its jurisdiction, of a so-called foreign corporation, whether created under the laws of another State or under the laws of a foreign country. On the contrary, the very strongest reasons may exist in many cases why such jurisdiction should exist and be exercised. Where the foreign corporation has removed out of the domicile for the purposes of business within the domestic State, as is seen every day in the case of foreign insurance companies, and is in the act of withdrawing its assets from the State to the prejudice of its local creditors, there may be,—at least under our tribal theory of the States being, for judicial purposes, *foreign* to each other,—the greatest propriety in a court of equity laying hold of its assets and impounding them for the benefit of its local creditors.

§ 6861. **Further of This Subject.**—On the other hand, where a general administration of the assets of an insolvent corporation is proceeding in the State of its creation, there are good reasons, founded on principles of judicial comity, why the courts of other States should not appoint receivers of such of its assets as might be found within their own jurisdiction, and why they should trust to the justice of the court of the State conducting the administration to see that non-resident, as well as resident creditors, receive their distributive shares. But, as the impounding of the assets of the debtor by means

<sup>1</sup> On this point the Rhode Island court followed the decision of the Supreme Court of the United States in the following and other cases:

Louisville R. Co. v. Letson, 2 How. (U. S.) 497; Ohio &c. R. Co. v. Wheeler, 1 Black (U. S.), 286; Muller v. Dows, 94 U. S. 444.

of a receiver is in the nature of a proceeding *in rem*, it is believed that no principle can be suggested which *disables* a court of equity, in a proper case, from taking that course with the assets of a non-resident debtor, corporate or unincorporate; and such a power is constantly exercised by courts of equity where they have acquired jurisdiction on other grounds.<sup>1</sup>

**§ 6862. How under Statutes of New York.** — Under the New York Code of Procedure, the courts of New York, possessing equity powers, are authorized to appoint *receivers of the assets of foreign corporations* on the applications of judgment creditors, and thereby to impound such assets for the benefit of creditors and shareholders.<sup>2</sup> It has been held that a creditor of a foreign corporation may pursue his demand against a corporation formed in New York, to which the property of the foreign corporation has been transferred in consideration of the issue of shares of stock in the New York corporation to the shareholders of the foreign corporation; and that, after such a creditor has recovered judgment in the State at the domicile of the foreign corporation, and has obtained the appointment of a sequestrator of the corporation, a receiver of the domestic corporation may be appointed in a suit brought by such sequestrator in New York.<sup>3</sup> But it has been held that an *injunction and receiver* will not be granted in respect of a foreign corporation, at the suit of one of its stockholders, on the ground that the corporation has been dissolved by the government of the country in which it is domiciled, where the decree of dissolution is not absolute, but declares that the company shall be considered in existence for certain specified purposes, — where it further appears that the corporation has

<sup>1</sup> It has been held in New Jersey that, to authorize the appointment of a receiver of an insolvent foreign corporation, it is not necessary that it should be actually engaged in business within the State at the time when the bill is filed, if it has previously done business and has property within the State. *Albert v. Clarendon Land &c. Co.* (N. J. Eq.), 23 Atl. Rep. 8. But this decision may be supported under a provision of the statute of that State concerning corporations, which

is to the effect that foreign corporations doing business in that State shall be subject to the provisions of the statute, so far as the same can be applied to them. N. J. Rev., ch. 196, § 103.

<sup>2</sup> *Murray v. Vanderbilt*, 39 Barb. (N. Y.) 140; *De Bemer v. Drew*, 57 Barb. (N. Y.) 438.

<sup>3</sup> *Banday v. Quicksilver Min. Co.*, 9 Abb. Pr. (N. s.) (N. Y.) 283; *s. c.* 6 Lans. (N. Y.) 25.

property in New York over which the foreign government has no jurisdiction; that it will be more conducive to the interests of all the stockholders not to disturb the existing management and arrangements of the corporation; and that to grant the relief asked for would produce irreparable injury to the majority of the stockholders. The court reasoned that, assuming the validity of the decree of the foreign government dissolving the corporation, yet one of its stockholders could not apply for a receiver in the courts of the foreign country, and therefore could not sustain such an application in New York.<sup>1</sup> But it has been held in that State that, where a corporation, created under the laws of another State, is in process of *voluntary dissolution*<sup>2</sup> in the State of its creation, but a portion of its assets are in New York, in possession of some of its officers who reside there, and who have complete control of the corporation, but who are subject to the jurisdiction of the courts of that State, and are not amenable to the courts of the State under whose laws the corporation was created, — a bill may be maintained by stockholders domiciled in New York for an account and distribution, under which the court may appoint a receiver, upon a showing that the officers of the corporation living in New York, and so in possession of its assets, are insolvent, and that the assets in their hands are in jeopardy.<sup>3</sup>

**§ 6863. Effect of the Pendency of a Proceeding by the State to Dissolve the Corporation.** — The mere fact that the State has, through its Attorney-General, instituted a proceeding to dissolve the corporation under the provisions of a statute, has been held not to impair the jurisdiction of the court to entertain a suit to *foreclose a mortgage* on the property of the corporation and to appoint a *temporary receiver* in that suit; and where in that suit the court, by its order, included,

<sup>1</sup> *Hamilton v. Accessory Transit Co.*, 26 Barb. (N. Y.) 46.

<sup>2</sup> As to which see *ante*, § 6678, *et seq.*

<sup>3</sup> *Redmon v. Hoge*, 3 Hun (N. Y.), 171. The fact that a foreign corporation doing business in New York had omitted to file, in the office of the Secretary of State, as required by a law of New York, the designation of a person on whom papers might be

served, and had abandoned its franchises, and declared itself insolvent, and sold its property to another corporation, of which its officers were also officers, — was held to justify the appointment of a receiver by a court of New York, even on an *ex parte* application. *De Bemer v. Drew*, 39 How. Pr. (N. Y.) 466; *s. c.* 57 Barb. (N. Y.) 438.

in the property which should pass under the sale of foreclosure, certain property of the corporation not specifically named in the mortgage, — it was held that the decree of the court was binding upon general creditors, and that this part of the decree could not be subsequently attacked by them on the ground of a *want of jurisdiction*.<sup>1</sup>

§ 6864. **Appointment Presumed Valid when Collaterally Attacked, etc.** — Whenever the validity of the appointment of the receiver is called in question in a collateral proceeding, whether in an action brought by the receiver or otherwise, the appointment will be *conclusively presumed* to have been properly made, provided it appear that the court had a *general power* to make such an appointment, and that it had jurisdiction in the particular case; and this is equally true whether the general power of the court to appoint such a receiver is held to exist under the principles of equity jurisprudence, or to have been conferred by a statute.<sup>2</sup> We shall see that the proceeding to appoint a receiver is essentially *a proceeding against the corporation*, and that the corporation is a necessary party.<sup>3</sup> The test by which to determine, in a collateral proceeding, whether the appointment is to be upheld,

<sup>1</sup> *Herring v. New York &c. R. Co.*, 105 N. Y. 340; *s. c.* 12 N. E. Rep. 763.

<sup>2</sup> *Keokuk Northern Line Packet Co. v. Davidson*, 13 Mo. App. 561; *Ward v. Farwell*, 97 Ill. 593; *Whittlesey v. Frantz*, 74 N. Y. 456; *Richards v. People*, 81 Ill. 551. Compare *State v. Ross*, 122 Mo. 125; *s. c.* 25 S. W. Rep. 947; 28 Am. Law Rev. 925. The first paragraph of the syllabus to *Chandler v. Brown*, 77 Ill. 333, is: "A decree for closing up the affairs of a corporation on the ground of insolvency, and the appointment of a receiver, in a suit brought under the twenty-fifth section of the 'act concerning corporations,' approved April 18, 1872, is not binding upon any stockholder not made a party to

the suit." But the author does not understand this as correctly expressing what was held in that case, but he understands that the case held that the peculiar order which was made for the assessment of shareholders, authorizing the receiver to collect 20 per cent, etc., did not conclude *shareholders* who were *not made parties*. Even so far as the court held this, the decision is not the modern law. *Ante*, § 3499. But see *ante*, § 3493. The appointment of a receiver is in the nature of a proceeding *in rem*, and it undoubtedly concludes the whole world, where it is made by a court or official of competent jurisdiction.

<sup>3</sup> *Post*, § 6874.

is therefore to consider whether it is binding on the corporation; for if it is binding on the corporation, it cannot be questioned by third persons.<sup>1</sup> And we have already had occasion to note a numerous class of cases known as "the Glenn Cases," where this principle was acted upon, for the purpose of supporting actions by a trustee appointed by a court of competent jurisdiction to wind up a corporation, which actions were brought in foreign jurisdictions.<sup>2</sup> From this it follows that, although the court may, in the proceeding which resulted in the appointment of the receiver, proceed erroneously in such a sense that the order appointing the receiver would have been discharged in a direct proceeding by appeal to reverse it, yet it will stand when questioned in a collateral proceeding,<sup>3</sup>—as, for instance, in a suit against stockholders to recover unpaid subscriptions.<sup>4</sup> If the corporation has been brought in, so that the court has jurisdiction as against it, this will give jurisdiction to appoint a receiver, so far as it may affect the rights of creditors and stockholders, and it is not necessary that they should be made parties defendant, except in cases where some special relief is sought against them; and even then their presence is not necessary to the appointment of a receiver.<sup>5</sup>

<sup>1</sup> This principle has been held to apply in an action by a receiver to recover a stock subscription, where the judgment on which the appointment of the receiver was based was taken against the corporation by default, although there had been a *misnomer* of the corporation which it might have taken advantage of by plea in *abatement* but had waived, under statute provisions, by not appearing. *Whittlesey v. Frantz*, 74 N. Y. 456.

<sup>2</sup> *Ante*, § 3568, and cases cited in last note to § 3570.

<sup>3</sup> *Keokuk Northern Line Packet Co. v. Davidson*, 13 Mo. App. 561.

<sup>4</sup> Thus, in proceedings for the dissolution of an insolvent insurance

company, under the Illinois Act of 1874, it is error to appoint a receiver before a full hearing and a decree of dissolution, or a decree restraining the continuance of business; but, if a receiver has been appointed without such hearing and decree, his authority to sue cannot be attacked in a collateral proceeding instituted by him against stockholders to recover unpaid subscriptions. (*Dickey, C. J., and Walker, J., dissenting.*) *Ward v. Farwell*, 97 Ill. 593.

<sup>5</sup> See *Ward v. Farwell*, 97 Ill. 593, 615, where this matter is very clearly brought out in the opinion of the court delivered by Mr. Justice Mulkey.

## ARTICLE III. WHO APPOINTED.

## SECTION

6868. Who should and who should not be appointed.

6869. Whether one corporation may

## SECTION

be appointed receiver of another corporation.

6870. Number of receivers to be appointed.

## § 6868. Who should and Who should not be Appointed.

The question who should and who should not be appointed is one which addresses itself almost exclusively to the sound *discretion* of the Chancellor, and as to which no general law can be laid down. There is no legal obstacle or necessary impropriety in appointing a *stockholder*, a *director*, or even the *president* of the corporation, to the office of receiver, — though in particular cases such an appointment would be obviously improvident. For instance, where it will be necessary for the receiver to maintain a general suit in equity against all the stockholders to enforce a *contribution* to a fund to be raised to liquidate the corporate debts, it would be improper to appoint a stockholder as receiver, since he could not be both complainant and defendant in such an action. When, therefore, such a bill for contribution was filed by a board of receivers, and it appeared that one of the receivers was himself a stockholder, the court sustained a demurrer to the bill, but suggested that his name be stricken from it, and that the majority of the receivers proceed.<sup>1</sup> Again, a *stockholder* whose ascertained *misconduct* has produced the necessity for the appointment of a receiver, obviously ought not to be appointed to that office.<sup>2</sup> Where, under the theory of the powers of a receiver obtaining in the particular jurisdiction, he has the power to bring an action against the directors to charge them in respect of breaches of their official trust, it is obviously improper to

<sup>1</sup> *Wiswell v. Starr*, 48 Me. 401, 406.

<sup>2</sup> Thus, it has been held that stockholders whose ascertained misconduct has already operated a forfeiture of the corporate franchises cannot become the trustees of the corporate assets to administer them under a statute (Cal. Civ. Code, § 400). The

statute was, moreover, held to apply only to voluntary dissolution (*People v. American Sugar Refining Co. (Super. Ct., San Francisco, Cal.)*, 8 Rail. & Corp. L. J. 128); though on the last point it was overruled, and the receivership was vacated by a writ of *prohibition*. *Ante*, § 6830.

appoint a *director* to the office of a receiver. Under a statute of New York relating to the winding up of moneyed corporations in the court of chancery on a bill filed by the Attorney-General, it was held improper, on grounds of public policy, as well as in regard of the spirit of the statute, to appoint a director to the office of receiver. In so holding Chancellor Walworth used this language: "The rule of exclusion adopted, I considered as based upon sound principles of public policy; and upon what I considered the spirit and intent of the act under which these proceedings were instituted. If the law will not intrust the concerns of an insolvent institution in the hands of its directors jointly, as trustees for the creditors, certainly the court ought not to intrust them to a part only as receivers. Public policy requires that the directors shall understand distinctly that if they so manage the concerns of the institution as to produce insolvency, the property and effects of the institution will be taken from them entirely, and be placed in the hands of those who will investigate their conduct fearlessly and impartially."<sup>1</sup> A person ought not to be appointed who sustains such a relation to the litigation as to make his appointment *inconvenient*. A *master in chancery* should not, therefore, be appointed, at least where there is but one, because he may be required to pass upon the accounts of the receiver.<sup>2</sup> It was held by Lord Eldon that the *son of a next friend* suing for an infant, ought not to be appointed a receiver in the cause.<sup>3</sup> Another court has held that the *solicitor of the complainant* cannot be appointed receiver in the same cause.<sup>4</sup> In England, there is no inflexible rule that a *trustee* cannot be appointed a receiver on terms of his having no remuneration.<sup>5</sup>

**§ 6869. Whether One Corporation may be Appointed Receiver of Another Corporation.**—There is no inherent obstacle in the way of one corporation being appointed re-

<sup>1</sup> Attorney-General v. Bank of Columbia, 1 Paige (N. Y.), 511, 517; *s. c.* affirmed, 3 Wend. (N. Y.) 588.

<sup>2</sup> Benneson v. Bill, 62 Ill. 408.

<sup>3</sup> Taylor v. Oldham, 1 Jacob, 527.

<sup>4</sup> Baker v. Backus, 32 Ill. 79.

<sup>5</sup> Re Bignell (1892), 1 Ch. 59.

ceiver of the assets of another corporation, provided the former corporation has, under its charter or governing statute, the faculty of filling such an office. No doubt, many of the modern *trust companies*, which, under their governing statutes and articles of association, habitually act as administrators, guardians, and other trustees, have the faculty of acting as receivers.<sup>1</sup> Concerning the propriety of appointing one corporation to the office of receiver of another, something may, no doubt, be said on both sides.<sup>2</sup> A corporation cannot be punished for *contempt* beyond the imposition of a pecuniary fine, and generally it may be regarded as an anomaly to cite a corporation to show cause why it should not be punished for contempt.<sup>3</sup> But if a corporation does occupy the office of receiver, there is no inherent difficulty in punishing it by the imposition of a pecuniary fine for contempt in disobeying the orders of the court, though the non-payment of the fine could not, of course, be enforced by *imprisonment*. If *criminal sanctions* attach, under the statute law of the jurisdiction, to breaches of trusts by receivers, they could not ordinarily be enforced against corporations aggregate. Against these difficulties may be weighed the fact that a *trust company*, organized for the discharge of pecuniary trusts, may, and ordinarily does, have a large capital which becomes a pledge for the faithful execution of the trust. It is, moreover, in general, represented by trained and competent counsel, who will, it may be assumed, in many cases, be able to aid the court by their advice and investigations in regard to the best mode of administering the trust.<sup>4</sup>

<sup>1</sup> That it is proper to appoint a trust company receiver of *two* banking corporations, one of which is indebted to the other,—see *Re Knickerbocker Bank*, 19 Barb. (N. Y.) 602.

<sup>2</sup> In a memorable case in Vermont, one railroad company was appointed receiver of another railroad, and the receivership seems to have lasted over a quarter of a century, and was

“rife with scandal.” See *Vermont, &c. R. Co. v. Vermont Cent. R. Co.*, 50 Vt. 500; *Langdon v. Vermont &c. R. Co.*, 53 Vt. 228.

<sup>3</sup> *Ante*, § 6448.

<sup>4</sup> A decision of the Supreme Court of North Carolina leads to the conclusion that there is no inherent difficulty in one railway corporation being appointed receiver of another such corporation. Under the general



§ 6870. **Number of Receivers to be Appointed.** — Unless there is a restraining statute, the number of receivers to be appointed is a matter resting in the *discretion* of the court making the appointment; and two, or even more, will be appointed where there are diverse interests which ought to be represented, or where it is desired to delay proceedings and multiply costs as much as possible.<sup>1</sup> So, if one of several receivers is *removed*, or *resigns*, or *dies*, it is discretionary with the court to appoint another in his stead, or to *allow the remaining ones to act* without the appointment of another.<sup>2</sup>

#### ARTICLE IV. PROCEEDINGS TO APPOINT.

##### SECTION

- 6873. At what stage of the proceeding appointed.
- 6874. Parties to the application.
- 6875. Bondholders not necessary parties.
- 6876. Conduct of the litigation by the trustees concludes the bondholders.
- 6877. Unsecured creditors not necessary parties.
- 6878. Appointment on complaint of minority stockholders.
- 6879. Appointment by the court of its own motion.
- 6880. Notice of the application.

##### SECTION

- 6881. Further of this subject.
- 6882. Manner of stating the grounds of the application in the bill or petition.
- 6883. Further of this subject.
- 6884. Relation of the proof to the pleadings in such applications.
- 6885. Showing cause against the application and making the appointment.
- 6886. Scope and terms of the order of appointment.
- 6887. Appeal and *supersedes* of orders appointing receivers.

power reserved by the constitution of that State to the legislature to alter or repeal general or special acts relating to corporations, a statute was passed, by which all acts creating, continuing, or recognizing the existence of a certain railway company, were repealed, and the assets of the company were transferred to another railway company, with the provision that they should become absolutely the rights and property of the transferee company, and conferring upon the transferee company the power to prosecute and defend all actions by or against the dissolved company, and

providing that the transferee company should not become liable for any debts or obligations of the dissolved company beyond the sum which the transferee company should actually realize from the property thus transferred to it. This extraordinary enactment was judicially sustained, and it was held that the transferee company was thereby invested with power to sue for and recover the property of the dissolved company. *Western North Carolina R. Co. v. Rollins*, 82 N. C. 523, 530.

<sup>1</sup> *Wiswell v. Starr*, 50 Me. 381.

<sup>2</sup> *Ibid.*

SECTION

6888. Taking and saving exceptions with a view to such appeal.

SECTION

6889. Qualifying: taking the oath of office.

§ 6873. At What Stage of the Proceeding Appointed.—

This, of course, depends upon the nature of the proceeding and the course and practice of the court; and in general, the question is one which addresses itself to the sound *discretion* of the Chancellor. As the act of dispossessing the proper officers of the corporation of the custody of its assets is necessarily severe, it may be roughly stated that a court will not be in a hurry to do it, where no irreparable mischief will result from the delay. On the filing of a bill against the president and directors of an incorporated banking company, charging them with the fraudulent abuse of their trust in the election of the directors, Chancellor Kent refused an injunction before the coming in of the answers, to restrain the new directors, whose election was colorable in law, from the exercise of their powers, and also refused to appoint commissioners or receivers to take charge of the affairs of the bank, there not being an *impending mischief irreparable in case of delay*.<sup>1</sup> On the other hand, where the exigency exists, the court will act promptly in appointing a receiver, even to the extent of making the appointment *before serving notice* of the application upon any party interested.<sup>2</sup> It has been held, under a statute of New York relating to the voluntary dissolution of corporations,<sup>3</sup> that a receiver cannot be appointed before the entry of the final order for dissolution.<sup>4</sup>

§ 6874. Parties to the Application.—The *corporation* is, of course, a necessary party defendant,<sup>5</sup> and in some cases it is

<sup>1</sup> Ogden v. Kip, 6 Johns. Ch. (N. Y.) 160.

<sup>2</sup> Post, § 6880.

<sup>3</sup> Ante, § 6692, et seq.

<sup>4</sup> Re Boynton Saw & File Co., 34 Hun (N. Y.), 369. Compare Herring v. New York & C. R. Co., 105 N. Y. 340, where in such a proceeding the

president of the corporation was appointed temporary receiver, and also in a subsequent action in the same court to foreclose a mortgage on the property of the corporation.

<sup>5</sup> Savings Ins. v. Makin, 23 Me. 360; Verplanck v. Mercantile Ins. Co., 2 Paige (N. Y.), 438.

the only necessary party.<sup>1</sup> The *stockholders* are not necessary parties unless some relief is sought against them.<sup>2</sup> Even where the governing statute authorized the court to appoint a receiver “*after a full hearing of all parties interested,*” it was held that neither the *stockholders* nor the *creditors* were necessary parties, but that nothing further was intended by the statute than that the court should have before it, at the hearing, all such parties as, by the general rules of chancery procedure, are deemed necessary and proper parties; and the court added: “Under this construction of the act, the stockholders might or might not be necessary parties, depending altogether upon the circumstances in each particular case.”<sup>3</sup> Therefore, in a subsequent proceeding by a receiver against stockholders to enforce, for the benefit of creditors, the payment of what is due by them in respect of their shares, they cannot defend on the ground that they were not made parties to the suit in which he was appointed receiver.<sup>4</sup> So, where a judge appointed a receiver of a corporation, and it was made to appear that the judge was related to some of its stockholders within the ninth degree, and his order was vacated on that ground, it was held error, since they were not necessary parties.<sup>5</sup> Nor, is it necessary to join as parties defendant persons having *liens* on the property sought to be impounded.<sup>6</sup> In a proceeding by the State to forfeit the charter of a railway company, by reason of the fact that it has assumed to make a sale of its corporate franchises, rights, and privileges

<sup>1</sup> Dunston v. Hoptonic Co., 83 Mich. 372; s. c. 47 N. W. Rep. 322; 31 Am. & Eng. Corp. Cas. 475; 9 Rail. & Corp. L. J. 67.

<sup>2</sup> Ward v. Farwell, 97 Ill. 593; Elwood v. First Nat. Bank, 41 Kan. 475; s. c. 21 Pac. Rep. 673; Re Dodge & Co. Man. Co., 77 N. Y. 101; s. c. 33 Am. Rep. 579; reversing s. c. 14 Hun (N. Y.), 440; East Line & Co. R. Co. v. State, 75 Tex. 434; s. c. 12 S. W. Rep. 69; Great West. Tel. Co. v. Gray, 122 Ill. 630; s. c. 19 Am. &

Eng. Corp. Cas. 260; 14 N. E. Rep. 214; 11 West. Rep. 739; 27 Am. L. Reg. (N. S.) 160. And see the “Glenn Cases,” as explained in a former title, *ante*, § 3499.

<sup>3</sup> Ward v. Farwell, 97 Ill. 593, 616, 617.

<sup>4</sup> Great West. Tel. Co. v. Gray, *supra*; *ante*, § 3499.

<sup>5</sup> Re Dodge & Co. Man. Co, *supra*.

<sup>6</sup> East Line & Co. R. Co. v. State, 75 Tex. 434, 451; s. c. 12 S. W. Rep. 690.

to a railway company incorporated in another State, the *purchasing company* has been held not a necessary party;<sup>1</sup> but this does not seem clear. It has been held that where a railway corporation has been extinguished by an act of the legislature, and its assets have been transferred to another corporation appointed to administer them in trust for the benefit of creditors and stockholders, a receiver of such assets cannot be appointed without making the last-named corporation a defendant.<sup>2</sup>

§ 6875. **Bondholders not Necessary Parties.**—In a proceeding in equity in a court of the United States to foreclose a railway mortgage, the trustee in the mortgage deed of trust represents all the bondholders under the mortgage, and the bondholders are neither necessary nor proper parties, in the absence of fraud on the part of the trustee. The court may, indeed, allow them to be made parties; but this ought not to be done where they do not allege that the trustee is acting fraudulently, in the conduct of the litigation, or otherwise. The reason is, that if separate bondholders are allowed to intervene, there may be as many parties plaintiff as there are bondholders, and if the court is obliged to listen to them all, the litigation will be interminable and the confusion inextricable.<sup>3</sup> From this statement of the rule, it appears that in such an action the bondholders stand in a relation to the suit analogous to that which is occupied by the stockholders in a

<sup>1</sup> East Line &c. R. Co. v. State, *supra*.

<sup>2</sup> Young v. Rollins, 85 N. C. 485. Under some statutes the proceeding is regarded as tantamount to a *dissolution* of the corporation, and it is necessary to make the State a party by notifying the *Attorney-General*. *Ante*, § 6701. Under a statute of Louisiana a writ of *sequestration* could only issue on the appearance and application of the *Attorney-General*. *Huntington v. Crescent City Bank*, 18 La. An. 350. In a proceeding in New

York, by the *Attorney-General* to close up the business of an insolvent life insurance company, the court may, even after the appointment of a receiver, permit *policy-holders* to appear and be made parties; and this gives them the right of appeal from orders affecting their interest. *Attorney-General v. North American Life Ins. Co.*, 6 Abb. N. Cas. (N. Y.) 293.

<sup>3</sup> *Farmers' Loan & Trust Co. v. Kansas City &c. R. Co.*, 53 Fed. Rep. 182; *ante*, § 6209, *et seq.*

case where a corporation is the complainant in equity.<sup>1</sup> The right to intervene in either case is dependent upon the failure or refusal of the party which stands in the relation of trustee to the others, to do its duty as complainant in the litigation.<sup>2</sup>

**§ 6876. Conduct of the Litigation by the Trustees Concludes the Bondholders.**—From the preceding section it must be concluded that, in every such litigation, the trustee in a railroad mortgage represents the bondholders in all legal proceedings carried on by it to enforce the trust, and that if the trustee acts in good faith, whatever orders or decrees made in the case have the effect of binding it, will equally have the effect of binding the bondholders, although not actual parties to the litigation.<sup>3</sup> If, therefore, the court in such a case appoints a receiver, but only upon certain terms, which require the *assent* of the trustee, such assent concludes the bondholders, as fully and absolutely as if it had been given by them in person.<sup>4</sup> So, where the trustees consented that

<sup>1</sup> *Ante*, § 4477, *et seq.*

<sup>2</sup> With this idea evidently in his mind, Mr. Circuit Judge Caldwell, in the case last cited, quoted from the decision of Mr. Justice Bradley in *Forbes v. Memphis & C. R. Co.*, 2 Woods (U. S.), 323, 335, where he said that while it was within the *discretion* of the court to permit a *stockholder* to become a party defendant in any cause where he was not made such by the bill, yet it was an extreme remedy, to be admitted by the court with hesitation and caution. Where the subject of the receivership was a street railway, and the municipal authorities ordered the street upon which it was laid to be *paved*, and, under the law, the street railway company was required to lay the pavement between its tracks and for two feet on the outside thereof, and the receiver had no funds with which to do this work thus imposed upon the corporation, and a petition was pre-

sented to the court, accompanied with a contract for the paving, and providing for payment of the work in certificates to be issued by the receiver, and a large amount of the holders of the first mortgage bonds intervened and protested against the issue of such certificates,—it was held,—directing the court below,—that they were entitled to be heard on the question whether the certificates should be issued. *Dorn v. Crank*, 96 Cal. 381; *s. c.* 31 Pac. Rep. 528.

<sup>3</sup> *Kerrison v. Stewart*, 93 U. S. 155; *Corcoran v. Chesapeake & C. Canal Co.*, 94 U. S. 741, 745; *Shaw v. Railroad Co.*, 100 U. S. 605, 611; *Richter v. Jerome*, 123 U. S. 233. "Whatever forecloses the trustee, in the absence of fraud or bad faith, forecloses them. This is the undoubted rule." *Richter v. Jerome*, *supra*.

<sup>4</sup> *Farmers' Loan & Trust Co. v. Kansas City & C. R. Co.*, 53 Fed. Rep. 182, 185.

*receiver's certificates* might be issued and might be made a *prior lien* on the mortgaged property, and afterwards the bondholders denied their right to give such consent and contested the validity of the certificates and the priority of the lien given them, the court said: "The consent of the trustees to the issue of the certificates bound every bondholder. There is nothing to show that the trustees acted corruptly or fraudulently."<sup>1</sup> In another case, where the trustee executed a *release of errors*, and the authority to do so was questioned by the bondholders, the court said: "The trustee represented the bondholders, not only in the proceedings which resulted in the entry of the decree, so that the bondholders were not necessary parties, but he also bound them by his release of errors."<sup>2</sup>

§ 6877. **Unsecured Creditors not Necessary Parties.** — In an action to foreclose a mortgage upon the property of a corporation, its *unsecured creditors* are neither necessary nor proper parties, and have no right to intervene, but any adjudication made against the mortgagor will be binding upon them.<sup>3</sup>

§ 6878. **Appointment on Complaint of Minority Stockholders.** — Where the holders of a majority of the stock of a corporation *neglect to choose officers* to take charge of its property, and the *franchises* of the corporation are, by them, virtually *abandoned*, a receiver will be appointed upon the application of the minority stockholders, to take possession of the property and preserve it for the benefit of the stockholders generally.<sup>4</sup>

<sup>1</sup> *Kneeland v. Luce*, 141 U. S. 491, 509. To the same effect, see *Kent v. Lake Superior Ship Canal &c. Iron Co.*, 144 U. S. 75.

<sup>2</sup> *Elwell v. Fosdick*, 134 U. S. 500, 512.

<sup>3</sup> *Bronson v. Railroad Co.*, 2 Black (U. S.), 524; *Stout v. Lye*, 103 U. S. 66; *Candee v. Lord*, 2 N. Y. 269; *s. c.* 51 Am. Dec. 294; *Herring v. New York &c. R. Co.*, 105 N. Y. 340, 370; *s. c.* 12 N. E. Rep. 763; 7 Cent. Rep.

308. *Candee v. Lord*, *supra*, probably contains the best discussion of the governing principle, which is, that a *judgment* obtained against a debtor, which affects his property, is, in the absence of fraud or collusion, *conclusive upon all his creditors*.

<sup>4</sup> *Ante*, § 4553; *Lawrence v. Greenwich Fire Ins. Co.*, 1 Paige (N. Y.), 587, citing *Andrews v. Boise*, 2 Brown P. C. 504, and *Maguire v. Allen*, 1 Ball & Beat. 75, — as fully sustaining

But it has been frequently held that a proceeding *by a stockholder* cannot be maintained where the substantial object is to dissolve and wind up the corporation.<sup>1</sup> But this is rather for the reason that a court of *equity* has no jurisdiction to *dissolve* a corporation;<sup>2</sup> though it may lay hold of its assets and *distribute* them among its creditors without assuming to oust it of its franchises.<sup>3</sup>

§ 6879. Appointment by the Court of its Own Motion. —

Where there was no prayer for the appointment of a receiver in the bill, nor in the answer of the defendant corporation, which was in the nature of a cross-bill, and there was nothing in the record going to show that the corporate property was in danger of destruction or loss, so as to require the appointment of a receiver, — it was held that the judge erred in making the appointment, and his judgment was therefore reversed, — although some of the other defendants in the corporation had, in their answer, in the nature of a cross-bill, prayed for the appointment of a receiver to do certain things in the event certain other things should be done; but there was no prayer of any party to have a receiver appointed, for the purpose and with the powers specified in the order of appointment set forth in the record.<sup>4</sup> But it does not follow from the above that it is necessary, according to the principles of chancery practice, to warrant the court in appointing a receiver, that such relief should have been *prayed for in the bill*. Such an appointment may be made on *supplementary motion*, although there is no such prayer in the bill.<sup>5</sup>

the principle that a receiver may be appointed in any case where it is necessary for the preservation of the property pending the litigation. But the infirmity of the case is that, as reported, it does not show what the minority stockholders were suing for, or what they wanted done, — though it would seem that they wanted the corporation wound up and its property distributed.

<sup>1</sup> Strong *v.* McCagg, 55 Wis. 624; Hinckley *v.* Pfister, 83 Wis. 64; *s. c.* 53 N. W. Rep. 21.

<sup>2</sup> *Ante*, § 4538.

<sup>3</sup> *Ante*, § 6555.

<sup>4</sup> Augusta Ice Man. Co. *v.* Gray, 60 Ga. 344. Compare State *v.* Ross, (Mo.), 25 S. W. Rep. 947.

<sup>5</sup> Bowman *v.* Bell, 14 Sim. 392; *post*, § 6882.

§ 6880. **Notice of the Application.**—Where there is no statute requiring notice to be given, it is not in all cases indispensably necessary to the validity of the appointment of a receiver that notice of the application should be given to any one. A little reflection will make this the more apparent. The appointment does not change any rights of property. In many cases it is a mere interim impounding of property for the purpose of administering it in the interest of all who have any claims against it, or liens upon it. Besides, cases may arise in which it may become necessary to effect a seizure of the property before notice can be given, in order to prevent it from being concealed or carried out of the jurisdiction.<sup>1</sup> Moreover, it is to be remembered that a seizure and an impounding of the property in itself conveys notice to its custodian. A receiver *may* therefore be appointed without the giving of notice to anyone, though, of course, notice of the application should be given to those who are necessary parties to the proceeding, provided it is practicable to do so;<sup>2</sup> and statutes are met with which require notice to be given.<sup>3</sup> Nevertheless, the best authorities concede that such an appointment should not be made without notice, except upon

<sup>1</sup> See High on Receivers (2d ed.), § 117.

<sup>2</sup> Elwood v. First Nat. Bank, 41 Kan. 475; s. c. 21 Pac. Rep. 673; Dayton v. Borst, 7 Bosw. (N. Y.) 115.

<sup>3</sup> Such a statute in Indiana (Rev. Stat. Ind. 1881, § 1230) provides that receivers shall not be appointed in any case until the adverse party shall have appeared, or shall have reasonable notice of the application for such appointment, "except upon sufficient cause shown by affidavit." Under this statute, it is held that where a verified complaint states that there is an emergency for the *ex parte* appointment of a receiver, and fails to state the facts on which the plaintiff bases his conclusion that such an emergency

exists, the appointment will not be justified. Wabash R. Co. v. Dykeman, 133 Ind. 56; s. c. 32 N. E. Rep. 823. It has been reasoned that where a complaint fails to show fraud, or that the property or any part of it, is about to be wasted, misappropriated, or removed beyond the jurisdiction of the court, and it is apparent that the plaintiff will suffer no great loss during the time necessary to give notice to the defendant, a railroad company, operating a line of railroad through the county in which the suit is brought, — a receiver should not be appointed *ex parte*, under the above statute. Chicago & C. R. Co. v. Cason, 133 Ind. 49; s. c. 32 N. E. Rep. 827.



the gravest emergency, demanding the immediate interference of the court to prevent irreparable injury.<sup>1</sup>

§ 6881. **Further of This Subject.**—A distinction must here be taken between the necessity of giving notice of the application for a receiver, and the necessity of bringing before the court, by the proper *original process*, the corporation itself, and any other person or corporation which is a necessary party defendant to the suit. Where this is omitted, the court acquires *no jurisdiction of the action*, and its order appointing a receiver, or any other ancillary order which it may make in the progress of the action, falls to the ground with the suit in chief, for the mere want of jurisdiction.<sup>2</sup> We have already seen<sup>3</sup> that cases may arise in which it will be competent and proper to appoint a receiver of the assets of a *foreign corporation*, found within the jurisdiction. In such a case it may not be practicable to serve the corporation with actual notice, either of the appointment of a receiver or of the suit in chief, and it must necessarily proceed, if at all, upon a jurisdiction *in rem* acquired by the seizure of the property, followed by *publication* in the statutory mode, assuming that there is a statute providing for publication in

<sup>1</sup> Haas *v.* Chicago Building Soc., 89 Ill. 498; Moyers *v.* Coiner, 22 Fla. 422; Whitehead *v.* Wooten, 43 Miss. 523. Mr. High points out (High on Receivers (2d ed.) § 111), on the authority of the following cases, that the courts are extremely loth to appoint receivers on *ex parte* applications: Verplanck *v.* Mercantile Ins. Co., 2 Paige (N. Y.), 438; Sanford *v.* Sinclair, 8 Paige (N. Y.), 373; People *v.* Albany & C. R. Co., 7 Abb. Pr. (N. S.) (N. Y.) 265; *s. c.* 1 Lans. (N. Y.) 308; 55 Barb. (N. Y.) 34; 38 How. Pr. (N. Y.) 228; Field *v.* Ripley, 20 How. Pr. (N. Y.) 26; Bisson *v.* Curry, 35 Iowa, 72 (following French *v.* Gifford, 30 Iowa, 148); Blondheim *v.* Moore, 11 Md. 365; Triebert *v.* Bur-

gess, 11 Md. 452; Whitehead *v.* Wooten, 43 Miss. 523; Rogers *v.* Dougherty, 20 Ga. 271; Nusbaum *v.* Stein, 12 Md. 315; Caillard *v.* Caillard, 25 Beav. 512; Voshell *v.* Hynson, 26 Md. 83; Crowder *v.* Moone, 52 Ala. 220; Howe *v.* Jones, 57 Iowa, 130. Mr. High adds that, under the statutes of Iowa, a receiver may be appointed in a law action, before notice to defendant,—citing Jones *v.* Graves, 20 Iowa, 596.

<sup>2</sup> On this ground, Young *v.* Rollins, 85 N. C. 485, may be harmonized with the cases which hold that notice of the application to appoint a receiver is not in all cases essential.

<sup>3</sup> *Ante*, § 6880, *et seq.*

such a case,—as in the case of a foreign *attachment*.<sup>1</sup> But a careful distinction must be kept in mind between the power of the court to *appoint a receiver* in the first instance without notice to the corporation, and the power to authorize him, without such notice, to *sell the property*: the appointment *may* be made without notice where the circumstances justify it, but a sale of the property *cannot* be made by the receiver, such as will pass a title, without notice to the corporation, actual or constructive.<sup>2</sup> Where the court appoints a receiver merely to hold and preserve the property pending a litigation, the appointment is regarded as being in the nature of an *equitable attachment*, whereby the court acquires, through its officer, the custody of the property or assets, to be retained until it has acquired jurisdiction; and the mere seizure of the property by the court's receiver does not give jurisdiction, but that must be acquired by a subpoena or other *notice* to the corporation, made and served or published in compliance with law, before the court can acquire jurisdiction to order a sale of the property.<sup>3</sup>

<sup>1</sup> *Post*, ch. 199. Where a bill was filed in a court of chancery in New Jersey against a bank, and a *subpœna ad respondendum* was issued, and returned by the proper officer not served, together with his affidavit that he could not find the bank officer to whom it was directed, and that he believed that there was no such officer in his county, and thereupon a receiver was appointed,—it was held, in a court of New York, that the return and affidavit left that court at liberty to appoint a receiver without notice to the corporation. *Dayton v. Borst*, 7 Bosw. (N. Y.) 115. The New York Code of Procedure, section 714, provides that a receiver can be appointed without notice only where an order for publication has been obtained. Another statute requires notice to be given to the corporation and to the Attorney-Gen-

eral. *Ante*, § 6701. The omission to give notice to the Attorney-General may, it has been held, be cured by a *nunc pro tunc* order. *Morrison v. Menhaden Co.*, 37 Hun (N. Y.), 522. As to the inherent power of the court to proceed notwithstanding the statute, see *Ettlinger v. Persian Rug & Co.*, 49 N. Y. St. Rep. 408; *s. c.* 20 N. Y. Supp. 772. A motion for the appointment of a receiver to wind up the affairs of a bank has been denied as illegal, where it appeared that the order to show cause against the appointment was served before the action was commenced. *Kattenstroth v. Astor Bank*, 2 Duer (N. Y.), 632.

<sup>2</sup> *St. Louis & C. Min. Co. v. San-doval Coal & Min. Co.*, 111 Ill. 32.

<sup>3</sup> *Ibid.* For states of fact which do not justify the appointment of a receiver without previous notice, and where such orders of appointment were reversed,—

§ 6882. **Manner of Stating the Grounds of the Application in the Bill or Petition.**—Where the jurisdiction addresses itself to the equitable powers of the court, no general rule can be stated as to the manner of stating the grounds on which the appointment is desired; but where the jurisdiction is *statutory*, then a case must be stated substantially *within the terms of the statute*. Whether the appointment is sought under the equitable powers of the court or under the provisions of a statute, it is, of course, necessary for the pleader to state a case in which a receiver may properly be appointed; but beyond this, except in statutory cases, it is not necessary that all the grounds on which he seeks the appointment should be set forth in his petition, especially where the receivership is only an ancillary remedy.<sup>1</sup> Indeed, it has been held that where the application for a receiver is *ancillary* to the main purposes of the suit, the facts essential to the appointment need not be pleaded at all, but may be shown by *affidavit* at the hearing; nor is a *prayer in the bill* for a receiver necessary,<sup>2</sup>—provided, it may be assumed, there is prayer for *general relief*. Where the governing statute predicates the right to a receivership on the fact of *insolvency*, and the proceeding is by the *Attorney-General* on behalf of the people, it is not sufficient for him to allege, in general terms, that he *believes* the corporation to be insolvent and unable to pay its debts; but he must state the facts and circumstances upon which that belief is founded, and if they are such as to raise a fair presumption of its insolvency, or, as it is commonly expressed, to make out a *prima facie* case, and are uncontradicted or unexplained by the corporation, the fact of insolvency will be regarded as proved, within the meaning of the statute.<sup>3</sup>

see Chicago &c. R. Co. v. Cason, 133 Ind. 49; s. c. 32 N. E. Rep. 827; Washash R. Co. v. Dykeman, 133 Ind. 56; s. c. 32 N. E. Rep. 823.

<sup>1</sup> Hottenstein v. Conrad, 9 Kan. 435; Elwood v. First Nat. Bank, 41 Kan. 475; s. c. 21 Pac. Rep. 673.

<sup>2</sup> Commercial &c. Bank v. Corbett, 5 Sawy. (U. S.) 172; Henshaw v. Wells,

9 Humph. (Tenn.) 568; Ladd v. Harvey, 21 N. H. 514; Malcolm v. Montgomery, 2 Molloy, 500; Osborne v. Harvey, 1 Younge & C. 116; Merrill v. Elam, 2 Tenn. Ch. 513. Compare Augusta Ice &c. Co. v. Gray, 60 Ga. 344.

<sup>3</sup> Bank of Columbia v. Attorney-General, 3 Wend. (N. Y.) 588; affirm-

§ 6883. **Further of This Subject.**—It is not at all necessary that the appointment should be *prayed for* in the original bill, or that an amended or supplementary *bill* should be filed for that purpose;<sup>1</sup> but if, at any time during the progress of the cause, a receiver becomes necessary, in the opinion of a party, he may present a *petition* to the court praying the appointment of a receiver, and under this petition the court may properly make the appointment,—assuming, of course, that the circumstances exist rendering the appointment expedient.<sup>2</sup> When, therefore, a receiver has been appointed on an *ex parte* application *before the filing of the bill*, it was held, on appeal, that the appointment ought to be revoked without regard to the merits of the application.<sup>3</sup>

§ 6884. **Relation of the Proof to the Pleadings in Such Applications.**—So little are the averments of the bill or petition regarded on such an application, that the order of the

ing s. c. 1 Paige (N. Y.), 510. In this case several opinions were delivered, and the vote in the New York Senate stood fifteen for affirmance to eleven for reversal. The capable reporter collected the decision of the court upon the proposition in question in the following syllabus, the italics being his: “In a *proceeding against a bank* by the Attorney-General under the ‘act to prevent fraudulent bankruptcies by incorporated companies, and to facilitate proceedings against them,’ if, in the bill filed by way of *information*, facts and circumstances are stated, verified by affidavit expressing *belief* in the truth of those facts, and they are of such a character as to raise a fair presumption that the bank proceeded against is insolvent, and are not *contradicted or explained* by the bank on a motion for the appointment of a *receiver* after due notice, the fact of insolvency will be considered as proved within the meaning of the act.”

<sup>1</sup> *Ante*, §§ 6879, 6882.

<sup>2</sup> Vermont &c. R. Co. v. Vermont Cent. R. Co., 50 Vt. 500; Langdon v. Vermont &c. R. Co., 54 Vt. 593, 610. The foregoing statement shows that the rule of the former chancery practice has been greatly modified in recent times, and especially with regard to the appointment of receivers of corporations, and in particular of railroad companies. The doctrine formerly prevailing was thus stated by Chancellor Zabriskie: “A receiver is generally appointed on bill filed for that purpose, and rarely before answer, except under provisions by particular statutes. There are a few exceptional cases where a receiver has been appointed upon petition; but these are in the cases of infants, whose position as wards of the court gives them the right to apply by petition, or in cases similarly situated.” Leddel v. Starr, 19 N. J. Eq. 159, 163. To the same effect, see *Ex parte Mountfort*, 15 Ves. 445.

<sup>3</sup> Crowder v. Moone, 52 Ala. 220.

court appointing the receiver need not be limited to such property as may be mentioned in the application; but where, under the governing statute, a receivership can only be granted in respect of all the property of the corporation, that will be the effect of the order, although the petition may not have been to that effect. When, therefore, the petition for the appointment recited that the defendant had certain described property, but made no reference to the unpaid assessments of its stockholders, and the order of court required the receiver to take charge of the property of the corporation, and to have all the powers and perform all the functions of receivers under the law, it was held that his powers extended to all the assets of the company subject to the payment of its debts, including the arrearages due by its stockholders.<sup>1</sup>

**§ 6885. Showing Cause against the Application and Making the Appointment.**—The motion may properly take the form of an *order* on the corporation *to show cause* why a receiver should not be appointed in compliance with the prayer of the bill, petition, or complaint. A reasonable time should, of course, be allowed the corporation so to appear and show cause, and in ordinary chancery practice it will be required to appear at a succeeding rule day. If the corporation fails so to appear and show cause, or if it appears and fails to show satisfactory cause, a *reference* may be made *to a master* to report to the court nominations of persons suitable to be appointed, and upon the coming in of his report the court will make the appointment;<sup>2</sup> but it is not, of course, necessary that the Chancellor should direct a reference to a master to nominate a person for the office; he may appoint a person to the office in the first instance.<sup>3</sup>

<sup>1</sup> Showalter v. Laredo Improvement Co., 83 Tex. 162; s. c. 18 S. W. Rep. 491. *Proof of insolvency* on such an application: Tuckahoe & c. R. Co. v. Baker, 49 N. J. Eq. 581; s. c. 25 Atl. Rep. 402.

<sup>2</sup> See Matter of Franklin Bank, 1 Paige (N. Y.), 85, where this course was pursued.

<sup>3</sup> Attorney-General v. Bank of Columbia, 1 Paige (N. Y.), 511; s. c. affirmed, 3 Wend. (N. Y.) 588.

**§ 6886. Scope and Terms of the Order of Appointment. —**

The order appointing a receiver of an insolvent corporation, on a bill filed by its creditors, ought not to direct the receiver to collect the debts owing to the company and to apply the proceeds thereof in payment of the judgments of the complainants; but it ought to direct that the *moneys* collected be *brought into court*, so that the court may order distribution among the creditors according to their respective priorities and equities.<sup>1</sup>

**§ 6887. Appeal and Supersedeas of Orders Appointing Receivers. —**

Whether an order appointing a receiver may be reviewed in a higher court *upon appeal* or *upon a statutory writ of error*, depends upon the course of procedure in the particular jurisdiction. In Connecticut, where a receiver was appointed for the purpose of winding up the affairs of a manufacturing corporation, on the petition of certain of its stockholders, and the court made an order upon the officers of the corporation to surrender all its property to the receiver, — it was held that a motion in error filed by the corporation operated as a *supersedeas* of the order, and that the officers of the corporation could not be held for contempt in disobeying it while the motion in error was pending.<sup>2</sup> In Indiana, whenever a court or judge, either in term time or in vacation, appoints or refuses to appoint a receiver, the aggrieved party may, under the provisions of a statute,<sup>3</sup> within ten days thereafter, appeal from the decision of the court or judge, without

<sup>1</sup> *Benneson v. Bill*, 62 Ill. 408. An order appointing a receiver of a railroad, directed, among other things, that "all the books, vouchers, and papers shall be delivered by its officers, servants, and agents to the receiver." It was held that this order included all the books relating to the previous history of the corporation, and all the records of its transactions, and that it was not confined to the books relating to the future opera-

tions of the road, or to such as the receiver might specifically demand. *American Const. Co. v. Jacksonville &c. R. Co.*, 52 Fed. Rep. 937. The order also provided for the delivery to the receiver of "all and every part of the properties, interests, effects, moneys, receipts, earnings," etc. It was held that this order embraced the company's *seal*. *Ibid*.

<sup>2</sup> *Catlin v. Baldwin*, 47 Conn. 183.

<sup>3</sup> Rev. Stat. Ind. 1881, § 1231.

awaiting the final determination of the case.<sup>1</sup> It seems that an appeal lies from an order appointing a receiver in Georgia.<sup>2</sup> An order appointing a receiver is a *final order*, which can be reviewed by appeal in advance of the main case, in Nebraska.<sup>3</sup> But outside of statutory provisions, and according to the practice inherited from the English Court of Chancery, which governs in the Circuit Court of the United States, there is *no appeal*, because the order is *interlocutory* merely.

§ 6888. **Taking and Saving Exceptions with a View to Such Appeal.** — Although there is a statute in Indiana which provides that the “party objecting to the decision must except at the time the decision is made,”<sup>4</sup> — yet, it is held that this statute applies only to adversary proceedings in court, and not to *ex parte* proceedings for the appointment of a receiver; so that, where a receiver was appointed upon an *ex parte* application, it was sufficient that the party against whom the proceeding was brought *excepted* to the order of the court *as soon as he could*.<sup>5</sup>

§ 6889. **Qualifying: Taking the Oath of Office.** — A statutory provision requiring a receiver of an insolvent corporation to take an oath of office has been held to be *directory* merely, so that the omission to take it before the commencement of an action by the receiver does not incapacitate him from maintaining the action.<sup>6</sup> Again, the failure of the person nomi-

<sup>1</sup> Pressely v. Lamb, 105 Ind. 171, 189; s. c. 4 N. E. Rep. 682; Wabash R. Co. v. Dykeman, 133 Ind. 56; s. c. 32 N. E. Rep. 823; Barnes v. Jones, 91 Ind. 161.

<sup>2</sup> Gardner v. Howell, 60 Ga. 11; Jones v. Johnson, 60 Ga. 260; Augusta Ice Co. v. Gray, 60 Ga. 344.

<sup>3</sup> McCord v. Weil, 33 Neb. 868; overruling s. c. 29 Neb. 682.

<sup>4</sup> Ind. Rev. Stat. 1881, § 626.

<sup>5</sup> Wabash &c. R. Co. v. Dykeman, 133 Ind. 56; s. c. 32 N. E. Rep. 823. In this case a receiver was appointed in the evening on an *ex parte* applica-

tion, and the next morning, and before the order of appointment was read by the clerk in open court, the defendant appeared by attorney and objected to the order, and his objection was overruled, — and it was held that he was entitled to have the order reviewed on appeal, although the record showed that no exception was taken to the ruling of the court appointing a receiver at the time when it was made.

<sup>6</sup> Dayton v. Borst, 7 Bosw. (N. Y.) 115.

nated by the majority of the stockholders of a dissolved corporation to accept and qualify as receiver, does not prevent the decree from terminating the existence of the corporation.<sup>1</sup>

<sup>1</sup> Nelson *v.* Hubbard, 96 Ala. 238; *s. c.* 11 South. Rep. 428; 17 L. R. A. 375; 12 Rail. & Corp. L. J. 182.



## CHAPTER CLIX.

### EFFECT OF APPOINTMENT.

SECTION	SECTION
6893. Effect of the appointment upon pending actions.	6904. How affects the running of interest.
6894. Does not suspend the right of action against corporation.	6905. Effect of appointment on the rights of purchaser <i>pendente lite</i> .
6895. Effect of receivership without dissolution upon existing rights of action.	6906. Where the corporation is a member of a partnership.
6896. Receiver can be made a party, but only on his own motion.	6907. When failure to apply for receiver extinguishes the debt of the corporation.
6897. Injunctions against the prosecution of actions against the corporation.	6908. Jurisdiction over property of non-resident stockholders through receiver.
6898. Appointment suspends the power of other courts to interfere with the subject of the receivership.	6909. Distribution under receiver <i>pendente lite</i> conclusive in a subsequent proceeding to dissolve.
6899. Exception in the case of receivers of national banks.	6910. Commencement of winding-up proceeding suspends similar rights of action.
6900. Suspends rights of action by the corporation.	6911. Power of a court to modify contracts entered into prior to insolvency.
6901. Prevents new rights of action from accruing.	6912. Decisions under particular State statutes.
6902. Suspends rights of action by creditors against stockholders.	
6903. Does not displace liens or other vested rights.	

#### § 6893. Effect of the Appointment upon Pending Actions.

The effect of the appointment of a receiver of a corporation upon actions pending against it at the time of the appointment will depend upon the governing statute in the case of a statutory receiver, or upon the scope of the order of court appointing him in a case where he is appointed by the court in the exercise of its ordinary equity powers. In the absence of a statute so enacting, it is believed to be the sound view that

the appointment of a receiver, even for the purpose of winding up a corporation, does not necessarily have the effect of causing the actions depending against the corporation to abate. If, however, the proceeding is *a statutory proceeding to dissolve* the corporation and also wind up its affairs, and if, under the provisions of the statute, the court enters a judgment of dissolution and also makes an order appointing a receiver to collect and distribute the assets, — this, it may be concluded, will, *ipso facto*, produce an *abatement* of every action depending against the corporation; but it is really the *judgment of dissolution* which produces the abatement, because it is that which destroys the corporation as a legal entity and disables it from thereafter exercising any corporate function. In New York it is held that the appointment of a receiver, in a proceeding by the people to wind up a corporation, has the effect of causing actions against the corporation to abate.<sup>1</sup> From this it follows that an answer under the corporate seal, after a receiver has been appointed in such a proceeding, cannot be allowed to affect the decision of a question between the receiver and a creditor.<sup>2</sup> So, in Maine no action could be maintained against a bank after the appointment of a receiver to wind it up, under the provisions of a statute declaring that “no action shall be maintained against any bank after the appointment of receivers thereof, but that the creditors shall have their remedy under the provisions of this bill.”<sup>3</sup> Where such is the effect of a statute appointing a receiver *in the State of the domicile* of the corporation, *that will be the effect everywhere*; and the appointment of the receiver in such a proceeding will abate actions proceeding against the corporation in a court of the United States sitting within another State.<sup>4</sup>

<sup>1</sup> Colorado Nat. Bank v. Scott, 19 Abb. N. Cas. (N. Y.) 348; citing McCulloch v. Norwood, 58 N. Y. 562; Davenport v. City Bank of Buffalo, 9 Paige (N. Y.), 12.

<sup>2</sup> Davenport v. City Bank of Buffalo, *supra*.

<sup>3</sup> Leathers v. Shipbuilders' Bank, 40 Me. 386.

<sup>4</sup> When, therefore, a judgment of the Federal Circuit Court in Tennessee, against a New York corporation, was reversed by the Supreme Court of the United States and a new trial ordered, but, pending the writ of error, the corporation was *dissolved* by the courts of New York and a receiver appointed, — it was held that

§ 6894. **Does not Suspend the Right of Action against Corporation.**—The mere *appointment* of a receiver does not suspend the right of action against the corporation itself, unless the proceeding in which the receiver is appointed has resulted in *dissolving* the corporation; or unless such proceedings have been commenced for the purpose of securing a judicial dissolution of the corporation; or unless the court in which it is commenced enjoins the prosecution of actions against the corporation, pending the determination of the question whether it is to be dissolved. The reason for this conclusion is, that the existence of the corporation is not destroyed, or even suspended, by reason of its property and franchises being held in custody by a court of equity;<sup>1</sup> though the seizure of its property may dispossess it of the *means* of defending suits, and make it inequitable to allow them to be prosecuted against it. But while this is true, any judgment obtained in such an action against the corporation cannot be satisfied by the *levy of an execution* upon any of its properties, because they are *in custodia legis*.<sup>2</sup> But the remedy of the plaintiff in the judgment is to file an *intervening petition*, and have his judgment allowed by the court holding the property through its receiver, and paid according to its due rank.<sup>3</sup>

§ 6895. **Effect of Receivership without Dissolution upon Existing Rights of Action.**—Except in the case of those stat-

a *judgment* by default, subsequently rendered by the Federal court in Tennessee against the corporation, without reviving the action against the receiver or serving him with notice, was without jurisdiction and *void*. *Pendleton v. Russell*, 144 U. S. 640. Nor did the appearance of the receiver appointed in New York, in the Supreme Court of the United States, for the purpose of securing a reversal of the judgment of the Federal court in Tennessee, preserve the jurisdiction of that court over the case after the dissolution of the corporation in New York, in such a sense as to make

its subsequent judgment binding on the property of the corporation in the hands of the receiver, or to prevent the receiver from showing that the judgment was invalid because rendered against a corporation which had no existence at the time, and which possessed no property within the local jurisdiction against which the judgment could be enforced. *Ibid*.

<sup>1</sup> *Heath v. Missouri &c. R. Co.*, 83 Mo. 617.

<sup>2</sup> *Post*, § 6898.

<sup>3</sup> *Heath v. Missouri &c. R. Co.*, *supra*.

utory receiverships where the appointment of a receiver to *wind up* the corporation follows immediately upon a judgment of *dissolution*, the general rule is that the appointment of a receiver does not, *ipso facto*, produce the *abatement* of a pending action against the corporation.<sup>1</sup> This doctrine is peculiarly applicable to receiverships of railways pending proceedings in equity for the foreclosure of mortgages and reorganization of the company. In such a case it was said that the mere fact that the property of the company had passed into the hands of a receiver did not bar the prosecution of the action, though it might bar the enforcement of the judgment, if the receiver should interpose. It was accordingly held no ground for *continuing*, that is, *postponing*, an action against such a corporation, that a receiver had been appointed.<sup>2</sup> So, while it is a principle that an action cannot be prosecuted in one court against a receiver appointed by another court without the consent of such other court, whose officer the receiver is, — yet this rule does not extend so far as to prohibit an action against a corporation for the mere reason that its assets have passed into the hands of a receiver appointed by a court of equity. On the contrary, the existence of the corporation is neither destroyed nor suspended by reason of the fact of its property and franchises being held in the custody of a court of equity through its receiver; but actions *in personam* may still be as freely prosecuted against the corporation as before, and no license is required from the court which has appointed the receiver for the prosecution of such actions. No judgment in such an action could be satisfied from the property of the corporation in the hands of the receiver, except through the assistance of the court appointing him. But if the property of the corporation is returned to its custody, such a judgment could be enforced against it in the usual way on final process.<sup>3</sup>

<sup>1</sup> Toledo &c. R. Co. v. Beggs, 85 N. Y. Civ. Proc. 194; s. c. 9 N. Y. St. Ill. 80; s. c. 28 Am. Rep. 613; Mercantile Ins. Co. v. Jaynes, 87 Ill. 199; <sup>2</sup> Toledo &c. R. Co. v. Beggs, Parry v. American Opera Co., 12 *supra*.

<sup>3</sup> Heath v. Missouri &c. R. Co., 83 Mo. 617.

§ 6896. **Receiver can be Made a Party, but only on his Own Motion.**—In such a case it is said that a receiver can be made a party, but that this can be done only upon his own motion.<sup>1</sup> The principle here applied is the well-known rule of chancery practice that a person who acquires an interest in a suit, *pendente lite*, cannot be made a party defendant on the record, unless he personally asserts his claim.<sup>2</sup> Where the action is in the nature of a *possessory action* to recover personal property, as in the case of an action against a national bank to recover a *special deposit*,—when the corporation passes into the hands of a receiver, he is properly joined as a defendant in the action, because he becomes the custodian of the property, and the judgment, to be effectual, must be such a judgment as will conclude him.<sup>3</sup>

§ 6897. **Injunctions against the Prosecution of Actions against the Corporation.**—In many cases, where a receiver is appointed of the entire assets of an individual or corporate debtor, either for the purposes of a general administration, or of an *interim* custody pending the foreclosure of a mortgage, the court will, in the order appointing the receiver, embody an order enjoining the prosecution of all actions against the debtor, and especially the prosecution of actions of a *possessory nature*, the judgment of which would operate to disturb the possession of the receiver. But this does not follow as a matter of course, except where the necessary effect of the appointment of the receiver, under some applicatory statute, is to work a dissolution of the corporation, either *de jure* or *de facto*, so as to disable it from defending actions pending or thereafter brought against it. Nor is it necessary that the appointment of a receiver should have the effect of terminating the existence of the corporation for the purpose of exercising the power of defending actions against it: it is enough that all the funds of the corporation are wrested from its possession and placed in the hands of the receiver, so that it is

<sup>1</sup> Mercantile Ins. Co. v. Jaynes, 87 Ill. 199, 205.

<sup>2</sup> Lawrence v. Lane, 4 Gilm. (Ill.) 354.

<sup>3</sup> Turner v. First Nat. Bank, 26 Iowa, 562.

deprived of the *means* of making such defenses. In either case, the court will enjoin the prosecution of such actions; or, where the parties plaintiff in such actions are beyond the jurisdiction of the court, the receiver will, on his own application, be introduced as a *party* defendant. But if the action is pending in a *foreign jurisdiction*, the receiver must come in and be made a party on his own motion, and submit himself, and the controversy which he seeks to defend, to the jurisdiction of the court. He cannot accomplish the result desired by him, by standing at long range and making a suggestion to the court that he has been appointed receiver in the State of the domicile of the corporation.<sup>1</sup> The subject of granting injunctions restraining pending and future actions against the corporation when a receiver is appointed to take charge of its properties, is closely analogous to the subject of granting leave to bring actions against the receiver. If, according to a view already considered,<sup>2</sup> any party is left free, by reason of the fact that the court has issued no such injunction, to prosecute his action against the corporation, then it may not be necessary for him to bring an action against the receiver in order to establish his demand. If, on the other hand, he is precluded, by a restraining order, from prosecuting his action against the corporation, then it will become necessary for him to obtain leave to sue the receiver; and if such leave is refused, his only remaining remedy will be to intervene *pro interesse suo* in the court appointing the receiver, and have his claim referred to a master for examination and report. But the proposition with which we are now chiefly concerned is that, where a court has acquired jurisdiction of a proceeding to wind up the affairs of a corporation, and has, under the provisions of the governing statute, appointed a receiver to that end, the court may *stay* the suit of a creditor brought to recover assets to which the receiver is entitled, in whatever court pending,<sup>3</sup>—a conclusion which necessarily follows from the fact

<sup>1</sup> St. Louis &c. Min. Co. v. Sandoval Coal & Min. Co., 111 Ill. 32.

<sup>2</sup> *Ante*, § 6894; referring especially to Kinney v. Crocker, 18 Wis. 74, 80; and cases which take that view.

<sup>3</sup> Attorney-General v. Guardian Mut. Life Ins. Co., 77 N. Y. 272.

that the receiver becomes the *custodian*, and in many cases acquires under the governing statute the *legal title*, for the purposes of his trust, of all the property of the corporation.<sup>1</sup> Nor is it necessary to secure an injunction for that purpose, in a separate action, for the reason that the decree dissolving the corporation and ordering a distribution of its assets is a decree in the nature of a *judgment for all the creditors*, and they are subject to the summary jurisdiction of the court in all matters pertaining to the administration of the estate of the insolvent corporation.<sup>2</sup>

**§ 6898. Appointment Suspends the Power of Other Courts to Interfere with the Subject of the Receivership.**—If the court appointing the receiver had *jurisdiction* to make the appointment, and the court has thus, by its officer, acquired possession of the property and of its revenues, for the purposes of justice, it is elementary that no other court can rightfully disturb that possession by its writ of *attachment*, or any other process affecting the property while in the hands of the receiver.<sup>3</sup> To levy an *execution* upon such property is a *contempt* of the court whose officer the receiver is, and punishable as such.<sup>4</sup> While *exceptions* to this principle may exist in the case of *statutory receivers*,<sup>5</sup> yet where the receiver is *appointed by a court of equity*, judicial authority seems to be uniform to the effect that the property in his hands is *in custodia legis*,

<sup>1</sup> *Post*, § 6979.

<sup>2</sup> *Ibid.*; *Thompson v. Brown*, 4 Johns. Ch. (N. Y.) 619, 641; *Re Hemiup*, 2 Paige (N. Y.), 316; *Travis v. Myers*, 67 N. Y. 542; *Peck v. Crane*, 25 Vt. 146.

<sup>3</sup> *Gest v. New Orleans &c. R. Co.*, 30 La. An., pt. 1, 28.

<sup>4</sup> *Coe v. Columbus &c. R. Co.*, 10 Ohio St. 372; *s. c.* 75 Am. Dec. 518, 541; *Russell v. East Anglian R. Co.*, 6 Rail. & Canal Cas. 501, 522; *Albany City Bank v. Schermerhorn*, 9 Paige (N. Y.), 372; *s. c.* 38 Am. Dec. 551. But it has been held that where no step is taken to punish the creditor

so levying for the contempt, and no objection is made to his right so to levy, an appellate court may infer that the court in which the receiver was appointed permitted the levy, so as to enable the judgment creditor to secure any rights to the property which the levy would give, in the event the claims in the action in which the receiver was appointed should not be prosecuted or should not be maintained. *Coe v. Columbus &c. R. Co.*, 10 Ohio St. 372; *s. c.* 75 Am. Dec. 518, 541.

<sup>5</sup> See next section.

and hence not subject to levy under *attachment*, *execution*, or other *judicial process*.<sup>1</sup> The rule being that property *in custodia legis* is not subject to levy under an *attachment*,<sup>2</sup> it must follow that *no title can be acquired* through a purchase of the property at a sale under such a levy. And accordingly, it has been held that one who purchases property, seized under an attachment while in the hands of a receiver, does not get a title which he can maintain as against a purchaser of the same property at a receiver's sale; though his deed will be

<sup>1</sup> Texas Trunk R. Co. *v.* Lewis, 81 Tex. 1; *s. c.* 26 Am. St. Rep. 776; Adams *v.* Haskell, 6 Cal. 113; *s. c.* 65 Am. Dec. 491, and note; Hagedorn *v.* Bank of Wisconsin, 1 Pinney (Wis.), 61; *s. c.* 39 Am. Dec. 275; Storm *v.* Waddell, 2 Sandf. Ch. (N. Y.) 494, 505; Van Alstyne *v.* Cook, 25 N. Y. 489, 496; Skinner *v.* Maxwell, 68 N. C. 400; Rutter *v.* Tallis, 5 Sandf. (N. Y.) 610; Maynard *v.* Bond, 67 Mo. 315.

<sup>2</sup> Stevenson *v.* Palmer, 14 Colo. 565; *s. c.* 20 Am. St. Rep. 295, and note; Bowden *v.* Schatzell, 1 Bailey Eq. (S. C.) 360; *s. c.* 23 Am. Dec. 170; Dawson *v.* Holcomb, 1 Ohio, 275; *s. c.* 13 Am. Dec. 618; Hardy *v.* Tilton, 68 Me. 195; *s. c.* 28 Am. Rep. 34. According to a learned note in 28 Am. Rep. 36, "this doctrine has been applied in numerous cases; to various classes of legal custodians, such as receivers, sheriffs, clerks of court, executors, and administrators, treasurers, assignees in bankruptcy, etc.": Patterson *v.* Pratt, 19 Iowa, 358; Drake on Attachments (5th ed.), ch. 22, 493-516. Property in hands of a receiver is *in custodia legis*, and is exempt from execution or attachment: Wiswall *v.* Sampson, 14 How. (U. S.) 52; Columbian Book Company *v.* De Golyer, 115 Mass. 67, 69; Glenn *v.* Gill, 2 Md. 1; Taylor *v.* Gillean, 23 Tex. 508; Field *v.* Jones, 11

Ga. 413; Nelson *v.* Conner, 6 Rob. (La.) 339; Langdon *v.* Lockett, 6 Ala. 727; *s. c.* 41 Am. Dec. 78; Gouverneur *v.* Warner, 2 Sandf. (N. Y.) 624; Yuba County *v.* Adams & Co., 7 Cal. 35; Bently *v.* Shrieve, 4 Md. Ch. 412; Freeman on Executions, 129; Drake on Attachments, 509; Robinson *v.* Atlantic & C. R. Co., 66 Pa. St. 160. Same rule applies to garnishment: Glenn *v.* Gill, 2 Md. 1; Taylor *v.* Gillean, 23 Tex. 508; Columbian Book Co. *v.* De Golyer, 115 Mass. 67, 69; High Receiv. (2d ed.), § 151. Applied to trustee appointed by the court: Bentley *v.* Shrieve, 4 Md. Ch. 412. See Jones *v.* Gorham, 2 Mass. 375; Decoster *v.* Livermore, 4 Mass. 101, in which assignees, under the bankrupt law of 1800, were charged. But the question was not raised or considered, and these cases were afterward overruled in Colby *v.* Coates, 6 Cush. (Mass.) 558. The rule was applied to sheriffs: Wilder *v.* Bailey, 3 Mass. 289; to county treasurers: Chealy *v.* Brewer, 7 Mass. 259; to executors and administrators: Brooks *v.* Cook, 8 Mass. 246. Colby *v.* Coates, 6 Cush. (Mass.) 558, deciding that an assignee, under the insolvent law of Massachusetts, cannot be reached by trustee process, was approved and followed in Columbian Book Co. *v.* De Golyer, 115 Mass. 67, 69; Dewing *v.* Wentworth, 11 Cush. (Mass.) 499."



such a *cloud upon the title* of the purchaser at the receiver's sale as will entitle him to have a sale of the property under the attachment *enjoined*.<sup>1</sup> But it has been held that the appointment of a receiver does not prevent a levy and sale of real property under a pre-existing *judgment* which constitutes a *lien* thereon.<sup>2</sup> Such levy and sale in no way affect the *possession* of the receiver, and the court whose officer he is would award possession to the purchaser on application.<sup>3</sup>

§ 6899. **Except in the Case of Receivers of National Banks.**—Exceptions to this principle, which seem to rest upon doubtful grounds, have been admitted in the case of *national banks* which are being wound up by receivers appointed by the Comptroller of the Currency; but possibly these exceptions may be justified in view of the fact that the receiver is not a receiver of a court of equity, and that the administration is not under the superintendence of such a court, but that it is under the superintendence of a mere ministerial officer, the Comptroller of the Currency, for which reason the receiver is a mere statutory trustee. Thus the National Banking Act,<sup>4</sup> after declaring void all assignments, etc., designed to prevent the property of such a bank from being applied in the manner described by the act, says that "no attachment, injunction, or execution shall be issued against such association or its property before final judgment, in any suit, action, or proceeding, in any State, county, or municipal court." It has been held that this provision does not operate to prohibit a *requisition* by a State court to a receiver of a national bank, requiring him to deliver up property belonging, not to the bank, but to the party to whose favor the requisition issues.<sup>5</sup> And another court has held that the receiver of a national bank may be joined as a party defendant with the corporation, in an action to recover a special deposit.<sup>6</sup>

<sup>1</sup> Texas Trunk & Co. R. Co. v. Lewis, 81 Tex. 1; s. c. 26 Am. St. Rep. 776.

<sup>2</sup> Southern Bank v. Ohio Ins. Co., 22 Ind. 181.

<sup>3</sup> *Ibid.*

<sup>4</sup> Rev. Stat. U. S., § 5242.

<sup>5</sup> Corn Exchange Bank v. Blye, 37 Hun (N. Y.), 473.

<sup>6</sup> Turner v. First Nat. Bank, 26 Iowa, 562. See *post*, § 7274, *et seq.*

**§ 6900. Suspends Rights of Action by the Corporation.**

The necessary effect of the appointment of a receiver, unless the statute under which he is appointed, or the order appointing him, is restrictive, is to suspend all rights of action, of whatever description, on the part of the corporation; since the receiver, in a general receivership, whether it be what is called a receivership *pendente lite*, or a receivership for the purpose of winding up the corporation, is vested with the right to the custody of all the assets of the corporation of whatever description, for the purposes of the administration; and this necessarily includes every right of action of whatever description which is possessed by the corporation. No doubt, in different jurisdictions the rules of practice are differently adjusted with reference to this principle, but without substantially affecting the principle itself. The usual *injunction*, which is granted in a proceeding to *wind up* a corporation, restrains it from exercising any of its corporate rights, privileges, or franchises; and this necessarily restrains it from the further prosecution of any action, whether commenced at the time or thereafter.<sup>1</sup> Statutes continuing the right of action in the corporation for a certain period of time after its dissolution, such as exist in many of the States, are not properly construed as having the effect of continuing such rights of action in the corporation after a receiver has been appointed to wind up its affairs.<sup>2</sup>

**§ 6901. Prevents New Rights of Action from Accruing.**

The appointment of a receiver for the purpose of *winding*

<sup>1</sup> Milwaukee Mut. Fire Ins. Co. v. Sentinel Co., 81 Wis. 207; s. c. 51 N. W. Rep. 440.

<sup>2</sup> It has been so held concerning the statute of Wisconsin, which enacts that "the directors or managers of the affairs of such corporation at the time of its dissolution, by whatever name they may be known, shall, subject to the power of any court of competent jurisdiction to make in any case a different provision, continue to act as such

during said term, and shall be deemed the regular administrators of such corporation with full power to settle its affairs," etc. Wis. Rev. Stat., § 1764. A court of competent jurisdiction makes a "different provision," within the meaning of this statute, by appointing a receiver and enjoining the corporation from doing any corporate act. Milwaukee Mut. Fire Ins. Co. v. Sentinel Co., 81 Wis. 207, 210; s. c. 51 N. W. Rep. 440.

*up* a corporation results in a *dissolution* of the corporation, at least *de facto*,<sup>1</sup> by dispossessing it of the means of carrying on its corporate functions; and it must follow that it prevents any *new right* of action from accruing against the corporation, though it may not necessarily prevent the *maturing* of rights of action inhering in contracts previously made by the corporation. For instance, it has been held, that the appointment of a receiver for the purposes of winding up, which, according to the law of the particular forum, has the effect of suspending its corporate powers,<sup>2</sup> will prevent it from becoming liable, in respect of its *commercial paper thereafter protested*, for the *damages*, amounting to twelve per cent per annum, denounced by a general statute against anyone who allows his bills or notes to be protested and remain unpaid.<sup>3</sup>

§ 6902. **Suspends Rights of Action by Creditors against Stockholders.** — In general, the effect of the appointment of a receiver for the purpose of *winding up* a corporation suspends all rights of action on the part of creditors against stockholders, to subject what may be due from the stockholders to the corporation upon their subscriptions to its capital stock, — the reason being that such rights of action belong to the corporation and form a part of its uncollected assets, and consequently pass to its receiver under general words of description in a statute or in the order appointing him.<sup>4</sup> In many cases, notably in the case of insolvent *national banks*,<sup>5</sup> this rule extends to the statutory superadded *individual liability* of stockholders, which becomes a part of the assets for the purposes of a ratable distribution among creditors, the right to enforce which consequently vests in the receiver. But in other cases, under the construction of various statutes, the right of action to enforce such superadded liability remains

<sup>1</sup> *Ante*, § 6893.

<sup>2</sup> So held in *Finnell v. Nesbit*, 16 B. Mon. (Ky.) 351, 354.

<sup>3</sup> *Sanford v. Kentucky Trust Company Bank*, 1 Met. (Ky.) 106.

<sup>4</sup> *Minnesota Thresher Man. Co. v.*

*Langdon*, 44 Minn. 37; *s. c.* 46 N. W. Rep. 310; *Merchants' Nat. Bank v. Northwestern Man. & Co.*, 48 Minn. 361; *s. c.* 51 N. W. Rep. 119; *ante*, § 3551.

<sup>5</sup> *Post*, § 7284.

in the creditors distributively.<sup>1</sup> Under a statute of Maine, when the receivers were appointed to take possession of a bank on the application of the bank commissioners, a *lien* was created upon the *real estate of the stockholders* liable for claims against the bank, situated within the State;<sup>2</sup> and in view of that fact, the court asserted jurisdiction over the real estate of non-resident stockholders so situated.<sup>3</sup>

**§ 6903. Does not Displace Liens or Other Vested Rights.**

The appointment of a receiver does not *impair the obligation of contracts*, though it may *change the remedy*; it does not *displace liens* or other vested rights, but the court will, in marshaling the assets, give effect to such liens and rights.<sup>4</sup> But this, under modern theories, is subject to qualifications elsewhere considered, that a court of equity, having possession of a foreclosure suit of the property of a *railroad company*, has jurisdiction to authorize the creation of debts for the purpose of preserving the road and keeping it in successful operation, and to charge such debt as a first lien on the mortgaged property, cutting under all prior liens.<sup>5</sup>

**§ 6904. How Affects the Running of Interest.** — The mere fact of putting the assets of a corporation into the hands of a receiver does not change the quality of its contracts one way or the other. Hence, in a suit on a demand due from a bank, the plaintiff is entitled to recover *interest* thereon from the time of action brought, although the bank is afterwards restrained, by injunction, from proceeding with its business, and its property is put into the hands of receivers.<sup>6</sup>

**§ 6905. Effect of Appointment on the Rights of Purchasers Pendente Lite.** — Purchasers of the *real property* of a corpora-

<sup>1</sup> *Ante*, § 3560.

<sup>2</sup> Maine Rev. Stat. 1857, ch. 47, § 74.

<sup>3</sup> *Wiswell v. Starr*, 50 Me. 381.

<sup>4</sup> *Kneeland v. American Loan &c. Co.*, 136 U. S. 89; *Union Bank v. Kansas City Bank*, 136 U. S. 223, 236;

*Bates v. Wiggin*, 37 Kan. 44; s. c. 1 Am. St. Rep. 234.

<sup>5</sup> *Post*, § 7186, *et seq.*; *Vilas v. Page*, 106 N. Y. 439; s. c. 13 N. E. Rep. 743; 9 Cent. Rep. 466.

<sup>6</sup> *Watson v. Phoenix Bank*, 8 Met. (Mass.) 217; s. c. 41 Am. Dec. 500.

tion will, under the common-law doctrine of *lis pendens*, be bound by the result of a litigation which is pending when they purchase the property;<sup>1</sup> but, outside of the disputed question whether the doctrine of *lis pendens* applies to *personal property*,<sup>2</sup> they will manifestly not be bound by the result of a litigation, the object and purpose of which does not affect the *status* of the property, — and this whether it is real or personal. If, therefore, an action is brought by the Attorney-General to *dissolve* a corporation on the ground of a misuser of its franchises, and the governing statute does not authorize the court to appoint a receiver after entering the judgment of dissolution, purchasers for value and in good faith, of the real and personal property of the corporation, pending the litigation, will get a title which will not be in any way affected by the action of the court in appointing a receiver; and the fact that they appear in their character of stockholders and make opposition to the appointment of the receiver, on the ground that no party in interest has petitioned for such an appointment, does not raise an *estoppel* against them, such as in any way concludes them, by reason of the order of the court making the appointment.<sup>3</sup>

**§ 6906. Where the Corporation is a Member of a Partnership.**— Where a corporation is a member of a partnership, the appointment of a receiver of the corporation, upon its dissolution, does not invest him with any of the property of the partnership, or give him any right to interfere in its management. The reason is, that when a partnership is dissolved by the death of one of its members, — in this case, the *civil death* of the corporation which is one of its members, — its prop-

<sup>1</sup> Newman v. Chapman, 2 Rand. (Va.) 93; s. c. 14 Am. Dec. 766, and note at page 774.

<sup>2</sup> See 14 Am. Dec. 779, note, — comparing Murray v. Lylburn, 2 Johns. Ch. (N. Y.) 441; McLaurine v. Monroe, 30 Mo. 462; Chase v. Searles, 45 N. H. 511; M'Cutchen v. Miller, 31 Miss. 65. That it does not

apply to *commercial paper*: Warren County v. Marcy, 97 U. S. 96.

<sup>3</sup> Havemeyer v. Superior Court, 84 Cal. 327; s. c. 18 Am. St. Rep. 192; 24 Pac. Rep. 121. It ought to be added that in the particular case it was held that the court had *no jurisdiction* to make the appointment. *Ante*, § 6830.

erty and the right to administer the same vest in the *surviving partners*, and not in the representatives of the deceased partner and consequently not in the receiver, who is merely the representative of the deceased corporation.<sup>1</sup>

**§ 6907. When Failure to Apply for Receiver Extinguishes the Debt of the Corporation.** — Where a bank was organized under the General Banking Law of Indiana of 1852, and failed to conform to the requirements of an amendment to the law enacted in 1855, by failing to redeem its circulating notes in coin, and did not afterwards resume payment, it ceased, under the later law, to have any corporate existence, without any judgment of forfeiture.<sup>2</sup> Thereafter contracts made by its officers, in their pretended corporate capacity, did not bind its stockholders.<sup>3</sup> But it did not lose its corporate existence for all purposes; but, under the operation of the general statute of the same State respecting corporations,<sup>4</sup> its *corporate existence* was *continued* for three years from that date for the purpose of winding up its affairs, with capacity to sue and be sued, to settle, dispose of, and convey its property, and divide its capital stock, but not to continue its banking business.<sup>5</sup> Where creditors suffered these three years to expire without making any application to the Circuit Court for the appointment of a receiver, or for an extension of time for collecting the debts due the bank, it was held that such *debts* thereby became *totally extinguished*.<sup>6</sup>

**§ 6908. Jurisdiction over Property of Non-resident Stockholders through Receiver.** — It has been held, under a statute of Maine which declared that, upon the appointment of receivers in any case, a *lien* should exist upon all *real estate* of each and all of the stockholders, liable for claims against such bank, situate within the State, as fully as if the same were attached under due process of law, which lien should remain and continue, to the end that such real estate, or any interest of such stockholder therein, might be seized on execution or other process granted by a court and sold or set off in satisfaction of the claims aforesaid, or until such stockholder should have paid over to or deposited with the receivers an

<sup>1</sup> Gray v. Oxnard Bros. Co., 31 N. Y. St. Rep. 968; s. c. 8 Rail. & Corp. L. J. 104; 11 N. Y. Supp. 118.

<sup>2</sup> Wilson v. Tesson, 12 Ind. 285.

<sup>3</sup> *Ibid.*

<sup>4</sup> 1 Rev. Stat. Ind. 1852, p. 240; 1 Gay. & H. Ind. Stat. 269.

<sup>5</sup> Cunningham v. Clark, 24 Ind. 7.

<sup>6</sup> Conwell v. Pattison, 28 Ind. 509.

amount of money equal to his liability, — that the court, by appointing a receiver of the corporation, acquires jurisdiction over the real estate of its non-resident stockholders to enforce its decrees against such real estate; and the court added with propriety, that it was eminently just that this should be so.<sup>1</sup>

**§ 6909. Distribution under Receiver Pendente Lite Conclusive in a Subsequent Proceeding to Dissolve.** — The doctrine of a preceding section is equally applicable to cases where the question of adverse jurisdiction arises between courts in the same State.<sup>2</sup> The governing principle is, that the court which first obtains jurisdiction, in a proper proceeding, to make a partial or final distribution of the property of the corporation, thereby acquires power to make such a distribution as will be binding on every other court in every other proceeding, except upon a court in a direct proceeding to review, supervise, or vacate the decree of distribution thus made. For instance, a decree disposing of the property of the corporation in a proceeding to foreclose a mortgage, binds all the parties to the action, and cannot be collaterally impeached in any other proceeding.<sup>3</sup>

**§ 6910. Commencement of Winding-up Proceeding Suspends Similar Rights of Action.** — From what has preceded, it necessarily follows that where a special statutory provision is made for the winding up of a corporation and distribution of its effects, no action can be maintained by a creditor or policy-holder for a similar object, either before or after proceedings have been instituted under the statute, and a receiver appointed.<sup>4</sup>

**§ 6911. Power of a Court to Modify Contracts Entered into Prior to Insolvency.** — It has been held that where two *railway companies* are in the hands of receivers appointed by

<sup>1</sup> Wiswell v. Starr, 50 Me. 381, 7 Cent. Rep. 308; 7 N. Y. St. Rep. 384.

<sup>2</sup> Ante, § 6856.

<sup>3</sup> Herring v. New York &c. R. Co., 105 N. Y. 340; s. c. 12 N. E. Rep. 763;

<sup>4</sup> Attorney-General v. North America Life Ins. Co., 6 Abb. N. Cas. (N. Y.) 293.

the same court, and a contract made prior to their insolvency subsists between them, under which one of them has acquired from the other the use of certain *terminal facilities*, and it appears that the price paid for such facilities has become excessive and onerous, — it is within the power of the court to modify the contract so as to readjust the rates to a reasonable basis, and that the exercise of this power is not open to the objection that it impairs the obligation of the contract. The statute made it the duty of the court to operate the railroads for the use of the public. The arrangement between them was, therefore, for the accommodation of the public, and the court had power to control it so that injustice be not done to either company. “This court,” said the Chancellor, “is not bound to recognize the obligation of such a contract, where it is injurious to the trust required to furnish the facilities or to that to which they are furnished; and it will, of course, modify it, if in equity it ought to be done in the interest of the trust to which the facilities are furnished, if it can be done with due regard to the interest of the other trust. The court, of course, will not take the property of one railroad company for the benefit of another. It will not require the receiver of one railroad company to furnish facilities to the receiver of another, in the operation of the road in charge of the latter, to the detriment of the trust in the hands of the former; but if there be necessity for so doing, it will not hesitate to modify the terms on which the facilities are furnished, — wholly ignoring, if need be, the bargain made between the two insolvent companies, — always taking care, however, that the company furnishing the facilities receives due compensation therefor.”<sup>1</sup>

§ 6912. **Decisions under Particular State Statutes.**— Some of these are merely indexed, for convenience of reference, in the margin.<sup>2</sup>

<sup>1</sup> Re New Jersey &c. R. Co., 29 N. J. Eq. 67, Runyon, Ch.

<sup>2</sup> Appointing a receiver under Maine Act of 1842, chapter 32, of a

*savings institution*, on the application of the trustees, or a depositor: Savings Inst. v. Makin, 23 Me. 360. Complaint of creditors of a *manufacturing corpo-*



ration not warranting the appointment of a receiver under statutes of New York: *Galwey v. United States &c. Co.*, 36 Barb. (N. Y.) 256, — referring to the following statutes: 2 Rev. Stats. 463, § 36; *Ibid.*, § (38) 46; *Ibid.*, 467, § 58. That the New York Act of 1869, chapter 902, regulating the appointment of receivers of *life insurance companies*, was in no way changed or affected by the Act of 1879, chapter 161, — see *People v. Globe Mut. Life Ins. Co.*, 60 How. Pr. (N. Y.) 57. In 19 Abb. N. Cas. (N. Y.) 359, *et seq.*, there is a long, learned, and painstaking note on *statutory receivers in New York*, — giving a history of the statutes; describ-

ing the statute applicable to *voluntary dissolutions* (compare *ante*, § 6678, *et seq.*); explaining the duties and obligations of receivers appointed under those statutes; dealing especially (at p. 362) with such receivers in actions relating to corporations; and discussing the difficult question what receivers in New York are to be deemed *statutory* receivers, and what not. When a stockholder cannot have a receiver of a railroad company, under Massachusetts statute, to prosecute a claim against a *new corporation* for damages for appropriating tracks of the old one: *Bigelow v. Union Freight R. Co.*, 137 Mass. 478.

## CHAPTER CLX.

## TITLE AND POSSESSION OF RECEIVER.

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## SECTION

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§ 6917. **Receiver not a Purchaser for Value.**—The statement already made, that the receiver takes property subject to all subsisting liens and vested rights,<sup>1</sup> carries with it the correlative proposition that he is, in no sense, what is called a *bona fide purchaser for value*. That is to say, he does not, on this theory, take any better rights in the property than the corporation itself had,—subject, as we shall hereafter see, to the qualification that he may impeach, in behalf of the creditors of the corporation, voidable acts of the corporation or of

<sup>1</sup> *Ante*, § 6903.

its directors, and agents, which the corporation itself could not have impeached.<sup>1</sup> With this qualification he merely steps into the shoes of the corporation and succeeds to no rights of action superior to those which the corporation would have had if it had continued a going concern; nor are the liabilities of third parties to the corporation increased, or otherwise varied, by the circumstance of his appointment.<sup>2</sup>

**§ 6918. How Far Title Divested out of Corporation and Vested in Receiver.**—The effect of an order appointing a receiver is such that a *qualified title* to the property of the corporate or individual debtor, together with a *right of possession* for the purposes of the administration, vests in the receiver,<sup>3</sup> and such *possession* will be *protected* by the court whose officer he is.<sup>4</sup> It is said, in an opinion of the Supreme Court of the

<sup>1</sup> *Post*, § 6950, *et seq.* For instance, a receiver appointed for a banking corporation has no greater rights in respect of notes due to the bank than the bank itself would have had: though a trustee for its creditors, he has not the rights of a *bona fide* purchaser for value of such notes. Bank of Lyons *v.* Denmon, Hill & D. Supp. (N. Y.) 398.

<sup>2</sup> *Lincoln v. Fitch*, 42 Me. 456. That assignees for the benefit of creditors take only the rights of the debtor, and are affected with all equities enforceable against him, and do not stand in a position of *bona fide* purchasers for value,—see *Brown v. Brabb*, 67 Mich. 17; *s. c.* 11 Am. St. Rep. 549; *Clark v. Flint*, 22 Pick. (Mass.) 231; *s. c.* 33 Am. Dec. 733, and note 740. That they are *bona fide* purchasers, see *Chamberlain v. Thompson*, 10 Conn. 243; *s. c.* 26 Am. Dec. 390, and note 396; *Root v. French*, 13 Wend. (N. Y.) 570; *s. c.* 28 Am. Dec. 482. That they cannot impeach a chattel mortgage on the ground that it was not filed pursuant

to a statute intended for the protection of subsequent *bona fide* purchasers for value,—see *Van Heusen v. Radcliff*, 17 N. Y. 580; *s. c.* 72 Am. Dec. 480, and note 483. That an assignment of goods for the benefit of creditors, to which the debtor has acquired no title, passes no title to his assignee, see *Millhiser v. Erdman*, 98 N. C. 292; *s. c.* 2 Am. St. Rep. 334; *Audenried v. Betteley*, 5 Allen (Mass.), 382; *s. c.* 81 Am. Dec. 755.

<sup>3</sup> *Wakeman v. Grover*, 4 Paige (N. Y.), 23; *Edmeston v. Lyde*, 1 Paige (N. Y.) 637; *s. c.* 19 Am. Dec. 454; *Beck v. Burdett*, 1 Paige (N. Y.), 305; *Storm v. Waddell*, 2 Sandf. Ch. (N. Y.) 494; *Mann v. Pentz*, 2 Sandf. Ch. (N. Y.) 257; *Wilson v. Allen*, 6 Barb. (N. Y.) 542; *Bates v. Elmer Glass Man. Co.* (N. J. Eq.), 15 Atl. Rep. 246.

<sup>4</sup> *Noe v. Gibson*, 7 Paige (N. Y.), 513; *Albany City Bank v. Schermerhorn*, 9 Paige (N. Y.), 372; *s. c.* 38 Am. Dec. 551.

United States delivered by Mr. Justice Gray: "A receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property, from that time, into his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title, or even the right of possession, in the property."<sup>1</sup> This is quite consistent with the proposition that he has a *special* or *qualified* title, the same as a sheriff who has made a levy, the general title remaining in the debtor until divested by a judicial sale.

**§ 6919. Whether Takes Title by Relation from the Date of Appointment.**—There is a difference of opinion as to the date at which the title of the receiver to the property of the debtor takes effect. The better opinion seems to be that it takes effect from the date of his appointment.<sup>2</sup> It was said by Lord Justice Cotton, in a case in which he expressed the judgment of the English Court of Appeal, "that the appointment of a receiver is now *delivery of execution* by lawful authority, within the meaning of the act of 27 and 28 Victoria, chapter 112, and that there is nothing whatever to prevent the court from interposing on interlocutory motion";<sup>3</sup> and this doctrine was distinctly reaffirmed in the same court at a later date.<sup>4</sup> The rule in New York is that the receiver's right to possession, during the interval between the order of appointment and the time of perfecting his appointment, is superior to the rights acquired by a judgment creditor who levies on the property in the mean time.<sup>5</sup> But the con-

<sup>1</sup> *Union Bank v. Kansas City Bank*, 136 U. S. 223, 236. See also *Owen v. Kellogg*, 56 Hun (N. Y.), 455; *s. c.* 31 N. Y. St. Rep. 600; 10 N. Y. Supp. 75.

<sup>2</sup> *Maynard v. Bond*, 67 Mo. 315.

<sup>3</sup> *Anglo-Italian Bank v. Davies*, 9 Ch. Div. 275, 293.

<sup>4</sup> *Ex parte Evans*, 13 Ch. Div. 252,

258; distinguishing *Edwards v. Edwards*, 2 Ch. Div. 291.

<sup>5</sup> *Rutter v. Tallis*, 5 Sandf. (N. Y.) 610; *Steele v. Sturgis*, 5 Abb. Pr. (N. Y.) 442. Otherwise in case of *voluntary dissolution*: *Chamberlain v. Rochester & Co.*, 7 Hun (N. Y.), 557. Under the Revised Statutes of New York, as they stood in 1857, the

trary has been decided in Maryland.<sup>1</sup> Under any theory, this doctrine of *relation* does not extend so far as to give the receiver the right to possession of property which has been disposed of under a valid order of court.<sup>2</sup> It has been held in Virginia that it will take effect *only from the date of filing the bond*; so that an execution issued after the appointment but before filing the bond, and returned unsatisfied, will create a *lien* upon the *money* then in the hands of the treasurer of the company, which passes into the hands of the court for administration in the foreclosure suit, which lien will be respected by the court so as to give a *priority* to the execution.<sup>3</sup>

**§ 6920. How in Case of Statutory Receivers.**—In the case of a *statutory receiver*, the operation and effect of the statute frequently is to vest the *legal title* in the receiver for the purposes of the trust, and to make him, in substance and effect, a *statutory trustee*. Such is the effect which seems to have been ascribed to a statute of New Jersey.<sup>4</sup> So, in case of a receiver appointed under the Revised Statutes of New York,<sup>5</sup>

appointment of a receiver of an insolvent corporation in a creditors' suit took effect from the time of granting an order for a reference to appoint a receiver, and from that moment no act could be done affecting the property of the corporation, either by the corporation or its creditors. The purpose of the statute was to take away the franchises of the corporation, and its powers of action, immediately on a petition for a receiver being filed, if the prayer of the petition was subsequently granted. And although the receiver could not take possession of the property of the corporation or be deemed vested with the estate, before he was appointed, yet when his appointment was completed, the estate vested in him *by relation* from the time of granting the order for a reference to appoint a re-

ceiver. *Re Berry*, 26 Barb. (N. Y.) 55.

<sup>1</sup> *Farmers' Bank v. Beaton*, 7 Gill & J. (Md.) 421; *s. c.* 28 Am. Dec. 226. See *High on Receivers* (2d ed.), § 136.

<sup>2</sup> *Herring v. New York &c. R. Co.*, 105 N. Y. 340; *s. c.* 12 N. E. Rep. 763; 7 Cent. Rep. 308; 7 N. Y. St. Rep. 547.

<sup>3</sup> *Frayser v. Richmond &c. R. Co.*, 81 Va. 388. So in New York: *Post*, § 6920, note 9.

<sup>4</sup> N. J. Rev. 179, § 172; *Freeholders v. State Bank*, 29 N. J. Eq. 263, 274; *s. c.* affirmed, 30 N. J. Eq. 311.

<sup>5</sup> 2 Rev. Stat. N. Y. 464, § 41. As to who are *statutory receivers* in New York, see 19 Abb. N. Cas. (N. Y.) 359, *et seq.* (learned note by Dr. Abbott).

in a stockholders' action to wind up the affairs of an insurance corporation on the ground of a violation of its charter, unless his powers are restricted by the order appointing him, he is absolutely vested with all the property and effects of the corporation, and has full power to sell and dispose of the same and to settle its affairs. This, it is pointed out, is not a common-law receivership to protect the fund pending the litigation; but the receiver is a *statutory assignee*, vested with nearly all the powers and authority of the assignee of an insolvent debtor.<sup>1</sup> In the same State, in a statutory proceeding by the Attorney-General to *dissolve* an insurance company and appoint a receiver of its assets, the receiver becomes vested with the title to all its property, and may *sue* to set aside a void agreement of the corporation, and may have a *stay* of a pending action for the same cause by a creditor, seeking to reach assets transferred thereunder. This conclusion flows from the doctrine which we shall consider hereafter,<sup>2</sup> that the receiver represents the creditors, and may assert rights in their behalf even as against the corporation.<sup>3</sup> In the same State, the receiver of a manufacturing corporation, appointed in a judgment creditor's action against it, with all the powers and authority conferred on receivers as provided in a particular statute,<sup>4</sup> becomes vested with such a title to the property that another judgment creditor cannot take it on execution.<sup>5</sup> A receiver appointed under certain provisions of the Revised Statutes of the same State, upon the application of the bank commissioners,<sup>6</sup> became vested with the title to the effects and choses in action of the corporation, without any formal assignment, and might *sue* for a tort committed before his appointment.<sup>7</sup>

<sup>1</sup> *Verplanck v. Mercantile Ins. Co.*, 2 Paige (N. Y.), 438. A receiver appointed under the thirty-sixth section of the same statute was held to be a mere common-law receiver, to protect the fund during the litigation, and possessing no powers except such as were conferred by the order appointing him. *Ibid.*

<sup>2</sup> *Post*, § 6950, *et seq.* Compare *ante*, § 3562, *et seq.*

<sup>3</sup> *Attorney-General v. Guardian Mut. Life Ins. Co.*, 77 N. Y. 272.

<sup>4</sup> 2 Rev. Stat. N. Y. 469, §§ 67, 68.

<sup>5</sup> *Chapman v. Douglas*, 5 Daly (N. Y.), 244.

<sup>6</sup> 2 Rev. Stat. N. Y. 464, §§ 41, 42.

<sup>7</sup> *Gillet v. Fairchild*, 4 Denio

§ 6921. **No Right to Take out of Possession of a Stranger to the Action.**—A receiver has no right to seize goods in the possession of a stranger to the action and to make himself the arbitrator of the title and right to possession of such goods; but it is his duty to bring the proper action to recover possession.<sup>1</sup>

§ 6922. **No Right to Possession of Goods Previously Levied upon in a Court of Law.**—Where goods have been lawfully seized, under an attachment issued out of a court of law, a court of chancery, having no supervisory or appellate jurisdiction over the court of law, cannot order the goods delivered into the custody of a receiver appointed by it, without some statutory authorization.<sup>2</sup>

§ 6923. **Further as to the Nature and Extent of his Title.** A receiver of a domestic insurance company, appointed under the Revised Statutes of New York,<sup>3</sup> may maintain an *action* upon notes found among the assets of the corporation, made by a *non-resident* of New York, but payable in that State, although, after his appointment, the debt due upon the notes has been *attached* in a foreign State by a creditor of the corporation.<sup>4</sup> We have already seen that the unpaid *stock subscriptions* pass to the receiver by operation of law, or under the general terms of the order appointing him, without special designation; so that, after assessments have been ordered by the court, he may maintain *actions* against the stockholders to recover the same;<sup>5</sup> and such is the case in sequestration

(N. Y.), 80. But in a statutory proceeding in the same State for the *voluntary dissolution* and winding up of a corporation, the title of the receiver vested only upon his *filing the required bond*; and it was held that a creditor might obtain a *lien by judgment or attachment* between the time of his appointment and filing such bond. *Chamberlain v. Rochester &c. Co.*, 7 Hun (N. Y.), 557. And so in Virginia: *Ante*, § 6919, note 3, p. 5480.

<sup>1</sup> *Havemeyer v. Superior Court*, 84 Cal. 327; s. c. 18 Am. St. Rep. 192. As to whether the court can require the *stranger* holding the goods to *intervene pro interesse suo*,—see *post*, § 7027.

<sup>2</sup> *Ford v. Judsonia Mercantile Co.*, 52 Ark. 426; s. c. 20 Am. St. Rep. 192.

<sup>3</sup> 2 Rev. Stat. N. Y. 463, § 41.

<sup>4</sup> *Osgood v. Maguire*, 61 N. Y. 524; affirming s. c. 61 Barb. (N. Y.) 54.

<sup>5</sup> *Ante*, § 3551, et seq.

proceedings under the statute of New York, and the receiver appointed in such a proceeding may *sell* such unpaid subscriptions, as a part of the assets of the corporation.<sup>1</sup> *Intangible rights*, such as the exclusive rights of the corporation to manufacture a certain article under a *patent* held by it, pass to its receiver; so that a party manufacturing the same article, under a *subsequent license* from the corporation, may be punished for a *contempt* of court in interfering with the *possession* of its receiver.<sup>2</sup>

#### § 6924. What Property Passes to Him in Particular Cases.

Property *conveyed* by the corporation *in fraud of its creditors* prior to the appointment of the receiver, will pass to him in such a sense that he may maintain suits in equity to set aside the fraudulent conveyance, except in those jurisdictions where the narrow and halting conception prevails that the receiver stands, like a voluntary assignee, in the mere shoes of the corporation. Where a conveyance has been attempted by the corporation, for instance, to its bondholders, and is *inchoate* at the time of the appointment of the receiver, the property will pass to him as against the grantees,<sup>3</sup>—though equities may exist in particular cases, such as will induce the court to give effect to such conveyances.

#### § 6925. Title and Custody of a Receiver Pendente Lite. —

It has been reasoned that a *temporary receiver*, appointed in an action to *foreclose a mortgage* upon the property of a railway company, is not vested with title to the property, nor is the company divested of title thereto; that the temporary receiver is *not a trustee* for the creditor, but is a mere caretaker, custodian, and manager, of the property and franchises, under the direction of the court, during the pendency of the action; and that if he is a trustee in any sense, he is a trustee

<sup>1</sup> Dean v. Biggs, 25 Hun (N. Y.), 122.

<sup>2</sup> Re Woven Tape Skirt Co., 12 Hun (N. Y.), 111.

<sup>3</sup> See, for illustration, Bates v. Elmer Glass Man. Co. (N. J. Eq.), 15 Atl. Rep. 246 (not officially reported).



for the corporation.<sup>1</sup> A better conception of his office and title seems to be that he is the mere arm of the court to hold possession of the property, take care of it, preserve it and use it pending the litigation; and that while it is in his custody, it is not in the custody of a trustee for the corporation, but in that of an officer of the court; that his possession is the possession of the court, and that the property, when in his possession, is *in custodia legis*. Such a receiver has, in general, no *rights of action* except such as are necessary to reduce the choses in action belonging to the corporation into his possession, or to recover property intrusted to his custody; and then, he must sue *in the name of the corporation* having the title, upon leave obtained for that purpose.<sup>2</sup> It is usually preferable, so far as practicable, to define in the order appointing the receiver, his powers in respect of the prosecuting and defending of actions; but it will not, in all cases, be possible to foresee the contingencies and cases that may arise, in which he may properly ask for the direction of the court. It is not too much to say that, the power of a receiver *pendente lite* being in general restricted to collecting and preserving the assets for the benefit of those entitled to them, he has no right to intermeddle upon the question of *priority* existing between different claimants to those assets. In other words, he has nothing to do with the question of their *distribution*; and therefore the general authority to him to prosecute actions will not be construed as extending so far as to enable him to maintain a suit in equity to obtain an adjudication that certain real property of the corporation is subject to the lien of a mortgage, and that all liens claimed thereon by parties in possession and parties out of possession are invalid as against him, and to obtain possession thereof against one claiming adversely, where neither the mortgagor nor mortgagee is made a party, and no assignment appears to have

<sup>1</sup> Herring v. New York &c. R. Co., 105 N. Y. 340, 370; s. c. 12 N. E. Rep. 763; 7 Cent. Rep. 308. See also Union Bank v. Kansas City Bank, 136 U. S. 223, 236.

<sup>2</sup> Harland v. Bankers' &c. Tel. Co., 32 Fed. Rep. 305. See also Yeager v. Wallace, 44 Pa. St. 294, where this question is fully considered.

been made by either of them to him of the property or cause of action.<sup>1</sup>

**§ 6926. Judgment Creditors may Subject Earnings until Mortgagee or Receiver Takes Possession.** — It has often been held, in respect of *railway mortgages*, that, although the mortgage gives a lien upon the income and earnings of the road, yet, until the mortgagee takes possession, or a receiver is appointed, the income and earnings belong to the company, and that any judgment creditor may subject them to the payment of his judgment.<sup>2</sup>

**§ 6927. Court will Protect the Possession of its Receiver.** The court will, by its process of *injunction* and *contempt*, protect the possession of its receiver, and will not permit him to be molested in the discharge of his official duties.<sup>3</sup> But the question of making orders staying creditors or others from prosecuting their actions, is a question of propriety depending on the purposes of the receivership, the terms of the governing statute, and the situation of the particular case. The court will interfere in a summary manner to protect the possession of its receiver, just as it will interfere to protect its ordinary officer in the service of its process.<sup>4</sup> For instance, where *real property* is the subject of the receivership, an action of *ejectment* cannot be brought without leave of the court;<sup>5</sup> because this, in its nature, is a *possessory action*, and necessarily proceeds against the receiver or his tenant. And even

<sup>1</sup> Harland v. Bankers' &c. Tel. Co., *supra*.

<sup>2</sup> American Bridge Co. v. Heidelberg, 94 U. S. 798; Fosdick v. Schall, 99 U. S. 235, 253; Dow v. Memphis &c. R. Co., 124 U. S. 652; Sage v. Memphis &c. R. Co., 125 U. S. 361; Farmers' Loan & Trust Co. v. Kansas City &c. R. Co., 53 Fed. Rep. 182, 184; Galveston Railroad v. Cowdrey, 11 Wall. (U. S.) 459; Gilman v. Illinois &c. Tel. Co., 91 U. S. 603. Compare McIlhenny v. Binz, 80 Tex. 1; s. c. 26 Am. St. Rep. 705.

<sup>3</sup> Attorney-General v. Guardian Mut. Life Ins. Co., 77 N. Y. 272; Angel v. Smith, 9 Ves. 335; Ames v. Trustees, 20 Beav. 332; De Winton v. Brecon, 28 Beav. 200; Columbian Book Co. v. De Golyer, 115 Mass. 67; Albany City Bank v. Schermerhorn, 9 Paige (N. Y.), 372; s. c. 38 Am. Dec. 551; Richards v. People, 81 Ill. 551; Morrill v. Noyes, 56 Me. 458; s. c. 96 Am. Dec. 486; Walling v. Miller, 108 N. Y. 173; s. c. 2 Am. St. Rep. 400.

<sup>4</sup> Peck v. Crane, 25 Vt. 146.

<sup>5</sup> Angel v. Smith, 9 Ves. 335.

where the property was situated in a *foreign jurisdiction*, upon which the creditor of the insolvent levied, but it did not appear that there were any creditors in such other jurisdiction, whose demand would operate to prevent the receiver from taking possession of it under principles of interstate comity, — it was held that an agent of the foreign corporation, conducting its business within the jurisdiction of the forum, was guilty of *contempt* in suing out such an attachment and causing it to be levied upon the property in the foreign jurisdiction, to which the domestic receiver claimed the right of possession.<sup>1</sup>

**§ 6928. How Far Protect his Right to Possession.** — The court will, by the same process, protect the receiver's *right to possession*, — in other words, his *constructive possession*, — in respect of property which has not been reduced into his manual custody, provided the property is situated within the jurisdiction and the receiver has the right to take possession of it. When, therefore, a receiver of all the property of a railway company had been appointed, and a creditor of the railway company, knowing of the appointment, recovered judgments against the company, and levied his executions by garnishment upon creditors of the company, within the jurisdiction of the court appointing the receiver, he was adjudged guilty of contempt.<sup>2</sup> But process of *contempt* cannot be resorted to to force *third persons* to deliver property to a receiver, of which he has *never had possession*, though the receiver may have the right to obtain possession of the property from them by proper proceedings.<sup>3</sup>

**§ 6929. Court will Protect its Receiver, though Erroneously Appointed.** — "There is no question," said Lord

<sup>1</sup> Sercomb v. Catlin, 128 Ill. 556; s. c. 15 Am. St. Rep. 147.

<sup>2</sup> Richards v. People, 81 Ill. 551.

<sup>3</sup> Albany City Bank v. Schermerhorn, 9 Paige (N. Y.), 372; s. c. 38 Am. Dec. 551. Where a receiver of rents and profits has been appointed, and tenants have attorned to him, or

have accounted to him for a share of the crops, etc., belonging to the landlord, and thereafter a sheriff levies execution thereon, they will be in *contempt* for thus attempting to disturb the constructive possession of the receiver. *Ibid.*

Romilly, M. R., "but that this court will not permit a receiver appointed by its authority, and who is therefore its officer, to be interfered with or dispossessed of the property he is directed to receive, by anyone, although the order appointing him may be perfectly erroneous. This court requires and insists that application should be made to the court for permission to take possession of any property of which the receiver either has taken or is directed to take possession."<sup>1</sup> "If," said Bakewell, J., "anyone is aggrieved by the order of court appointing or continuing in office a receiver, he must institute proper proceedings to test the validity of the receiver's appointment, or to have the property restored to the proper custodian."<sup>2</sup> Therefore, in a proceeding for *contempt* against one disturbing the possession of a receiver, or levying upon goods to which he has the right of possession, the *propriety of the appointment* of the receiver cannot be inquired into, if it appear that the court had *jurisdiction*.<sup>3</sup>

**§ 6930. Statutes Punishing the Refusal to Deliver Property and Records to Receiver.** — By a statute of Rhode Island, bank officers refusing to deliver property of the bank to the receiver are liable to be fined not exceeding ten thousand dollars, or be imprisoned not exceeding three years, or both.<sup>4</sup> By another statute of the same State, officers of *insurance companies*, or other persons who refuse to deliver to the receivers of said companies any *records* thereof, shall be fined not exceeding ten thousand dollars, or be imprisoned not exceeding three years, or both.<sup>5</sup>

**§ 6931. Levying Attachments and Executions on Property in Possession of Receiver.** — After the appointment of a re-

<sup>1</sup> Ames *v.* Trustees, 20 Beav. 332.

<sup>2</sup> Keokuk Northern Line Packet Co. *v.* Davidson, 13 Mo. App. 561, 566; citing Vermont &c. R. Co. *v.* Vermont Cent. R. Co., 46 Vt. 792, 795; Russell *v.* East Anglian Co., 3 Macn. & G. 104; Beverley *v.* Brooke, 4 Gratt. (Va.) 187.

<sup>3</sup> Richards *v.* People, 81 Ill. 551. But see Jacobson *v.* Landolt, 73 Wis. 142; s. c. 9 Am. St. Rep. 767.

<sup>4</sup> Gen. Stats. R. I. 1872, p. 299, § 52.

<sup>5</sup> *Ibid.*, p. 310, § 12.

ceiver, the property which lawfully comes into his custody is deemed to be *in custodia legis*,<sup>1</sup> so that no right can be acquired by the levy of an attachment or execution thereon.<sup>2</sup> An injunction against the sale of property levied upon while in the hands of a receiver, has been granted, on the ground that the sale would cast a cloud upon the title of one who had purchased the property from the receiver.<sup>3</sup> When, before the dismissal of a suit in which a receiver was appointed, the court assumed the custody of the same property in another suit, by appointing *another receiver*, and confirmed a sale of the property, ordered to be made by the second receiver, the validity of this sale was not affected by an attachment levied on the property while in the custody of the former receiver, and before the dismissal of the former suit.<sup>4</sup>

<sup>1</sup> Van Alstyne v. Cook, 25 N. Y. 489, 496; Skinner v. Maxwell, 68 N. C. 400; Rutter v. Tallis, 5 Sandf. (N. Y.) 610; Maynard v. Bond, 67 Mo. 315; Texas Trunk R. Co. v. Lewis, 81 Tex. 1; s. c. 26 Am. St. Rep. 776; Adams v. Haskell, 6 Cal. 113; s. c. 65 Am. Dec. 491, *n*; Hagedon v. Bank of Wisconsin, 1 Pinney (Wis.), 61; s. c. 39 Am. Dec. 275.

<sup>2</sup> Walling v. Miller, 108 N. Y. 173; s. c. 2 Am. St. Rep. 400; Wiswall v. Sampson, 14 How. (U. S.) 52; Edwards v. Norton, 55 Tex. 405, 410; Robinson v. Atlantic & C. R. Co., 66 Pa. St. 160; Adams v. Haskell, 6 Cal. 113; s. c. 65 Am. Dec. 491; Hagedon v. Bank of Wisconsin, 1 Pinney (Wis.), 61; s. c. 39 Am. Dec. 275; Texas Trunk R. Co. v. Lewis, 81 Tex. 1; s. c. 26 Am. St. Rep. 776; Blair v. Cantey, 2 Speers L. (S. C.) 34; s. c. 42 Am. Dec. 360; Ex parte Fearle, 13 Mo. 467; s. c. 53 Am. Dec. 155; Marvin v. Hawley, 9 Mo. 378; s. c. 43 Am. Dec. 547; Clymer v. Willis, 3 Cal. 363; s. c. 58 Am. Dec. 414; Prentiss v. Bliss, 4 Vt. 513; s. c. 24 Am. Dec. 631; Jones v. Jones, 1 Bland. Ch. (Md.) 443; s. c. 18 Am. Dec. 327;

Dawson v. Holcomb, 1 Ohio, 275; s. c. 13 Am. Dec. 618; Hackley v. Swigert, 5 B. Mon. (Ky.) 86; s. c. 41 Am. Dec. 256; King v. Moore, 6 Ala. 160; s. c. 41 Am. Dec. 44; Zurcher v. Magee, 2 Ala. 253, 255; Alston v. Clark, 1 Hayw. (N. C.) 171; Ross v. Clarke, 1 Dall. (U. S.) 354. But *surplus money* in the hands of a sheriff, after satisfaction of an execution, has been held subject to attachment by a creditor of the execution debtor. Tucker v. Atkinson, 1 Humph. (Tenn.) 300; s. c. 34 Am. Dec. 650.

<sup>3</sup> Texas Trunk R. Co. v. Lewis, 81 Tex. 1; s. c. 26 Am. St. Rep. 776.

<sup>4</sup> Texas Trunk R. Co. v. Lewis, 81 Tex. 1; s. c. 26 Am. St. Rep. 776. That property in the custody of the law is not subject to execution or attachment, and when property is deemed to be in custody of the law within this rule,—see Stevenson v. Palmer, 14 Colo. 565; s. c. 20 Am. St. Rep. 295; Cox v. Bearden, 84 Ga. 304; s. c. 20 Am. St. Rep. 359; Bowden v. Schatzell, 1 Bailey Eq. (S. C.) 360; s. c. 23 Am. Dec. 170; Dawson v. Holcomb, 1 Ohio, 275; s. c. 13 Am. Dec. 618.

§ 6932. **Whether Prior Earnings of the Corporation Subject to Levy.**—The Supreme Court of Appeals of Virginia have held that the prior earnings of a railroad company, which have passed into the hands of a receiver, in a proceeding to foreclose a mortgage, levied on under a judgment, after the appointment of the receiver, and *before the execution of his bond*, go to the judgment creditor, and that the court should order them paid over on his intervening petition.<sup>1</sup> The court proceed upon the principle that, until the mortgagee takes possession, under his mortgage, the mortgagor is entitled to the profits, and that the mortgagee becomes entitled only to such as accrue subsequently to the date of his taking possession.<sup>2</sup> To the argument that the effect of the appointment of the receiver was to sequester the fund on hand, consisting of money in the treasury of the corporation, and thus to withdraw it from the reach of its execution creditors, the court replied: "The bill is not a general creditor's bill, but was filed merely to foreclose the mortgage and for the appointment of a receiver; and, consequently, the rights of the plaintiff *cannot extend beyond the mortgaged property*, nor could the decree divest or impair the rights of those persons whose claims to the fund are unaffected by the mortgage."<sup>3</sup> The writer is particular to set out the ground on which the Virginia court proceeded and which the learned President of the court makes so clear, because it is believed that courts appointing railway receivers are violating the principle every day. A holding of the English Court of Appeal supports the same conclusion. In the case last referred to, after an order had been made appointing a receiver, but before the receiver had given the required security and taken possession, certain

<sup>1</sup> Frayser v. Richmond &c. R. Co., 81 Va. 388, opinion by Lewis, P.

<sup>2</sup> 1 Jones Mort. (3d ed.), § 690; Williamson v. Washington &c. R. Co., 33 Gratt. (Va.) 624; Gibert v. Washington &c. R. Co., 33 Gratt. (Va.) 645; Chinnery v. Blackman, 3 Doug. 391,—where Mr. Mansfield said: "Until the mortgagee takes posses-

sion, he is the owner to all the world, and is entitled to all the profits made." To the same effect are Gilman v. Illinois &c. Tel. Co., 91 U. S. 603; American Bridge Co. v. Heidelberg, 94 U. S. 798.

<sup>3</sup> Frayser v. Richmond &c. R. Co., 81 Va. 388, 392; citing Noyes v. Rich., 52 Me. 115.

goods of the defendant were taken in execution at the instance of a judgment creditor. The Vice-Chancellor held the taking to be a *contempt* of court, and that no rights were acquired thereby. But his ruling was reversed on appeal, James, L. J., saying: "A receiver becomes such on giving security. When he has done that, he can take possession. It would be very serious to hold that he can take possession before giving security. There is no reason to depart from the plain meaning of the words of the order which appoints him receiver conditionally on his giving security." Mellish, L. J., concurred in reversing the order, but expressed the opinion that "if the receiver had really taken possession before the goods were seized, then, although he had not been completely appointed receiver," the case would have been different.<sup>1</sup> The same court subsequently held, explaining its previous decision, that the *appointment* of a receiver of the *rents and profits of land*, at the instance of a judgment creditor, though made condition-

<sup>1</sup> Edwards v. Edwards, 2 Ch. Div. 291, 296, 298. Compare Ex parte Evans, 13 Ch. Div. 252. Upon the question of the *validity of levies made upon the property between the date of the appointment of the receiver and his qualification* by giving the requisite bond, Mr. High states as follows: "The receiver's title and authority, as well as his right of possession, are dependent on and accrue only upon his giving the requisite bond or security, as fixed by the order of his appointment: Johnson v. Martin, 1 Thomp. & C. (N. Y.) 504; De Fries v. Creed, 34 Law Jour. (Ch.) 607; Edwards v. Edwards, 2 Ch. Div. 291; reversing s. c. 1 Ch. Div. 454. But see Ex parte Evans, 13 Ch. Div. 252. And a failure to execute the bond in due form, as required by the order, is ground for a nonsuit in an action brought by the receiver in his official capacity: Johnson v. Martin, 1 Thomp. & C. (N. Y.) 504. And see as to receiver's

failure to give security as ground for reversing decree, Tomlinson v. Ward, 2 Conn. 396. Although a mere formality in the bond, as the fact that it was not executed under seal, cannot be taken advantage of in an action brought by the receiver against third parties: Morgan v. Potter, 17 Hun (N. Y.), 403. So, when creditors of the defendant levy upon the property which is the subject-matter of the receivership, between the date of the appointment and the time of giving the required security, such levy constitutes no disturbance of the receiver's possession: De Fries v. Creed, 34 L. J. (Ch.) 607; Edwards v. Edwards, 2 Ch. Div. 291; reversing s. c. 1 Ch. Div. 454. But see Ex parte Evans, 13 Ch. Div. 252." And the learned author proceeds to state other applications and qualifications of the rule, depending upon particular circumstances. High on Receivers (2d ed.), § 121.

ally upon the receiver's giving security, *operates as an immediate delivery* of the land, in such a sense that, when the security is given, his possession takes effect *by relation* from the date of the order.<sup>1</sup>

**§ 6933. Moneys Earned by the Receiver not Subject to Garnishment as against the Corporation.**—Where the receiver takes possession and proceeds to complete an unfinished contract of the corporation, the moneys due to him for completing the contract are not subject to garnishment by the creditors of the corporation, although the work may have been done and the bills made out in the name of the corporation,—especially where the contract is performed by the receiver with the knowledge and consent of the other contracting party. “Payment,” said the court, “belongs, not to the nominal party, but to the party performing.”<sup>2</sup> This is perhaps a branch of the general proposition, elsewhere stated,<sup>3</sup> that moneys and properties in the hands of the receiver are *in custodia legis*, and not subject to seizure in other judicial proceedings.

**§ 6934. Liable to Garnishment after Order of Distribution Made.**—It is said by Judge Wade in his work on Attachments: “It is elsewhere held, and as it appears with considerable unanimity, that when a defendant has a right to a certain distributive share of the fund in the hands of a receiver, master in chancery, or trustee of court, the officer may be effectually garnished by a creditor of the party so entitled, after the court has ordered it to be paid. . . . The authorities seem to concur in holding receivers and similar officers liable to garnishment, when they have in their hands a definite sum to which the defendant or judgment debtor is clearly entitled, and the officer has nothing more to do with the fund than to pay it over. Some of them may go beyond,

<sup>1</sup> *Ex parte Evans*, 13 Ch. Div. 252; citing *Hatton v. Haywood*, L. R. 9 Ch. 299; *Anglo-Italian Bank v. Davies*, 9 Ch. Div. 275. Compare *ante*, § 6919.

<sup>2</sup> *Blake Crusher Co. v. New Haven*, 46 Conn. 473.

<sup>3</sup> *Ante*, § 6898.



but none, so far as they have been examined, fall short of, this conclusion.”<sup>1</sup> The theory of this is expressed by the same learned author in another place: “It is no longer the property of the assignee, and in case of his refusal to pay it over to the party entitled thereto, the latter could maintain an action for it. It is not apparent how, in such case, the assignee would occupy ground more favorable to his exemption than would a sheriff in possession of a surplus due an execution defendant.”<sup>2</sup>

**§ 6935. Proceedings to Recover Property Seized by the Receiver.**—If property in the possession of the receiver is claimed by a third person, his proper course is to apply to the court appointing the receiver for an order on the receiver to deliver it over to him.<sup>3</sup> A court has the same general power in determining what property shall be held by its receiver, and what surrendered, which every court possesses, in the control of its own process, to prevent it from being abused. This power may be exercised by an *interlocutory order* directing its receiver to surrender property to some of the parties in the action, to another receiver, or to a third party.<sup>4</sup> Some-

<sup>1</sup> Wade on Attachments, § 424. See also Freeman on Executions, § 129.

<sup>2</sup> Wade on Attachments, § 423. That the same rule applies as to the garnishment of executors and administrators after an order of distribution has been made, see *Estate of Nerac*, 35 Cal. 392; *s. c.* 95 Am. Dec. 111. These principles were fully recognized by the Supreme Court of California in *Dunsmoor v. Furstenfeldt*, 88 Cal. 522; *s. c.* 22 Am. St. Rep. 331, as applicable to all classes of officers holding funds *in custodia legis* after an order of distribution has been made. See also *Gaither v. Ballew*, 4 Jones L. (N. C.) 488; *s. c.* 69 Am. Dec. 763. That surplus money in the hands of a sheriff, after satisfaction of an ex-

ecution, is subject to attachment by creditors of the execution debtor, see *Tucker v. Atkinson*, 1 Humph. (Tenn.) 300; *s. c.* 34 Am. Dec. 650, and note 652; *King v. Moore*, 6 Ala. 160; *s. c.* 41 Am. Dec. 44; *Pierce v. Carleton*, 12 Ill. 158; *s. c.* 54 Am. Dec. 405; Freeman on Executions, § 130; Drake on Attachments, § 509; *Lightner v. Steinagle*, 33 Ill. 510, 516; *s. c.* 85 Am. Dec. 292; *Weaver v. Davis*, 47 Ill. 235, 237; *Triebel v. Colburn*, 64 Ill. 376.

<sup>3</sup> *Riggs v. Whitney*, 15 Abb. Pr. (N. Y.) 388.

<sup>4</sup> *People v. Albany &c. R. Co.*, 57 Barb. (N. Y.) 204; *s. c. sub nom. People v. Church*, 2 Lans. (N. Y.) 459; affirming *s. c.* 4 Abb. Pr. (N. s.) (N. Y.) 122.

times the court will order a restoration of the property, and will require the claimant to hold it subject to the order of the court, and will, in the mean time, direct a reference to determine title.<sup>1</sup>

<sup>1</sup> Dickerson v. Van Tine, 1 Sandf. receivers of *national banks*, — see *post*, (N. Y.) 724. As to replevin against § 7262, *et seq.*

## CHAPTER CLXI.

### WHOM THE RECEIVER REPRESENTS.

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§ 6939. **Whom the Receiver Represents.** — If the receiver is appointed by a *court of equity*, he represents, in a sense, the court whose hand he is sometimes said to be.<sup>1</sup> If he is appointed under a *statute*, his representative character is determined by the scope of the statute. A *statutory receiver*, appointed for the purpose of winding up a dissolved or insolvent corporation, is a *statutory trustee*, and represents the *beneficiaries in the trust*. These beneficiaries are, first, the creditors, and secondly, the stockholders; and the creditors must be classified according to their priorities. The better view of the representative character of a statutory receiver to wind up, is that he represents both the creditors and the stockholders, and that, in his representative character, he may assert their rights as against

<sup>1</sup> Brown v. Warner. 78 Tex. 543; s. c. 22 Am. St. Rep. 67, and note.  
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the fraudulent or illegal acts which have been done *in the name of the corporation*; and this view ought to be taken in all cases except where the language of the governing statute precludes it. Such is the representative character of receivers appointed under the statute of New York "to prevent the insolvency of moneyed corporations and to secure the rights of creditors."<sup>1</sup> He may, therefore, recover the *capital* of an insolvent insurance company which has been wrongfully distributed among its stockholders as *dividends*<sup>2</sup> A receiver appointed under another statute of the same State,<sup>3</sup> on application of an execution creditor, may maintain an action to set aside a mortgage executed by the corporation, on the ground that the written assent of the stockholders owning at least two-thirds of the capital stock had not been first procured, as required by another statute.<sup>4</sup> So, a receiver appointed under the Rhode Island statute, commonly called "the bank act,"<sup>5</sup> to wind up an insolvent bank, represents, not only the corporation, but the creditors, and he may, therefore, avoid a conveyance made by the bank in fraud of its creditors,<sup>6</sup>—the governing principle being that a deed which is void as against creditors is void also as against those who, by law, *represent* the creditors.<sup>7</sup> It has been justly added that "if this princi-

<sup>1</sup> 1 Rev. Stat. N. Y. 589; *Gillet v. Moody*, 3 N. Y. 479; *Talmage v. Pell*, 7 N. Y. 328.

<sup>2</sup> *Osgood v. Laytin*, 3 Abb. App. Dec. 418; affirming *s. c.* 48 Barb. (N. Y.) 463. Compare *ante*, §§ 2135, 2136.

<sup>3</sup> 2 Rev. Stat. N. Y. 462, § 36.

<sup>4</sup> *Vail v. Hamilton*, 20 Hun (N. Y.), 355. The other statute was N. Y. Laws 1871, ch. 481.

<sup>5</sup> Rev. Stat. R. I., ch. 146.

<sup>6</sup> *Hayes v. Kenyon*, 7 R. I. 136.

<sup>7</sup> *Grimsby v. Ball*, 11 Mees. & W. 531, 533. This case holds that a conveyance of lands, which is fraudulent and void as against creditors of the conveying party, within the statute

13 Elizabeth, chapter 5, is void also as against his assignee, on his insolvency, who represents the creditors, and that the assignee may recover the lands in ejectment. To the same effect, see *Englebert v. Blanlot*, 2 Whart. (Pa.) 240. So in Pennsylvania, the *administrator* of an insolvent estate, being a *trustee* for creditors, may set aside a fraudulent conveyance of his intestate: *Welsh v. Bekey*, 1 Penr. & W. (Pa.) 57, 61; *Buehler v. Gloninger*, 2 Watts (Pa.), 226. But the rule seems to be otherwise if the estate is not *insolvent*: *Osborne v. Moss*, 7 Johns. (N. Y.) 161; *s. c.* 5 Am. Dec. 252. Compare *Minor v. Mead*, 3 Conn. 289.

ple were not applied to the receivers of insolvent banks, the receivership would, in a great number of cases, be of very little use.”<sup>1</sup> And the same observation is equally applicable to receivers of most other insolvent corporations.

§ 6940. **The Receiver the Agent of the Court.**—A receiver appointed by a court in virtue of its equity powers, is, generally, the mere agent of the court appointing him, with authority to take possession and control of the property in litigation,<sup>2</sup> and is *not the representative of the corporation* in the sense which casts upon him any obligation to fulfill the contracts of the corporation, except in cases where he has made such contracts his own by some act of adoption.<sup>3</sup> He may, it has been said, fulfill the contracts of the corporation, so far as beneficial; but he cannot pay its debts, or fulfill contracts which are burdensome or tend to diminish the value of the property under their control, unless such contracts are charged as *incumbrances* on the property, or are necessary to its proper preservation and security.<sup>4</sup> Thus, the trustee in possession under a railway mortgage,—and a receiver, appointed on an application to foreclose a mortgage, would stand on the same footing,—is not bound to carry out a contract concerning the carrying of express matter entered into by the railroad corporation after the making of the mortgage, with one who had notice of it.<sup>5</sup>

§ 6941. **And Court has Plenary Control over Him.**—The receiver being the mere officer of the court, the control of the court over him is *plenary*,—at least in any controversy which may arise between him and the court touching the propriety of an order of the court made upon him; and it is elsewhere

<sup>1</sup> Hayes v. Kenyon, 7 R. I. 136, 142.

<sup>2</sup> Brown v. Warner, 78 Tex. 543; s. c. 22 Am. St. Rep. 67; Com. v. Franklin Ins. Co., 115 Mass. 278; Herrick v. Miller, 123 Ind. 304; Morrill v. Noyes, 56 Me. 458; s. c. 96 Am. Dec. 486. Any disturbance of his possession is punished as a con-

tempt on the theory that his possession is the *possession of the court*. *Ibid.*

<sup>3</sup> Brown v. Warner, 78 Tex. 543; s. c. 22 Am. St. Rep. 67.

<sup>4</sup> Ellis v. Boston &c. R. Co., 107 Mass. 1; *post*, § 6998.

<sup>5</sup> *Ibid.*

seen that an order of the court justifies his action, in ordinary cases, and prevents him from being treated as a trespasser.<sup>1</sup> He has *no discretion*, in general, in the *application of the funds* in his hands, but holds them strictly subject to the orders of the court, and to be disposed of as the court may direct.<sup>2</sup> When ordered to pay money to a particular person, he will not be allowed to *set off* a claim due to him personally; since to allow this would render the disposition of the money as uncertain as before the receiver's appointment, and would defeat the very object of his appointment.<sup>3</sup> He cannot appeal from an allowance made by the court in favor of a claimant against the funds in his hands.<sup>4</sup> This subject cannot be understood, in its fullest sense, without recurring to the principle that it is, in substance, *the court*, and not merely its receiver, that is *in possession*, and that the receiver is the mere arm or hand of the court.<sup>5</sup> A receiver of a court of equity, who does not possess independent powers conferred upon him by statute, can, therefore, make no contract which will be binding upon the trust, or which will conclude his successor in office, without the sanction of the court whose officer he is.<sup>6</sup> Contracts made by a receiver, without the authority of the court, stand on the footing of contracts made by an agent without the authority of his principal: the court may ratify or repudiate them, as it deems beneficial to the trust, or otherwise equitable and just.

**§ 6942. Hence the Court will Perform his Contracts.**—Where the receiver is a receiver *pendente lite*, appointed by a

<sup>1</sup> *Post*, § 6944.

<sup>2</sup> *Herrick v. Miller*, 123 Ind. 304.

That it is his duty to obey the orders of the court, see *Burroughs v. Bunnell*, 70 Md. 18. That he cannot, by procuring himself to be appointed permanent trustee of the insolvent, defy the orders of the court appointing him, and refuse to account for the funds in his hands as receiver,—see *Henry v. Kaufman*, 24 Md. 1; *s. c.* 87 Am. Dec. 591.

<sup>3</sup> *Herrick v. Miller*, 123 Ind. 304.

<sup>4</sup> *Stanton v. Andrews*, 18 Ill. App. 552.

<sup>5</sup> This principle has been emphasized in a case in the Chancery Court of New Jersey by Vice-Chancellor Van Fleet in appropriate language. *Lehigh Coal & Nav. Co. v. Central R. Co.*, 35 N. J. Eq. 426, 427.

<sup>6</sup> *Lehigh Coal & Nav. Co. v. Central R. Co.*, 35 N. J. Eq. 426, 427.

court of equity, he is, in a very close sense, the mere *arm* or *instrument* of the court itself,<sup>1</sup> and his contracts are, in a sense, the *contracts of the court*. The court will so regard them, and will insist upon their being performed, and will not allow the property to pass out of his hands until their performance has either been made or secured.<sup>2</sup> If he has become bound to pay money, upon a contract for supplies, which has been made by him with the sanction of the court, he will be required to pay according to the contract, and wholly without reference to the question whether such payment would prove injurious to the trust represented by him.<sup>3</sup>

§ 6943. **And Those of his Predecessor in Office.**—If we take the case of a receiver appointed by a court of equity, and if we consider that it is really *the court* that is in possession, and not merely the receiver,—the latter being the mere arm or hand of the court, and subject, in the most absolute sense, to the orders of the court,—we shall conclude that no matter how many changes take place in the *personnel* of the receivership—no matter how many receivers may be successively appointed in the place of others who have died or who have been dismissed from the office,—the valid obligations of each one of them are binding upon his successor or successors in the trust;—and this rule was happily and tersely expressed by a most just-minded judge, when he said that “courts should pay their debts, if no one else does.”<sup>4</sup> Some shuffling and inconsistent decisions are found in New Jersey, where this principle was, in terms, repudiated, although possibly the right decisions were reached on the merits.<sup>5</sup>

<sup>1</sup> “A receiver is the agent of the court. He is an officer of the court, and his possession is that of the court. He is not the agent of either party, and neither party is responsible for his misfeasance or malfeasance.” *Texas &c. R. Co. v. Rust*, 17 Fed. Rep. 275, 282; *Dow v. Memphis &c. R. Co.*, 20 Fed. Rep. 260, 269.

<sup>2</sup> *Dow v. Memphis &c. R. Co.*, 20 Fed. Rep. 260, 26J.

<sup>3</sup> *Re United States Rolling Stock Co.*, 57 How. Pr. (N. Y.) 16.

<sup>4</sup> Caldwell, J., in *Dow v. Memphis &c. R. Co.*, 20 Fed. Rep. 260, 269.

<sup>5</sup> *Lehigh Coal & Nav. Co. v. Central R. Co.*, 35 N. J. Eq. 426, and 41 N. J. Eq. 167. All that the writer can make out of these decisions is that the fact that the receiver appointed by a court of equity *dies*, furnishes a reason why the court, whose officer

**§ 6944. Validity of Receiver's Acts not Questioned Collaterally.** — By analogy to the principle already considered<sup>1</sup> which upholds the *appointment* of a receiver where the court has jurisdiction, the validity of the *receiver's acts*, when done within the scope of the powers conferred upon him by the court appointing him, such powers being within the general jurisdiction of the court, cannot be questioned collaterally in other courts. Thus, it has been held that the validity of the acts of a receiver, in the *sale or exchange* of the property in his possession in that capacity, will not be questioned in a collateral suit in another court. And where the court which appointed him has approved his accounts, discharged him, and canceled his bond, it must be assumed to have authorized as well as approved the sale.<sup>2</sup> But where the receiver acts *outside of the powers* conferred upon him, or in excess of those powers, the rule will be different. Thus, if the court, whose officer he is, authorizes him to issue *receiver's certificates* in payment of materials furnished, or labor performed in the betterment of the property in his hands, and he issues such certificates *in advance* to contractors, *before* the materials have been furnished or the labor performed, and the materials are not in fact furnished nor the labor performed, so that the estate in his hands gets no benefit from the issue of the certificates, — they will be treated as void, even in a collateral proceeding,<sup>3</sup> — though a *bona fide* sub-purchaser for value of such certificates may have an action for *damages* against the receiver, on the footing of *fraud and deceit*.<sup>4</sup>

**§ 6945. Represents All Parties in Interest.** — A receiver is *not the agent of the creditor* or other party who brings the action, in any closer sense than that he is the agent of any other party interested in, or having a claim upon, the fund. He “is not appointed for the benefit merely of a party on whose application the appointment is made, but equally for

he is, should not require his successor to fulfill his contracts.

phate Min. &c. Co., 3 Hughes (U. S.), 26.

<sup>1</sup> *Ante*, § 6864.

<sup>2</sup> *Bank of Montreal v. Chicago R.*

<sup>3</sup> *Bradley v. Marine & River Phos-* Co., 48 Iowa, 518.

<sup>4</sup> *Bank of Montreal v. Thayer*, 7 Fed. Rep. 622.



the benefit of all persons who may establish rights in the case. He is not the complainant's agent, but should be equally the representative of all the parties, in his capacity as an officer of the court."<sup>1</sup> He represents both the creditors and the stockholders of the corporation, and is to be regarded as a trustee for them.<sup>2</sup> He cannot, it is true, overthrow any valid act of the corporation which he represents;<sup>3</sup> but when acts have been done in fraud of the rights of creditors, he may litigate for their benefit, though the act in question be valid as to the corporation itself; in which case, he holds adversely to the corporation.<sup>4</sup>

**§ 6946. Represents All the Creditors.** — Moreover, it is an obviously just view that a receiver *appointed under a statute* to wind up an insolvent corporation,<sup>5</sup> becomes a *statutory trustee*, not only for the creditor upon whose application he was appointed, but for all the other creditors of the corporation,<sup>6</sup> and this, whether the statute says so or not.<sup>7</sup> As the representative of all the creditors, he has the right to appear before a referee, and *file exceptions* to his report, or *appeal* from any order or decree made at any stage of the proceeding affecting the funds in his charge.<sup>8</sup> But it is scarcely necessary to add that he represents the *bona fide creditors* only, and that it is not his duty to take action in behalf of one who asserts a claim which is, in fact, fraudulent and void as against the other creditors; but, on the contrary, it is, in such case, his duty so to administer the assets that the fraudulent claim will have no share in the distribution.<sup>9</sup> "He is supposed to be

<sup>1</sup> First Nat. Bank *v.* Barnum Wire &c. Works, 60 Mich. 487, 499, *per* Sherwood, J.; citing High on Receivers (2d ed.), § 175; Delany *v.* Mansfield, 1 Hogan, 234. To a similar effect, see King *v.* Goodwin, 130 Ill. 102; *s. c.* 17 Am. St. Rep. 277.

<sup>2</sup> High on Receivers (1st ed.), § 314.

<sup>3</sup> Hyde *v.* Lynde, 4 N. Y. 387, 392.

<sup>4</sup> High on Receivers (2d ed.),

§ 315; Alexander *v.* Relfe, 74 Mo. 395, 516.

<sup>5</sup> As, for instance, 3 Rev. Stat. N. Y. 763, § 44.

<sup>6</sup> Libby *v.* Rosekrans, 55 Barb. (N. Y.) 202.

<sup>7</sup> In the particular case the statute said so.

<sup>8</sup> Attorney-General *v.* North American Life Ins. Co., 82 N. Y. 172.

<sup>9</sup> McParland *v.* Bain, 26 Hun (N. Y.), 38.

impartial between the several claimants upon the funds, and yet he may *intervene* to see that no injustice is done to anyone, and that the funds are properly protected, disposed of, and administered.”<sup>1</sup>

§ 6947. **May Bring Actions to Charge Directors for Breaches of Trust.**—It is well settled that he may bring actions in his representative character against unfaithful directors and other officers of the corporation, to charge them with losses sustained by the corporation through fraudulent or grossly negligent breaches of their official trust and duty,<sup>2</sup> and even to recover statutory *penalties* denounced against them.<sup>3</sup> But it must be carefully kept in view that this right of action exists in the receiver only in his character of representative of *all* the creditors, under a principle already stated.<sup>4</sup> It does not, of course, extend so far as to enable him to prosecute an action to redress a wrong done to a *particular* creditor. Or, borrowing the language of the civil law, commissioners or receivers appointed to liquidate a corporation may assert, against unfaithful directors, those rights which pertain to the creditors *ut universi*, but not those which pertain to them *ut singuli*.<sup>5</sup> Applying this principle, where directors had falsely represented to the public that additional capital had been subscribed and paid for, and they had made and published various other *false, fraudulent, and deceptive statements* of the condition and resources of the bank,—it was held that although such

<sup>1</sup> Attorney-General *v.* North American Life Ins. Co., 82 N. Y. 172, 182; citing *Bockes v. Hathorn*, 78 N. Y. 222, which was a case of a trustee in a mortgage.

<sup>2</sup> *Butterworth v. O'Brien*, 39 Barb. (N. Y.) 192; *s. c.* 24 How. Pr. (N. Y.) 438; *Bank of Niagara v. Johnson*, 8 Wend. (N. Y.) 645; *Gillet v. Phillips*, 13 N. Y. 114; *Hayes v. Kenyon*, 7 R. I. 136; *Re National Funds Assur. Co.*, 10 Ch. Div. 118; *ante*, § 4121.

<sup>3</sup> *Bank of Niagara v. Johnson*, 8 Wend. (N. Y.) 645.

<sup>4</sup> *Ante*, § 6939.

<sup>5</sup> *Raymond v. Palmer*, 35 La. An. 276; *Lacombe v. Milliken*, 36 La. An. 367; *Syndic v. Members Board of Direction*, Jour. des Palais 1869, p. 712 (cited 36 La. An. 369). In the case last cited, it was held that the syndic of an insolvent bank cannot institute, in the name of the mass, an action against the directors which belongs to the creditors *ut singuli*; that they can do so only where they represent the creditors *ut universi*.

acts, if committed, may have injured particular creditors who dealt with the bank on the faith of them, or particular stockholders who became such on that account,—yet the court could perceive no direct injury flowing from them to the mass of creditors or stockholders, and therefore held that the bank commissioners could not maintain an action to redress such an injury.<sup>1</sup> But the same court held, on the same principle, that the commissioners appointed to liquidate a free bank whose charter had been judicially forfeited, could not maintain an action against the directors for the violation of certain provisions of the Civil Code of Louisiana prohibiting the making of loans under certain circumstances,<sup>2</sup> because the statute did not say that the liability thus incurred should accrue *in favor of the concern*, or constitute one of its *assets*. It merely said “liability for its debts and obligations,” and in the opinion of the court the liability accrued, not in favor of the bank in liquidation, which was a debtor to its creditors, but in favor of the creditors themselves. The decision seems to be strangely self-contradictory and untenable. The very object of the liquidation was (it must be assumed) to call in

<sup>1</sup> *Raymond v. Palmer*, 35 La. An. 276. That such injuries form the ground for *actions for deceit* on the part of defrauded stockholders or creditors, see *ante*, §§ 4091, 4140, *et seq.*

<sup>2</sup> *Lacombe v. Milliken*, 36 La. An. 367. The statute was as follows: “Every banker or banking company doing business under this act is required, in addition to securities for circulation deposited with the auditor, to have on hand at all times, in specie, an amount equal to one-third of all their other cash liabilities, and for the other two-thirds of said liabilities an equal amount in specie, specie funds, bills of exchange, or discounted paper maturing within ninety days and not renewable. Civ. Code La., § 300. If, at any time, the specie, specie funds and short paper held by

such banker or banking company should fall below the proportion to cash liabilities prescribed in the preceding section, and shall remain so for a space of ten days, it shall not be lawful thereafter for such banker or banking company to make any loan or discount whatever until its or their position is re-established according to the terms of the preceding section. A violation of this provision shall be held to be an act of insolvency, and the auditor shall cause the necessary steps to be taken for the liquidation of the affairs of said banker or banking company, as in case of insolvency; and every director or manager of a banking company who participate in or assent to such violation, shall become individually liable for all its debts and obligations.” *Ibid.*, § 301.

all the assets of the bank for the purpose of distribution among its creditors, and the commissioners in liquidation were manifestly the proper persons to bring actions for violations of the statute, for the mere purpose of preventing a multiplicity of actions, and of effecting a ratable distribution of the assets of the corporation, if for no other reason; and if the statute did not say that liability should accrue in favor of the bank, on the other hand, it did not say that it should *not* accrue in favor of the official representative of its creditors.

**§ 6948. Theory that He Stands in the Shoes of the Corporation.** — Other courts take the narrower view that the receiver stands in the shoes of the corporation itself, the same as a voluntary assignee stands in the shoes of his assignor, and is estopped from maintaining any action, or setting up any defense, where the corporation itself would have been estopped.<sup>1</sup> Another statement of the same doctrine is, that receivers, for the purpose of closing up the concerns of an insolvent bank, have no rights superior to those which the corporation would have had if the management of its affairs had continued with its directors, and that the liabilities of third parties are not changed by such an appointment.<sup>2</sup> So, under certain statutes of New York,<sup>3</sup> it has been held that the receiver represents merely the corporation as to his title and the defenses which are available to him; so that, under another statute prohibiting corporations from setting up the defense of *usury*, he is disabled from interposing that defense; and this, although the loan was effected and the defense interposed before the passage of the act. The act was a virtual repeal of the usury laws of the State so far as corporations were concerned, and was held to be retrospective in its operation.<sup>4</sup> On the other hand, it was held that the receiver of a corporation cannot *recover back usurious premiums* paid

<sup>1</sup> McLaren v. First Nat. Bank, 76 Wis. 259; s. c. 45 N. W. Rep. 223.

<sup>2</sup> Lincoln v. Fitch, 42 Me. 456.

<sup>3</sup> 2 Rev. Stat. N. Y. 463, 464, §§ 39-41.

<sup>4</sup> Curtis v. Leavitt, 15 N. Y. 9, 296.

by it on the loan of forbearance of money.<sup>1</sup> So, it was held that the receiver of an insolvent corporation could not contest the validity of a transfer of its shares not entered upon its books, where the corporation itself could not have done so by reason of its recognition of the transferees as the owners.<sup>2</sup> So, it has been held that the defense that a note given to the corporation was diverted from the purpose for which it was given, is available to the maker of the note in an action thereon brought by the receiver of the assets of the corporation, to the same extent as though the action had been brought by the corporation itself.<sup>3</sup>

**§ 6949. In What Sense the Representative of the Corporation.**—In certain imperfect senses the receiver is regarded as the representative of the corporation.<sup>4</sup> Thus we shall see that, by the rules of pleading at common law, in bringing an action for rights belonging to the corporation, he must use the name of the corporation.<sup>5</sup> He is the representative of the corporation in respect of the principle that certain rights, possessed against the corporation, survive against him; but in strictness, these can only be rights *against the property* of the corporation, and not merely rights subsisting against the corporation personally. Thus, a creditor having a specific right to be paid out of the *earnings* of a railroad, or a *lien* on its property which has passed into the hands of a receiver, based on a contract made with the company before his appointment, may maintain an action against the receiver to enforce such rights, leave to sue being obtained from the court whose officer the receiver is; and, upon recovering judgment, he may have it satisfied out of the earnings of the road in the hands of the receiver, or the proceeds

<sup>1</sup> *Butterworth v. O'Brien*, 28 Barb. (N. Y.) 187; *s. c.* 7 Abb. Pr. (N. Y.) 456; 16 How. Pr. (N. Y.) 503. Compare *Hungerford's Bank v. Potsdam &c. R. Co.*, 10 Abb. Pr. (N. Y.) 24.

<sup>2</sup> *Cutting v. Damerel*, 88 N. Y. 410; reversing *s. c.* 23 Hun (N. Y.), 389.

<sup>3</sup> *Bell v. Shibley*, 33 Barb. (N. Y.) 610. That the receiver, under the New York Code, § 317, represents himself and the estate, but not the judgment creditors,—see *McHarg v. Donnelly*, 27 Barb. (N. Y.) 100.

<sup>4</sup> See *ante*, § 3653.

<sup>5</sup> *Post*, § 6979.

of the foreclosure sale which come into his hands.<sup>1</sup> But as elsewhere seen, the corporation is not, in general, liable for torts committed by the receiver, or his agents or servants, in the management of its property while in his exclusive custody under the orders of the court.<sup>2</sup>

**§ 6950. May Impeach Fraudulent Conveyances Made by the Corporation.** — A leading exception to what is undoubtedly the general principle, that the receiver stands in the shoes of the corporation, is found in those cases which hold that he may maintain suits in equity to impeach conveyances made by the corporation of its property for the purpose of hindering, delaying, or defrauding its creditors.<sup>3</sup> The power

<sup>1</sup> *Howe v. Harding*, 76 Tex. 17; s. c. 18 Am. St. Rep. 17.

<sup>2</sup> *Post*, § 7148; *Ohio &c. R. Co. v. Davis*, 23 Ind. 553; s. c. 85 Am. Dec. 477; *Bell v. Indianapolis &c. R. Co.*, 53 Ind. 57; *Texas &c. R. Co. v. Bledsoe* (Tex. Civ. App.), 20 S. W. Rep. 1153.

<sup>3</sup> Such actions were maintained in *Leavitt v. Yates*, 4 Edw. Ch. (N. Y.) 134, 139; *Leavitt v. Palmer*, 3 N. Y. 19; s. c. 51 Am. Dec. 333. See also *Whittlesey v. Delaney*, 73 N. Y. 571; *Pittsburgh Carbon Co. v. McMillin*, 119 N. Y. 46; *Gillet v. Moody*, 3 N. Y. 479; *Tuckerman v. Brown*, 33 N. Y. 297; s. c. 88 Am. Dec. 386; *Attorney-General v. Guardian Mut. Life Ins. Co.*, 77 N. Y. 272; *Alexander v. Relfe*, 84 Mo. 495; reversing s. c. 9 Mo. App. 133; *Bate v. Graham*, 11 N. Y. 237; *Weston v. Loyd*, 30 Minn. 221; *Bliss v. Doty*, 36 Minn. 168. Compare *Brouwer v. Appleby*, 1 Sandf. (N. Y.) 158; *Brouwer v. Hill*, 1 Sandf. (N. Y.) 629; *Gillet v. Phillips*, 13 N. Y. 114. Mr. High points out that the rule is the same under the New York Code of Procedure, and in other States which have adopted the same practice, in the case of a receiver appointed in

*proceedings supplementary to execution.*

"Such receiver is not the mere agent or representative of the debtor, but occupies the relation of a trustee for the creditors in whose behalf he is appointed": *Bostwick v. Menck*, 40 N. Y. 383; referring also to *Bostwick v. Menck*, 4 Daly (N. Y.), 68; reversing s. c. 8 Abb. Pr. (N. s.) (N. Y.) 169; and questioning the statements of doctrine in *Porter v. Williams*, 9 N. Y. 142; s. c. 59 Am. Dec. 519. The learned author continues: "He is, therefore, entitled to enforce the rights of such creditors to the extent necessary for the satisfaction of their demands: *Bostwick v. Menck*, 4 Daly (N. Y.), 68; reversing s. c. 8 Abb. Pr. (N. s.) (N. Y.) 169; *Manley v. Rassiga*, 13 Hun (N. Y.), 288. And for this purpose he may institute actions in his own name to set aside fraudulent assignments or transfers of his property made by the debtor with a view of defeating his creditors, and may recover the property so transferred, for the purpose of applying it in satisfaction of the judgments. *Porter v. Williams*, 9 N. Y. 142; s. c. 59 Am. Dec. 519; *Bostwick v. Menck*, 40 N. Y. 383; *Manley v. Rassiga*, 13

to do this necessarily springs from his position as the representative of *all* the creditors.<sup>1</sup> Although the assets of the corporation are said to be a trust fund for its creditors,<sup>2</sup> from the mere statement of which principle it would seem to follow that a conveyance made by the corporation in fraud of its creditors ought to be regarded as *ultra vires* in such a sense that *the corporation* ought to be allowed, in its character of trustee for its creditors, to maintain an action to set it aside, especially seeing that in many cases it might be regarded as an act done by its unfaithful directors in breach of their duty, and hence such an act as ought not to bind or estop the stockholders acting at large, or a board of directors subsequently elected,—yet the courts undoubtedly proceed, in regard to fraudulent conveyances made by corporations, on the principle which applies to such conveyances when made by individuals, in so far as to hold that they are *good between the parties*, in such a sense as to *estop* the grantor.

§ 951. **Further of This Subject.**—Again, some difficulty arises in applying the principle that the receiver may maintain an action to impeach such a conveyance, growing out of the fact that, whereas he represents all the creditors, yet *some* of them may be creditors who sustain such a relation to the transaction that they, in suing alone, would have no standing in equity to maintain a bill for this purpose. For instance, in respect of the power to impeach fraudulent conveyances or diversions of funds, a very important distinction exists between *prior* and *subsequent* creditors.<sup>3</sup> Some of the creditors

Hun (N. Y.), 288; Hamlin v. Wright, 23 Wis. 491. But see, *contra*, Higgins v. Gillesheiner, 26 N. J. Eq. 308." High on Receivers (2d ed.), § 454. The learned author gives a further explanation of the doctrine and its variations, in the same text and note.

<sup>1</sup> *Ante*, § 6946.

<sup>2</sup> *Ante*, §§ 1569, 2951.

<sup>3</sup> See, for instance, Farwell v. Metcalf, 63 N. H. 276; Haben v. Harshaw,

49 Wis. 379; with which compare Viles v. Bangs, 36 Wis. 131; Hurt v. Clarke, 56 Ala. 19; *s. c.* 28 Am. Rep. 751; Ootzhausen v. Judd, 43 Wis. 213; *s. c.* 28 Am. Rep. 539. Huiskamp v. Moline Wagon Co., 121 U. S. 310; Schmidlapp v. Currie, 55 Miss. 597; *s. c.* 30 Am. Rep. 530, and note. These cases relate to transactions where one *partner* applies the property of the firm in payment of his *in-*

represented by the receiver might be *subsequent creditors* who would have no standing in equity to impeach mere *voluntary conveyances*.<sup>1</sup> To illustrate this, let us take the case where the president of a corporation misappropriated its assets to the payment of his individual debt, and no objection within the corporation was raised to his act until six months later, after a receiver had been appointed, and an action was brought by the receiver to set aside the transaction,—and it was held that he could not recover, especially in the absence of proof that the corporation was insolvent or indebted to anyone at the time when the transaction took place. The court held that, on the showing made, the receiver could not recover, and expressed doubts whether, even if it had appeared in the record that, at the time of the appointment of the receiver, the corporation was insolvent, the receiver would be entitled to recover, as the representative of creditors who became such subsequent to the transaction.<sup>2</sup> But this may be an unsubstantial requirement; since it is well settled that a conveyance void *in part* for actual fraud is void *in toto*. The general principle is as first above stated; and accordingly, it has been held that a receiver may, in his own name, maintain an action to set aside and vacate a judgment rendered against the corporation, on the ground that it was obtained without consideration and by collusion with the officers of the corporation, and in fraud of its creditors.<sup>3</sup> The power of the receiver so to proceed is even more clear where the object of his action is to impeach fraudulent transfers and misappropriations of the assets by the officers of the corporation, without the authority of the directors,—so that the transaction itself is illegal, and in no proper sense the act of the corporation.<sup>4</sup>

*dividual debt*, and several of them make a distinction between the rights of prior and subsequent creditors of the firm, in respect of their power to impeach such a transaction.

<sup>1</sup> This was pointed out in McLaren

*v.* First Nat. Bank, 76 Wis. 259, 264; *s. c.* 45 N. W. Rep. 223.

<sup>2</sup> McLaren *v.* First Nat. Bank, 76 Wis. 259; *s. c.* 45 N. W. Rep. 223.

<sup>3</sup> Whittlesey *v.* Delaney, 73 N. Y. 571.

<sup>4</sup> Gillett *v.* Phillips, 13 N. Y. 114.



§ 6952. **And Other Illegal Diversions of its Funds.**— So, where the statute prescribes a certain prerequisite to the execution of a mortgage by the corporation, — as, for instance, the consent of two-thirds of the stockholders, — and the mortgage is executed without complying with such prerequisite, the receiver may maintain an action to set it aside as *ultra vires*.<sup>1</sup> So, as already stated,<sup>2</sup> an action may be maintained by the receiver of an insolvent corporation against its stockholders to recover *dividends*, improperly declared and paid to them at a time when the company was insolvent;<sup>3</sup> and he may join as *defendants*, *creditors* of the corporation, for the purpose of *restraining them* individually from proceeding against the stockholders separately.<sup>4</sup> In such an action, any claims which the defendant may have against the corporation cannot be allowed as a *set-off*, because the receiver represents, not the company but the creditors, and to allow a set-off to the particular stockholder would operate to *prefer* him as a creditor.<sup>5</sup> So, it has been held, that a receiver of the property of a corporation may avoid a *chattel mortgage* made by the corporation, on the ground that it was *not filed* according to law,<sup>6</sup> — the reason being that he represents creditors, and that until such a filing, the mortgage is not, under the governing statute, good as against the creditors.

§ 6953. **May Sue to Recover Assets Fraudulently Diverted by the Officers of the Corporation.**— From what has preceded, it is perfectly clear that, under any theory of the scope of the powers of a receiver, he may maintain actions to recover

<sup>1</sup> Vail v. Hamilton, 85 N. Y. 453; affirming s. c. 20 Hun (N. Y.), 355.

<sup>2</sup> Ante, §§ 2135, 2136, 2962, 2963.

<sup>3</sup> Osgood v. Laytin, 3 Keyes (N. Y.), 521; Osgood v. Ogden, 4 Keyes (N. Y.), 70. *Contra*, Butterworth v. O'Brien, 24 How. Pr. (N. Y.) 438, where it was held that such right of action to recover such dividends was in the creditors themselves.

<sup>4</sup> Osgood v. Laytin, *supra*.

<sup>5</sup> Osgood v. Ogden, 4 Keyes (N. Y.), 70; ante, § 3786, *et seq.*

<sup>6</sup> Farmers' Loan & Co. v. Minneapolis Engine & Co. Works, 35 Minn. 543; s. c. 29 N. W. Rep. 349. In like manner, it has been held, that the assignee under the late bankruptcy law might avoid a *chattel mortgage* which was void as to the creditors of the bank, for want of *filing*. Bank of Leavenworth v. Hunt, 11 Wall. (U. S.) 391.

moneys of the corporation *fraudulently diverted* from its treasury or custody by its unfaithful *directors* or *officers*. In such a case, he clearly proceeds *in right of the corporation*, because the fraudulent and unfaithful acts of the directors or officers must be regarded as having been done in fraud of the corporation itself, and not merely in fraud of its creditors.<sup>1</sup> But, whether they can be so regarded in all cases, will not affect the power of the receiver, where it is conceded that, in his character of representative of the creditors, he may impeach fraudulent conveyances made by the corporation itself.<sup>2</sup>

**§ 6954. Corporation not Bound to Redeem Obligations of a Receiver.**—The principle already explained, that the corporation, from whose possession the property is wrested for the purpose of being placed in the hands of a receiver, does not occupy toward the receiver the relation of a *principal* toward his *agent*,<sup>3</sup> unless in exceptional cases,<sup>4</sup> prepares us for

<sup>1</sup> *Ante*, §§ 4119, 4121.

<sup>2</sup> Thus, it has been held, under the Missouri statute relating to the winding up of insolvent insurance companies (1 Wag. Mo. Stat., p. 753, § 41), that the receiver represents both the creditors and the stockholders of the company, and, when authorized by the proper order of court, may sue in his own name to recover assets of the company, from one who has wrongfully appropriated or wasted them through the fraud or with the connivance or assistance of the officers of the company. "The receiver," said the court, in "instances such as this, represents both the creditors and stockholders, and is regarded as the trustee for them. He cannot, it is true, overthrow any valid act of the corporation which he represents; but when acts have been done in fraud of the rights of creditors, he may litigate for their benefit, though the act in question be valid as to the corporation itself; in which case he holds

adversely to the corporation." *Alexander v. Relfe*, 74 Mo. 495, 516, opinion by Sherwood, C. J.; reversing *s. c.* 9 Mo. App. 133. This case may be studied as affording a very apt illustration of the rule. Cases involving the same subject-matter are: *Alexander v. Williams*, 14 Mo. App. 13, 28, and *Alexander v. Rollins*, 14 Mo. App. 109; *s. c.* affirmed, 84 Mo. 657. Compare *Gill v. Balis*, 72 Mo. 424.

<sup>3</sup> *Ante*, § 6940; *post*, § 7148. The following observations by Mr. Commissioner Martin are believed to be sound and judicious: "As a general rule, a corporation cannot be subjected to obligations or liabilities incurred by the receiver, or his agents or servants, while in charge of the corporate property. The receiver, in his official capacity, and the property in his charge, are alone liable in such causes of action." *Heath v. Missouri &c. R. Co.*, 83 Mo. 617, 622.

<sup>4</sup> *Post*, § 7149.

the further statement of doctrine that the corporation is not bound to make good the contracts or engagements made by a receiver who has been in the temporary custody of its property. This doctrine is subject, however, to the reservation that the court may impose on the railway company, receiving its property back from the receiver, or upon a newly formed or reorganized company receiving it from him after a foreclosure sale, the condition of making good his obligations, such as outstanding receiver's certificates, floating debts, claims for damages, outstanding railway tickets, and the like. But unless a case is brought within the scope of such a reservation, the railroad company is not bound to make good the engagements of the receiver; and accordingly, where a railroad company, on receiving possession of its road from a receiver, executed a bond to indemnify him against all debts and liabilities incurred by him, in pursuance of an order of court which also required claims to be presented within sixty days, it was *not bound to redeem tickets* issued by the receiver.<sup>1</sup>

§ 6955. **Estoppels against Receivers.**—It must be obvious that where the receiver is appointed by a court of equity, he occupies the position of a mere officer of the court, and has not the liberty of independent action that a private person would have; and consequently there is not the same room for the operation of estoppels against him as might arise against a private individual. In so far as he stands in the shoes of the corporation whose property has passed into his hands, whatever will estop the corporation will estop him; but this principle does not extend so far as to estop him from exercising those rights of action which he may exercise in behalf of creditors against the unlawful or fraudulent acts done by the corporation or in its name.<sup>2</sup> It has been held that a mere *pro forma*

<sup>1</sup> *Godfrey v. Ohio &c. R. Co.*, 116 Ind. 30; *s. c.* 18 N. E. Rep. 61; 15 West. Rep. 533.

<sup>2</sup> *Ante*, § 6950, *et seq.* A case in Connecticut may be cited as illustrating this principle. A manufacturing

corporation executed a deed of its property to a trustee for the benefit of such of its creditors as should accept extension notes secured by it. A savings bank, which was a creditor, voted to accept the extension notes,

report of a referee in favor of claims which consist of *void judgments* against the corporation, and an order of court directing their payment *pro rata*, is not an adjudication of their validity, such as estops the receiver from bringing an action to recover the amounts realized by the judgment creditors from a prior execution sale thereunder.<sup>1</sup>

to be held as collateral to the original notes, and to grant extensions, receiving at the same time a considerable sum as semi-annual interest in advance. A large number of other creditors took like action. It was held that the savings bank could not afterwards repudiate its acceptance of the benefits of the deed and attack it for fraud. The savings bank was managed by a board of trustees. At the time when they took the action above referred to, the bank had suspended payment, and was in an embarrassed condition, and its affairs had been investigated and reported upon by a committee appointed by the Governor of the State under the governing statute, but no receiver had been appointed. It was held that it still remained the duty of the trustees to use their best judgment in managing its affairs, and that they had the power to accept the provisions of the deed. Soon after, a receiver of the savings bank was appointed. It was held that he could not repudiate the action of the trustees in accepting the deed. The court reasoned correctly, that a receiver of a corporation can repudiate acts of the corporation done in violation of law and in fraud of creditors; but that this is an exception to the general rule, which is, that he stands in the shoes of the corporation, and before he can be allowed to repudiate

corporate acts, a case should be made which clearly appears to be within the exception. *Greene v. Sprague Man. Co.*, 52 Conn. 330. The court also reasoned that if, in violation of the agreement, the plaintiff were permitted to appropriate a portion of the trust estate to the exclusive use of the estate represented by him, it would operate as a fraud upon all the other assenting creditors. *Ibid.*; citing the following cases: *Ex parte Alsop*, 1 De Gex, F. & J. 289; *Ex parte Stray*, L. R. 2 Ch. 374; *Adlum v. Yard*, 1 Rawle (Pa.), 163; *s. c.* 18 Am. Dec. 608; *Bodley v. Goodrich*, 7 How. (U. S.) 276; *Clay v. Smith*, 3 Pet. (U. S.) 411; *Rapalee v. Stewart*, 27 N. Y. 310; *Chafee v. Fourth Nat. Bank*, 71 Me. 514; *s. c.* 36 Am. Rep. 345. These cases are to the general effect that an arrangement, such as the court had under consideration, cannot be repudiated by a creditor who has received a dividend under it; and the Connecticut court accordingly reasoned that the savings bank, having received an advance of interest under the arrangement, its receiver could not play fast and loose, and keep what it had received and repudiate the rest. That such conduct is tantamount to a *ratification*, see *ante*, § 5303.

<sup>1</sup> *Varnum v. Hart*, 25 N. Y. St. Rep. 755; *s. c.* 6 N. Y. Supp. 346.

## CHAPTER CLXII

### COLLECTING THE ASSETS.

SECTION	SECTION
6959. What assets pass to the receiver.	6967. No right of set-off in respect of claims purchased after suspension.
6960. May have a <i>mandamus</i> to compel State officer to pay over funds.	6968. Doctrine illustrated by the case of bank bills.
6961. What rights of action pass to him.	6969. Aiding the receiver by writ of assistance.
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§ 6959. What Assets Pass to the Receiver.—This question cannot be answered with a dash of the pen. It depends upon the scope of the governing *statute*, in the case of a statutory receivership, where the limits of the statute are not restrained by the order of the court; it also depends upon the *order of the court* appointing the receiver, where he is appointed by a court. It further depends upon the *power of the court* to make the order; for, if there is a governing statute, the order may be in excess of the power conferred by the statute, and if there is none, it may be in excess of the inherent power possessed by the court. Certainly, all the *tangible property* and *rights in action* of the corporation pass into the custody and power of the receiver.<sup>1</sup> We have already seen that all

<sup>1</sup> This was at one time held to carry by a banking corporation with the Comptroller of the State, under the banking statute, for the security of

property comes into the hands of the receiver *subject* to existing *valid liens*, and that the appointment of a receiver does not operate to displace liens or vested rights.<sup>1</sup> It must follow, as a general rule, that the receiver is not entitled to the custody of property, already *in custodia legis*, by reason of having been attached by the sheriff under a valid writ of *attachment*,—unless the statute under which the receiver is appointed, in express terms, dissolves the liens of such attachments. It must equally follow that, unless there is a statute so operating,—and such was the late Federal bankruptcy law,—if property which has been attached passes into the hands of the receiver, he takes it subject to any right of preference acquired by the attaching creditor by virtue of his levy. And where the value of the property is more than sufficient to satisfy such attaching creditor, he must pay over to the sheriff enough to satisfy the judgment in the attachment suit, and also the costs of that proceeding, and reserve the residue for administration under his own trust. This, the writer conceives to be the general principle; but cases are met with which hold that, on the *dissolution* of a corporation and the appointment of a receiver, he is entitled to the possession of property of the corporation which has been previously attached, in case no *judgment* in the attachment suit

its bills: *Van Steenwyck v. Sackett*, 17 Wis. 645. And where a judgment had been entered up by the Comptroller, under a warrant of attorney given for that purpose, it was held that it might be allowed to stand and be enforced by a receiver subsequently appointed. *Ibid.* Later the Supreme Court, overruling on this point the decision just cited, held that the bank comptroller and not the receiver was the proper person, under the statute, to bring such an action. *Rusk v. Van Norstrand*, 21 Wis. 159. Under a statute of New York (New York Laws 1869, ch. 902, § 8), the receiver of a registered policy life insurance company is entitled to

the money realized by the *superintendent of the insurance department* from the sale of the securities deposited with him by the company, as soon as the sale has taken place, and the superintendent cannot withhold the funds until the receiver is ready to make distribution. The State is merely the custodian of the *securities*, and when they have been converted into money under the provisions of the act, the receiver becomes the rightful custodian of the money. *Attorney-General v. North American Life Ins. Co.*, 80 N. Y. 152; affirming *s. c.* 18 Hun (N. Y.), 470; 58 How. Pr. (N. Y.) 197.

<sup>1</sup> *Ante*, § 6903.

has been rendered against the corporation.<sup>1</sup> If a judgment has been rendered in an action against the corporation, and an execution has been issued thereon and levied upon property of the corporation prior to the appointment of the receiver, and the property nevertheless comes into his hands, — he is bound to account to the sheriff for the proceeds of it, and the execution creditor and sheriff may have such proceeds paid over to the sheriff, so far as necessary to satisfy the execution, on a motion made to the court in the nature of an intervening petition.<sup>2</sup>

**§ 6960. May have a Mandamus to Compel State Officer to Pay over Funds.** — Where funds are in the hands of an officer of a State, as is often the case where *insurance companies* are required, under the statutes of the State, to *deposit securities* with the Treasurer, Comptroller, or other State officer, as a condition of their license to do business in the State, and, under the operation of the governing statute, the receiver becomes entitled to the custody of such securities, or of the money into which they may have been converted, — he may have a *mandamus* against the State officer to compel him to deliver the securities or pay the money to him.<sup>3</sup> But the receiver of an insolvent insurance company, appointed *in an action by a creditor or stockholder*, is not entitled to the custody of the *securities* deposited with the superintendent of insurance.<sup>4</sup>

<sup>1</sup> *Frailey v. Central Fire Ins. Co.*, 9 Phila. (Pa.) 219.

<sup>2</sup> *Rich v. Loutrel*, 9 Abb. Pr. (N. Y.) 356; *s. c.* 18 How. Pr. (N. Y.) 121; *Re North American Gutta Percha Co.*, 9 Abb. Pr. (N. Y.) 79. Circumstances under which the receiver of a railroad was entitled to the *insurance money* of a hotel, which was held to be appurtenant to the railroad: *United States Trust Co. v. Wabash &c. R. Co.*, 32 Fed. Rep. 480.

<sup>3</sup> *Attorney-General v. North American Life Ins. Co.*, 80 N. Y. 152; af-

firming *s. c.* 18 Hun (N. Y.), 470; 58 How. Pr. (N. Y.) 197. That the proceeds of the sale of such securities go to the receiver: *Attorney-General v. North American Life Ins. Co.*, 89 N. Y. 94; modifying *s. c.* 26 Hun (N. Y.), 294.

<sup>4</sup> *Ruggles v. Chapman*, 59 N. Y. 163; affirming *s. c.* 1 Hun (N. Y.), 324. See also *People v. Chapman*, 64 N. Y. 557; *Re Guardian Mut. Life Ins. Co.*, 74 N. Y. 617; affirming *s. c.* 13 Hun (N. Y.), 115. The receiver of an insolvent bank in Vermont has

§ 6961. **What Rights of Action Pass to Him.**—Upon this question no general rule can be stated; but here it will again be necessary to recur to the question whether the receiver is appointed under the provisions of a *statute*, or by a *court* in virtue of its chancery powers, and in either case, whether he is appointed for the mere purpose of holding the *interim custody* of property pending a judicial proceeding affecting it, or for the purpose of *winding up* the affairs of the corporate or individual debtor, and distributing the assets. The rights of action which pass to a statutory receiver are measured by the provisions of the statute. For instance, *dividends*, improperly declared and paid, remain, at least in theory of equity, a part of the assets of the corporation; and the stockholders who have improperly received such dividends will be charged, as trustees, in respect of them, under the principles of equity, and will be compelled to surrender them to the receiver of the corporation for administration. This is undoubtedly the general rule;<sup>1</sup> and yet, in a case where the administration proceeded under a statute, it was held that the receiver could not maintain an action to *recover dividends* improperly declared and paid, because the right of action belonged *to the creditors*, and had not been vested in him by the statute.<sup>2</sup>

been held entitled to a *mandamus* to compel the State treasurer to pay over to him, out of the fund, known as the bank fund, a sum sufficient for discharging the excess of the indebtedness of the bank beyond its effects, provided such fund was large enough. But it was held that the writ should not require payment of any money of the State, as distinguished from the bank fund, nor require the treasurer to pay any money of his own, on the theory of his having subjected himself to a liability for the deficit of the fund, by reason of having wrongfully made payments from it to banks not entitled to such payments. *Receiver v. State Treasurer*, 39 Vt. 92. In *Missouri*, the Circuit Court, on dissolving

an insurance company for violation of the insurance laws, takes, through its receiver, possession of the company's securities as a necessary incident, and must distribute the property among those entitled to it. Accordingly, a bill filed by the *Superintendent of Insurance* against the receiver, asking advice as to the disposal of the securities, is properly dismissed. The Superintendent of Insurance brings the action, but the *court* makes the distribution. *Relie v. Spear*, 6 Mo. App. 129.

<sup>1</sup> *Ante*, §§ 2135, 2136, 2954, 2963, 3430, 3562.

<sup>2</sup> *Butterworth v. O'Brien*, 39 Barb. (N. Y.) 192.



§ 6962. **Enforcing Liability of Stockholders.**—This subject has been much considered in a former title.<sup>1</sup> It there appears that the usual practice, in the winding up of a corporation, is, first, to take and state an account by a reference to a master in chancery or referee, for the purpose of ascertaining to what extent, if any, it will be necessary to assess the stockholders to raise a fund to liquidate the debts and pay the costs. When the court, on the report of the master, ascertains how much will probably be necessary, it will make an order requiring the stockholders to pay the percentage which will raise the fund required, if they be assessable to that extent.<sup>2</sup> The receiver will then proceed to collect this percentage from the stockholders. If they refuse to pay it upon such reasonable notice as may be prescribed by the court, the receiver will (assuming that the court has so ordered),<sup>3</sup> bring *actions at law* against the stockholders severally, to enforce what is due by each under the order of assessment, or bring an *action in equity* against all of them collectively, if they reside within the jurisdiction, and if other circumstances exist making that mode of proceeding convenient. It has been distinctly held that he may proceed in either way,—by an *action at law* against each, or by a suit in equity against all;<sup>4</sup> and we have already had occasion to examine cases in which both modes were upheld.<sup>5</sup> We have already gone over the question of the power of a court to superintend the administration, and to make such an interlocutory order of assessment as will be binding upon those stockholders who have not been cited as parties defendant in the winding up proceeding,—with the conclusion, now firmly established in the courts of the United States and in most other American courts, in favor of the existence of such a power,—the theory being that the stockholders are *bond by representation* through the corporation.<sup>6</sup> The Supreme Court of Iowa have held that

<sup>1</sup> *Ante*, § 3549, *et seq.*; and elsewhere in that title.

<sup>2</sup> *Ante*, § 3386.

<sup>3</sup> *Ante*, § 3537, *et seq.*

\* *Stanton v. Wilkeson*, 8 Ben. (U. S.) 357; *ante*, § 3567.

<sup>b</sup> *Ante*, §§ 3455, 3460, 3569.

<sup>6</sup> *Ante*, §§ 3486, 3494, 3495, 3499.

a court has *no jurisdiction* to grant an interlocutory order making an assessment on the unpaid shares of stock of an insolvent corporation, in an action against such corporation for the appointment of a receiver, as against stockholders who are not made parties to the proceedings, where the bill contains no allegations that the stockholders are too numerous to be made parties;<sup>1</sup> and such also seems to be the doctrine of the Supreme Court of Illinois.<sup>2</sup> The doctrine is extremely inconvenient in practice, and is destitute of support in analogy. It would require the court to hear the objections of each separate stockholder, however numerous, against the propriety of the assessment, and to implead everyone sought to be charged, whether residing within the State of the forum or in a foreign jurisdiction. It would, therefore, give them the privilege of objecting to the assessment, which they would not have had while the corporation was a going concern; for we have already seen that, while the corporation is a going concern, in the absence of fraud or oppression, the propriety of the assessment is a matter lodged in the sound discretion of the directors, and in their discretion alone.<sup>3</sup> Where the receiver proceeds under a statutory authorization and without an order of court, and recovers a judgment against the stockholder for the entire balance unpaid in respect of the shares held by him, the court may, notwithstanding, control the conduct of the receiver, just as a court may control its own writ of *fieri facias*, so as to restrain the receiver from collecting any more than the stockholder's fair proportion of the sum necessary to discharge the debts which are to be discharged in the proceeding in which the receiver was appointed.<sup>4</sup> It may be stated, as a general rule,<sup>5</sup> that the receiver cannot bring such actions against stockholders in the absence of a statutory authorization, unless he receives authorization from the court appointing him.<sup>6</sup>

<sup>1</sup> *Lamar Ins. Co. v. Hildreth*, 55 Iowa, 248.

<sup>2</sup> *Chandler v. Brown*, 77 Ill. 333; *Chandler v. Dore*, 84 Ill. 275.

<sup>3</sup> *Ante*, §§ 1705, 1706.

<sup>4</sup> *Clarke v. Thomas*, 34 Ohio St. 46.

<sup>5</sup> *Post*, § 6977.

<sup>6</sup> But see *ante*, §§ 3553, 3620, as to statutory assignees.

§ 6963. **The Same Subject Continued.**—Under a statute of Maine,<sup>1</sup> relating to the winding up of insolvent banks, it has been held that, before the receiver of such a bank can file a bill in equity against the stockholders, the court must decide that the other assets of the corporation are insufficient to pay the claims against it, and that the allegation in the bill of the receiver, that such a decision has been made, must be *proved by the record* of a judgment to which the bank was a party: docket entries in a proceeding under a petition, to which the bank was not a party, are not sufficient.<sup>2</sup> It has been held in Massachusetts that the *legislature* have the power to pass an act authorizing receivers of a banking corporation, against which a perpetual injunction has been ordered, to make a ratable assessment upon the stockholders, of an amount, in the opinion of the receivers, sufficient to make up the probable deficiency of funds in their hands for the payment of its bills, subject to the approval of the Supreme Judicial Court, upon notice to all parties; and to impose a penalty of twelve per cent per annum upon all stockholders who neglect to pay such assessment.<sup>3</sup> It is not necessary, to give *jurisdiction* to the Circuit Court of the United States of a bill by a judgment creditor of a corporation, for the sequestration of its property and the appointment of a receiver, with power to collect from the stockholders their unpaid subscriptions, — that the corporation has tangible property within the district, but all of its property may consist of unpaid subscriptions.<sup>4</sup> In Missouri, a *sheriff acting as receiver* of the effects of a corporation, by virtue of an appointment made by the court under a statute,<sup>5</sup> has no power, by suit in his

<sup>1</sup> Maine Rev. Stat., ch. 47.

<sup>2</sup> Hewett v. Adams, 54 Me. 206.

<sup>3</sup> Com. v. Cochituate Bank, 3 Allen (Mass.), 42. Compare *ante*, § 5437.

<sup>4</sup> Winans v. McKean R. & C. Co., 6 Blatchf. (U. S.) 215. That the receiver cannot sue for the unpaid subscriptions, the right of action being in the creditors, — see Tucker v. Gilman, 45

Hun (N. Y.), 193; s. c. 10 N. Y. St. Rep. 23. That the power of a receiver, under the English Railway Companies Act of 1867, does not extend to getting in unpaid calls, — see Re Birmingham & C. R. Co., 18 Ch. Div. 155.

<sup>5</sup> Gen. Stats. Mo. 1865. p. 642, §§ 20, 21; Rev. Stats. 1879, § 554.

own name, to enforce the liability of a stockholder to the corporation for unpaid stock, which is not due according to the terms of his subscription, and for which no call has been made.<sup>1</sup> The remedy of a judgment creditor is to proceed by motion for execution, under another statute.<sup>2</sup> But in the same State, where a corporation makes a voluntary assignment for the benefit of its creditors, under a statute, by reason of its insolvency, the assignee may maintain actions to collect the unpaid installments due by the stockholders in respect of their shares, and no assessment by the court is required, where the whole amount will be necessary to liquidate the debts of the company.<sup>3</sup>

**§ 6964. Theory that Debtors to the Corporation have Full Right of Set-off.**—It is believed to be a principle regularly acted upon in the *administration of the estates of deceased persons*, that those who were indebted to the deceased at the time of his death, and to whom the deceased was also indebted, have a complete right of *set-off*, discount, or defalcation, as it is called in the jurisprudence of different States, to the full extent of the debt which they owe, as completely as they would have had during the lifetime of the decedent, and this wholly without reference to the question whether the State is solvent or insolvent.<sup>4</sup> Some of the American State courts

<sup>1</sup> *Hannah v. Moberly Bank*, 67 Mo. 678.

<sup>2</sup> *Ibid.*; *ante*, § 3602, *et seq.*

<sup>3</sup> *Ante*, § 3553.

<sup>4</sup> *Ely v. Com.*, 5 Dana (Ky.), 398, and other cases, *infra*. The subject of the right of *set-off* in courts of probate is treated by Judge Woerner, in his admirable work on the American Law of Administration, though in a condensed form (2 Woern. Adm., § 398); but a reading of his text leads to the conclusion that he is dealing rather with the right of *set-off* which may and must be exercised by the administrator, rather than that which may be exercised by the debtor,

which are two totally different things. The administrator *must* insist upon the right of *set-off*, because he represents all the creditors and distributees, and he cannot give away the assets to which they are entitled, to any particular creditor who may also be a debtor to the estate. His obligation to collect with diligence the debts due the estate requires him to insist upon every such right of *set-off*. But whether one who is a debtor to the estate, where it is insolvent, can insist upon this right of *set-off*, becomes a question relating to *priorities among creditors*; for to allow it as to him gives him an advantage over

have applied this principle, by analogy, to the case of the winding up of a *deceased corporation*, and have upheld the same complete right of set-off.<sup>1</sup>

**§ 6965. Whether Debtor Entitled to Set-off.**—The principle by which to determine whether a *debtor*, against whom the receiver proceeds to collect a debt, is entitled to *set off*, against the demand of the receiver, any debt which the corporation may be owing to him, seems to be the same as that which is applied in the settlement of the *estates of deceased persons*, to which we have already referred.<sup>2</sup> We have seen that that principle is that, if the circumstances are such that a right of set-off existed prior to the death of decedent, it may be asserted against his personal representative after his death.<sup>3</sup> So, in the case of an insolvent corporation, if the right of set-off existed prior to the suspension of the corporation, the mere appointment of a receiver does not affect it.<sup>4</sup> This results from the principle thus clearly stated by Cornell, J., with

other creditors, in that, to the extent of the set-off, he gets *payment in full*, whereas they are obliged to take a *pro rata* share, less than the full amount of their demands. There is, however, no suggestion in the text of Judge Woerner of any difference in respect of this right, between solvent and insolvent estates; and it may be assumed that, if any such difference had been exhibited in the adjudications, it would have been discovered by a writer of such thorough and careful research. The only limitation upon the right exhibited in his text is that it does not exist in respect of claims maturing after the grant of letters. But clearly it does exist in respect of claims maturing in the lifetime of the decedent, so that the right might have been exercised upon a settlement made with him, and this wholly without reference to the question whether the estate is solvent or insolvent: *Martin v. White*,

58 Vt. 398; *Knecht v. United States Sav. Inst.*, 2 Mo. App. 563; *Light v. Leininger*, 8 Pa. St. 403. It has been held that this right of set-off exists even where the debt matured after the death of the deceased insolvent: *Skiles v. Houston*, 110 Pa. St. 254.

<sup>1</sup> *Finnell v. Nesbit*, 16 B. Mon. (Ky.) 351.

<sup>2</sup> *Ante*, § 6964, *note*. Compare *ante*, § 3785, *et seq.*

<sup>3</sup> See specially as to *national banks*, *post*, § 7298, *et seq.*

<sup>4</sup> *Miller v. Receiver*, 1 Paige (N. Y.), 443; *Re Middle District Bank*, 1 Paige (N. Y.), 585; *s. c.* 19 Am. Dec. 452; *United States Trust Co. v. Harris*, 2 Bosw. (N. Y.) 75; *Clarke v. Brockway*, 3 Keyes (N. Y.), 13; *Clarke v. Hawkins*, 5 R. I. 219; *Balch v. Wilson*, 25 Minn. 299; *s. c.* 33 Am. Rep. 467; *Colt v. Brown*, 12 Gray (Mass.), 233; *American Bank v. Wall*, 56 Me. 167.

reference to an insolvent national bank: "The respective rights and liabilities existing between the bank and its creditors and debtors became fixed when its insolvency occurred, and it passed into the hands of the receiver appointed by the Comptroller of the Currency. All the property and assets of the association then became a fund legally dedicated, first, to the satisfaction of any claim of the United States government, for any deficiency in the proceeds of the bonds pledged for the redemption of its notes, to meet the amount necessary to be expended for that purpose; and, second, for a ratable distribution of the balance among its general creditors, upon the principle of equality. No subsequent lien could be created, or right or preference obtained, in respect to any of the assets or property of the bank, which did not exist at that time."<sup>1</sup> To give, from a single case, a double illustration of this principle,—if, at the time when the receiver of a national bank is appointed, the bank is indebted to A. upon a note not yet due, and A. is indebted to the bank, but upon a note overdue, and afterwards the receiver sues A. upon his overdue note, A. cannot claim the right to have the note of the bank held by him, which was not due when the receiver was appointed, set off against his note held by the bank, which was then overdue. The reason is, that if he had paid his note to the bank when it became due according to its terms, the money so paid would have gone into the assets of the bank, and would have passed into the hands of the receiver for ratable distribution among all the creditors of the bank; and the law will not allow him, as one of the creditors of the bank, to get an advantage over the other creditors by the wrong of withholding payment of his obligation to the bank, it being a going concern, until an obligation of the bank held by him matures.<sup>2</sup> If, again, the note of the bank held by him is the *joint obligation* of the bank and a third person, and if he, after the appointment of the receiver, transfers a part interest in this

<sup>1</sup> Balch v. Wilson, 25 Minn. 299, National Bank v. Colby, 21 Wall. 302; s. c. 33 Am. Rep. 467. See also (U. S.) 609.

<sup>2</sup> Balch v. Wilson, 25 Minn. 299; s. c. 33 Am. Rep. 467.

note to another person, the reasons which deny his right of set-off are rendered stronger: he had no right of set-off prior to the suspension of the bank, because there was no mutuality of indebtedness,—the bank was liable to him jointly with another party; and this want of mutuality was further increased by his act in transferring an interest in the obligation of the bank held by himself, to a third person after the suspension of the bank.<sup>1</sup>

§ 6966. **Further of This Subject.**—It has been held, however, that it makes no difference with the application of this principle, whether the debt of the corporation was then payable, or has since become due. “If,” said Chancellor Walworth, “a debtor claims to offset bills which were then in the hands of any other person for his use, the receiver should be satisfied he was the real owner of the bills at that time; and if the amount due thereon is lost, that the loss will legally and equitably fall on such debtor, and not upon the person who had them for his use.”<sup>2</sup> If the receiver is compelled to resort to the indorser where the real debtor is unable to pay, such indorser can offset the bills of the bank which he held at the time it stopped payment, unless he is indemnified by the real debtor.<sup>3</sup> This right of set-off may be asserted by persons who have deposited money in the bank in a representative or trust capacity,—as for instance, a *public administrator*. Such a person has been held to occupy toward the bank a situation similar to that which would be occupied by an attorney or solicitor depositing money in the bank for different clients, in one general account, in his own name as attorney or solicitor, to be drawn out upon his own checks as desired. In neither case could the bank object to pay money to the depositor, or to allow it to be set off against the demand in favor of the bank, unless they had notice, from the persons having an equitable claim thereon, not to pay it.

<sup>1</sup> Balch v. Wilson, 25 Minn. 299; s. c. 33 Am. Rep. 467.

<sup>2</sup> Re Middle District Bank, 1 Paige (N. Y.), 585; s. c. 19 Am. Dec. 452.

<sup>3</sup> *Ibid.*

Neither would the right of set-off depend upon the question whether the depositor was personally liable in case of loss, by the failure of the bank.<sup>1</sup>

§ 6967. **No Right of Set-off in Respect of Claims Purchased after Suspension.**—The statement of doctrine in the preceding section necessarily implies that the debtor of a corporation must have been such while the corporation was a going concern; otherwise he would have had no right of set-off prior to its suspension. It follows that he has no right of set-off in respect of claims purchased after such suspension. It would be contrary to the most ordinary conceptions of equity to allow the debtor of an insolvent corporation to purchase debts and outstanding liabilities at such prices as they might command, and establish them as offsets against his own debt to the extent of their full value.<sup>2</sup> In the winding up of insolvent estates by means of receivers, a larger right of set-off is often allowed than the so-called right of *discount* which exists in actions at law. In the latter case the well-known principle is, that the debts must be strictly mutual, or no right of set-off exists.<sup>3</sup>

<sup>1</sup> *Miller v. Receiver*, 1 Paige (N. Y.), 443.

<sup>2</sup> *Colt v. Brown*, 12 Gray (Mass.), 233; *American Bank v. Wall*, 56 Me. 167. That no such right of offset exists on the part of *shareholders* who are also creditors, — see *ante*, § 3797. That no such right of offset exists on the part of other debtors, — see *Re Middle District Bank*, 1 Paige (N. Y.), 585; *s. c.* 19 Am. Dec. 452; *Bank of Niagara v. Rosevelt*, 9 Cow. (N. Y.) 409.

<sup>3</sup> Cases illustrating this principle are *Ex parte Deeze*, 1 Atk. 228; *Ex parte Prescott*, 1 Atk. 230; *Atkinson v. Elliott*, 7 T. R. 378; *State Bank v. Receivers*, 3 N. J. Eq. 266. A statute of *New Jersey* enacted that, “in case of mutual dealings between the said corporation and any other person or persons, the receivers are to allow

just set-offs in favor of such person or persons, in all cases in which it shall appear to them that the same ought to be allowed according to law and equity.” It was held that this statute gave the receivers a larger right in the allowance of set-offs than would exist in controversies at law. “It gives to the receivers an equitable power, and they are to exercise it according to the justice of the case.” Therefore, it was held that the creditor of an insolvent bank, having security for a specific debt, to an amount greater than that debt, might set off the excess against other debts due by the bank to him, and this excess did not belong to the general fund in the hands of the receivers for distribution among all the creditors. *State Bank v. Receivers*, 3 N. J. Eq. 266.



§ 6968. **Doctrine Illustrated by the Case of Bank Bills.**—The doctrine of the two preceding sections is illustrated in the case of insolvent banks of issue, by holdings to the effect that the debtor of such a bank, when sued by its receiver or assignee, has a right of set-off to the extent of any bills of the bank which he held at the time when it suspended, but that he has no such right of set-off in respect of any bills of the bank which may have come into his hands after the date of its suspension.<sup>1</sup> The reason which upholds the right of set-off in the former case is that, as the bills were payable by the bank on demand, the right of set-off existed at the time when the receiver was appointed. If the bills had been obligations of debt issued by the bank, payable at a day subsequent to the date of its failure, the principle would not apply.

§ 6969. **Aiding the Receiver by Writ of Assistance.**—If the possession of the receiver is resisted, he is entitled to a *writ of assistance*, and it seems that this issues on his application, as a matter of course, but it can only be executed *against a party to the suit*; it cannot be executed against one, who, without being a party to the suit, claims the right to hold the property by an adverse title or possession. It cannot, for instance, be executed by one who has, previous to the appointment of the receiver, come into possession of the property as the receiver of another court.<sup>2</sup> The principle is the same as that which obtains in the case where real property has been sold under a decree foreclosing a mortgage, and possession of it is adversely held by persons who were not parties to the foreclosure suit. In such a case the court making the decree of foreclosure has no jurisdiction, in a summary proceeding, to determine their rights or title to the premises.<sup>3</sup> The power of the court in such cases seems, at most, to extend to persons holding property *in privity* with parties to the suit, and to purchasers of it *pendente lite*.

<sup>1</sup> *Miller v. Receiver*, 1 Paige (N. Y.), 444; *Re Middle District Bank*, 1 Paige (N. Y.), 585; *s. c.* 19 Am. Dec. 452; *American Bank v. Wall*, 56 Me. 167; *Colt v. Brown*, 12 Gray (Mass.), 233; *Clarke v. Hawkins*, 5 R. I. 219.

<sup>2</sup> *Gelpeke v. Milwaukee &c. R. Co.*, 11 Wis. 454.

<sup>3</sup> *Frelinghuysen v. Colden*, 4 Paige (N. Y.), 204; *Van Hook v. Throckmorton*, 8 Paige (N. Y.), 33; *Boynton v. Jackway*, 10 Paige (N. Y.), 307; *McChord v. M'Olintock*, 5 Litt. (Ky.) 304.

**§ 6970. Delivery of Property to Receiver Enforced by Process of Contempt.**—When a court appoints a receiver of a corporation, it is usual to make, as a part of its order, an order upon the corporation, its officers, agents, and all persons, being parties to the action or their privies, having possession of any of its properties, to deliver the same to the receiver,—making the order as detailed and explicit as the court, and the counsel soliciting the appointment, may consider necessary. If the order is violated, it will be enforced by the usual process of *contempt*, in the same manner as the court would proceed in the case of the violation of its *injunction*.<sup>1</sup>

**§ 6971. Remedy of Receiver in Case of Property Levied on by Sheriff Prior to his Appointment.**—If property has been levied upon, under valid process, by the sheriff, prior to the appointment of the receiver, no principle is understood under which the appointment dissolves the levy, unless the statute law applicable to the proceeding in which the receiver has been appointed, has this effect. If the statute has this effect, and if the receiver, notwithstanding the levy, is entitled to the custody of the property, subject to the lien (if any) which the levy may give, it is said that his remedy to recover the same is by *action*, and not by a *motion* to set aside the levy.<sup>2</sup>

**§ 6972. Loss of Money Deposited in Bank.**—The receiver is appointed to hold the custody of the property and money of which he is ordered to take possession, and if he substitutes the custody of another for that of himself, he simply makes that other his agent or bailee, and becomes responsible for his misprisions. If, therefore, a receiver, without an order of the court, or without authority in some governing statute, elects to deposit the money which comes into his pos-

<sup>1</sup> See, for illustration, *American Construction Co. v. Jacksonville &c. R. Co.*, 52 Fed. Rep. 937; *ante*, § 6448, *et seq.*

<sup>2</sup> *Andrews v. Paschen*, 67 Wis. 413; citing *Gelpeke v. Milwaukee &c. R. Co.*, 11 Wis. 454.

session in a bank,—he cannot, it has been held, substitute the credit of the banker for his own responsibility as its ultimate custodian, but if the bank fails he must bear the loss.<sup>1</sup> So, it has been held that a receiver, acting as *guardian*, is derelict in his duty, when he invests the estate of his ward, by depositing it in a bank in another State without security, however solvent such bank may be at the time; so that, if the bank fails, the receiver will have to bear the loss.<sup>2</sup> But, notwithstanding the foregoing, it is believed that it cannot be affirmed, as a general rule of equity, that a receiver is guilty of *negligence* in depositing the funds or securities which come into his hands, with a reputable banker, instead of running the risk of keeping them in his own custody,—so that if the bank fails he must bear the loss.<sup>3</sup> Indeed, if a receiver were to attempt to keep the moneys and securities coming into his custody, in his own safe, and they should there be destroyed by fire or robbery, it would be a serious question whether he ought not to be made liable, on the ground of not having used that *ordinary diligence* which business men in the custody of like funds and securities use,—which diligence, it is well known, generally consists in depositing them with a reputable banker, or in the vaults of a safe-deposit company.

**§ 6973. Power of Receiver to Compromise Debts.**—It may be assumed, on general principles, that the power of a receiver to *compromise* debts due the estate of which he is receiver, cannot be properly exercised without an order of the court; and that even then, a power so delicate ought not to be exer-

<sup>1</sup> Ricks v. Broyles, 78 Ga. 610; s. c. 6 Am. St. Rep. 280. Possibly this conclusion is strengthened, when the further consideration appears that, to deposit money in bank has the effect in law of *lending* it to the bank, and creating merely the relation of *debtor and creditor* between the banker and the depositor (Gumbel v. Abrams, 20 La. An. 568; s. c. 96 Am. Dec. 426),—so that a receiver, so depositing the

funds in his hands, parts with *good money* and substitutes the *credit* of the bank for the same.

<sup>2</sup> State v. Gooch, 97 N. C. 186; s. c. 2 Am. St. Rep. 284.

<sup>3</sup> That a receiver, in such case, is not liable, see Knight v. Plymouth, 1 Dick. 120; s. c. 3 Atk. 480; Rowth v. Howell, 3 Ves. 565. And so as to the *treasurer* of a railway company: Atlantic &c. R. Co. v. Cowles, 69 N. C. 59.

cised without an examination and report by a master in chancery. The Revised Statutes of the United States provide that a receiver of a national banking association "upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts."<sup>1</sup> The *State courts* of ordinary jurisdiction are understood to be "courts of record of competent jurisdiction" within the meaning of this statute, and it is the constant practice of receivers of such banks to apply to such courts for orders authorizing them to compromise what they report to the court as being bad or doubtful debts; and it is believed that this power has been greatly abused and corruptly exercised. The receiver selects some easy-going judge of a State court, who will pass the desired order almost as a matter of course. The proper manner in which the judge should treat such applications is illustrated by a decision of Mr. District Judge Ross, of the Circuit Court of the United States for the Southern District of California, to whom such a receiver applied, under the above statute, for an order to compound the statutory liability of certain stockholders, by accepting payment of a gross sum less than the amount due, in satisfaction and discharge of their liability. The court held that, although more money would be thus realized than by judicial proceedings to enforce their liability, yet, as it appeared probable that they had made *fraudulent conveyances* of their property to avoid their liability, the order ought to be refused.<sup>2</sup> It has been held that the *District Court* of the United States, for the district in which the administration is taking place, has jurisdiction to make orders of compromise under this statute;<sup>3</sup> and of this there can be little doubt.<sup>4</sup>

<sup>1</sup> Rev. Stat. U. S., § 5234.

<sup>2</sup> Re Stockholders, 53 Fed. Rep. 38.

<sup>3</sup> Matter of Platt, 1 Ben. (U. S.) 534.

<sup>4</sup> See the reasoning in *Kennedy v. Gibson*, 8 Wall. (U. S.) 498, 506.

Where the receiver of a national bank compromised suits with counsel for the United States, it was held that the *compromises would not be reopened years afterwards*, no fraud being alleged: *Henderson v. Meyers*, 11 Phila. (Pa.) 616.

## CHAPTER CLXIII.

### ACTIONS BY THE RECEIVER.

SECTION	SECTION
6977. Whether the receiver can sue without express authority.	6984. Actions by receivers in courts of the United States.
6978. What constitutes such authority.	6985. Jurisdiction of Federal courts as depending upon citizenship.
6979. Whether he must sue in his own name or in the name of the corporation.	6986. Reviving in favor of receiver actions commenced by corporation.
6980. The Federal doctrine on this subject.	6987. Revivor of actions commenced by the receiver and pending at his death or removal.
6981. Receiver must plead and prove his official character.	6988. Effect of discharge of receiver on actions pending against him.
6982. Parties to actions by and against receivers.	6989. Compulsory reference under the New York statute.
6983. Not necessary that corporation should join.	

§ 6977. **Whether the Receiver can sue Without Express Authority.** — The answer to this question must depend upon considerations already adverted to,<sup>1</sup> — whether the receiver is a *statutory* receiver, is a receiver *pendente lite*, or is a receiver for the general *winding up* of the affairs of the corporation. The general rule is, that the receiver *cannot bring an action without express authority* so to do, derived either from the statute under which he is appointed, or from the order of the court by which he is appointed.<sup>2</sup> A receiver *in equity* is an officer of the court, and derives his power from the orders of the court by which he is appointed. It is believed that he has ordinarily no power to prosecute suits in his character of receiver, either in the court appointing him or in any other court, unless empowered to do so by the court appointing him. Where he has received such authorization, there can

<sup>1</sup> *Ante*, § 6939.

<sup>2</sup> *Manlove v. Burger*, 38 Ind. 211; *Battle v. Davis*, 66 N. C. 252, 254.

be, we think, no question about his power to sue, provided the court by which he was appointed acted in appointing him in virtue of the general power of a court of equity. The office of such a receiver is to gather in and administer the assets of the estate; and the power to take possession of the assets must, it should seem, include the power to invoke the aid of any court of competent jurisdiction in getting possession of them, where they are unlawfully withheld from him. Where, however, a receiver is appointed in pursuance of the provisions of a *statute*, then, obviously, the statute must be referred to for the purpose of ascertaining whether it is competent for the receiver to exercise this power, or for the court appointing him to confer it upon him. As such a power is necessary for the complete administration of an insolvent estate, it *prima facie* exists, and the governing statute will not be construed as taking it away, unless its terms plainly exclude any other conclusion. When, therefore, a statute provides for the appointment of receivers of insolvent insurance companies, and empowers the court, in which the proceeding to wind up the company is pending, "to make such orders and decrees as may be needful . . . for the dissolution of the company and the winding up of its affairs,"—this is held to include the power to make orders authorizing the receiver to prosecute suits for the collection of the assets of the company.<sup>1</sup> The rule under the English chancery practice appears to have been that a receiver cannot commence any action for the recovery of outstanding property without an order of the court appointing him; and that, when such an order is made, the action must be brought *in the name of the legal owner*, who will be compelled to allow the use of his name upon being properly indemnified against costs, etc., out of the estate and effects under the control of the court.<sup>2</sup> In Wisconsin, it is said that a receiver of rents and profits should apply to the court, upon notice to the defendant, for authority to prosecute the action in his own name as receiver.<sup>3</sup>

<sup>1</sup> Gill v. Balis, 72 Mo. 424.

<sup>2</sup> 3 Dan. Ch. Pr. 1977, 1991.

<sup>3</sup> King v. Cutts, 24 Wis. 627. That, according to the general chancery

§ 6978. **What Constitutes Such Authority.**—Where a statutory receiver is *appointed*, — not by a court but *by a ministerial officer*, — such as a receiver of a *national bank* appointed by the *Comptroller of the Currency*, — it is a sound conclusion that, although the statute does not authorize him to prosecute actions in direct terms, all rights of action to collect the assets of the corporation and to establish its rights are necessarily vested in him.<sup>1</sup>

practice, a receiver cannot bring an action without the previous sanction of the court, whose officer he is, appears to be well settled. *Merritt v. Merritt*, 16 Wend. (N. Y.) 405, 410; *Wynne v. Newborough*, 1 Ves. Jr. 165; *Green v. Winter*, 1 Johns. Ch. (N. Y.) 60; *Freeman v. Winchester*, 10 Smedes & M. (Miss.) 577. In *Taylor v. Allen*, 2 Atk. 213, it was held that a receiver appointed to collect the assets and to bring actions in the name of the executrix, must *give security to indemnify* the executrix on account of such actions. In *Pitt v. Snowden*, 3 Atk. 750, it was held that a receiver appointed by the court of chancery has the right to *distrain for rent*, and need not apply to the court for a particular order for that purpose, unless there is a doubt as to who has the legal right to the rent. In *Wynne v. Newborough*, *supra*, which is sometimes cited on this question, nothing seems to have been determined, except that parties moving to restrain the receiver from ejecting tenants could not succeed in their motion, because they had not sufficient interest for that purpose. But in a subsequent case, it was held, not only incompetent for a receiver to eject tenants without a previous application to the court, but, moreover, that without such sanction, he was not at liberty even to defend an action of ejectment brought against himself. *Anonymous*,

6 Ves. 287. In *Green v. Winter*, 1 Johns. Ch. 60, which is sometimes cited on this question, Chancellor Kent, on the application of a party interested, ordered a receiver to bring suits in the name of the trustee who held the legal title, on giving security to indemnify him, and also ordered that the receiver should hold possession of the lands recovered and moneys received by him, subject to the further order of the court. In an early chancery case in Mississippi, — *Freeman v. Winchester*, 10 Smedes & M. (Miss.) 577, — it was left undecided whether the Chancellor could authorize his receiver to bring a suit in his own name, but it was held that if he did sue, he must proceed appropriately according to the form in which he brought his action; that is to say, he could not bring an action at law in the court of chancery, and *vice versa*.

<sup>1</sup> *Kennedy v. Gibson*, 8 Wall. (U. S.) 498, 506. The statute is Rev. Stat. U. S., § 5234. It authorizes him to "collect all debts," etc. Where an order had been made in a suit against a firm, reciting that, by consent, its attorney was authorized to collect all insurance moneys, accounts, and choses in action due the firm, and that, by like consent, the question of the appointment of a receiver was continued to the next term, — it was held that this did not constitute him the

§ 6979. **Whether He must Sue in his Own Name or in the Name of the Corporation.**—In this respect, there is a distinction between the principles of pleading which existed at *common law* and those which have been established under the modern *codes of procedure*. Unless the receiver is appointed under a statute, and the operation of the statute is to vest in him the *legal title*, as distinguished from the mere right of possession for the purposes of the trust,—then the theoretical legal title, naked though it be, still remains in the corporation, and when the receiver brings an action to recover any property of the corporation, or to recover a judgment upon any right of action belonging to it, he must bring the action in the name of the corporation to his use as receiver.<sup>1</sup>

firm's receiver so as to entitle him to maintain, in his own name, an action on an insurance policy payable to the firm. *Boyd v. Royal Ins. Co.*, 111 N. C. 372; *s. c.* 16 S. E. Rep. 389. See *post*, §§ 7279, 7280.

<sup>1</sup> *Yeager v. Wallace*, 44 Pa. St. 294; *Manlove v. Burger*, 38 Ind. 211; *Battle v. Davis*, 66 N. C. 252; *Freeman v. Winchester*, 10 Smedes & M. (Miss.) 577 (*semble*); *Newell v. Fisher*, 24 Miss. 392; *Herron v. Vance*, 17 Ind. 595, 597; *Ingersoll v. Cooper*, 5 Blackf. (Ind.) 426; *King v. Cutts*, 24 Wis. 627; *Garver v. Kent*, 70 Ind. 428; *Moriarty v. Kent*, 71 Ind. 601; *Harrell v. Kent*, 71 Ind. 602. *Ante*, § 3570; *post*, § 7280. It is said in the case in Pennsylvania (*Yeager v. Wallace*, *supra*) that, outside of the statute of New York, it was never ruled that the receiver had the *legal title* even to personalty, and the corresponding right to sue in his own name, and that the right to sue in his own name always rested upon the Act of 1845, or upon the code, or upon an act passed in 1825, and not upon any rule or course of practice in chancery. See also *Wilson v. Wilson*, 1 Barb. Ch. (N. Y.) 592, 594;

*Storm v. Waddell*, 2 Sandf. Ch. (N. Y.) 494. In *Wilson v. Allen*, 6 Barb. (N. Y.) 542, 545, it was said that, *at law*, an ordinary receiver was not considered as having the legal title, so as to authorize him to sue in his own name for any debt or demand transferred to him (under the order of his appointment), or to the possession or control of which he was entitled under the order of the court, until the Act of 1845. The reader will gather from some of the above cases that, even the courts of some of the "code States" cling to the common-law rule which required the receiver to use the name of the corporation. It was held by the St. Louis Court of Appeals,—and Missouri is what is called a "code State,"—that the receiver cannot sue in his own name: *Alexander v. Relfe*, 9 Mo. App. 133. But this decision was reversed on appeal, the Supreme Court holding the contrary, in *Alexander v. Relfe*, 74 Mo. 495. In *Wray v. Jamison*, 10 Humph. (Tenn.) 186, it was held,—although the common-law system of pleading was in force in that State,—that it was error, where the receiver brought an



But a leading provision of the modern codes of procedure is that all rights of action vest in the *real party in interest*, and do not necessarily follow the naked legal title; and this is understood to be the rule *in equity*,<sup>1</sup> the codes having in this respect adopted the rule of that forum. When, therefore, an action is brought in a jurisdiction whose remedial system is governed by one of the modern codes of procedure, the receiver brings the action in his own name.<sup>2</sup>

action in the name of "Y. B. Jones, receiver of the accounts of Wray & Price, partners," to allow the plaintiff to amend his declaration by striking out the words above quoted. McKinney, J., said: "In this case, as the warrant originally showed, Young B. Jones was the sole and proper plaintiff. He alone had the legal right to maintain a suit for the recovery of the debt due from the defendant; and the statement in the warrant of the character in which he sued, namely, 'as receiver of the accounts of Wray & Price,' was merely *descriptio personæ*." It does not appear that this ruling was influenced by any statute.

<sup>1</sup> That he may sue in his own name in equity, see *Iglehart v. Bierce*, 36 Ill. 133.

<sup>2</sup> Thus, in *Missouri* the receiver of a dissolved corporation, appointed by a court of equity, may, if empowered to do so by the court appointing him, sue in his own name for the recovery of the assets of the corporation. *Gill v. Balis*, 72 Mo. 424; *Alexander v. Relfe*, 74 Mo. 495, 516. The rule is the same under the code of *Alabama*: *Leonard v. Storrs*, 31 Ala. 488; in *Georgia*: *Hardwick v. Hook*, 8 Ga. 354; and, it seems, in *Louisiana*: *Helme v. Littlejohn*, 12 La. An. 298, where the action was so brought. In *Maine*, suits may be commenced by receivers of *savings banks* in their

own names as receivers, or in the name of the bank, — it is immaterial which. It is said that "suits may be so commenced by the receivers of *banks of discount* (citing Rev. Stat. Me., ch. 47, § 62); and no reason is perceived why the same rule should not apply to receivers of savings banks." *Hobart v. Bennett*, 77 Me. 401, 403. See also *Baker v. Cooper*, 57 Me. 388, where the action proceeded in the name of the receivers. In a recent case in *North Carolina*, overlooking its previous decision in *Battle v. Davis*, 66 N. C. 252, the court hold that the action is properly brought in the name of the receiver without joining the parties of whose property he is the receiver, provided he has authority to sue at all. *Boyd v. Royal Ins. Co.*, 111 N. C. 372; s. c. 16 S. E. Rep. 369. In *Texas*, an equitable action in behalf of all the creditors of an insolvent corporation, for an accounting and to compel its stockholders to contribute unpaid subscriptions to the payment of its debts, may be brought by the receiver of its assets, in his own name, under a statute, if there is an order of court authorizing him to sue, although neither the statute nor the order, in terms, directs the suit to be brought in his own name. *Mathis v. Pridham*, 1 Tex. Civ. App. 58; s. c. 20 S. W. Rep. 1015, 1021. The Supreme Court of Indiana, recognizing the

§ 6980. **The Federal Doctrine on This Subject.**—The Supreme Court of the United States have twice laid down the doctrine that suits may be brought, both at law and in equity, by the receiver of a corporation organized under the National Banking Act,<sup>1</sup> in his own name or in the name of the corporation for his use, although the act does not in terms give him authority to sue in his own name.<sup>2</sup> This rather vague judicial declaration left the practitioner without a definite rule whether, in a case where his action is brought in a court of the United States, the receiver *may* sue in his own name or *must* use the name of the corporation; but a later decision makes it clear that if the jurisdiction is one in which the rules of *pleading at common law* prevail, he must use the name of the corporation.<sup>3</sup>

§ 6981. **Receiver must Plead and Prove his Official Character.**—As in the case of any other person suing in a representative capacity, it is necessary for a receiver, in prosecuting an action, to *aver* and *prove* his official character. If he sues in the name of the corporation, he should set forth, in his declaration, petition, or complaint, sufficient to show the character in which he sues,—that is to say, he should *plead*

common-law rule that a receiver must use the name of the party having the legal title, has nevertheless held, in a series of cases, that the statute of that State (2 Rev. Stat. Ind. 1876, p. 116, § 205; amended by Ind. Act 1879, p. 168), conferring upon receivers the power, under the control of the court, to bring and defend actions, etc., was broad enough to confer upon the court the power to authorize the receiver to bring such actions in his own name; and the syllabus probably correctly states the conclusion of the court, which is that, “unless the law of this State, or the order appointing him, authorizes the receiver to sue in his own name, he can sue only in the name of the person in whom the right of action

existed before his appointment.” *Garver v. Kent*, 70 Ind. 428; followed in *Moriarty v. Kent*, 71 Ind. 601, and in *Harrell v. Kent*, 71 Ind. 602.

<sup>1</sup> 13 U. S. Stat. at Large, 99.

<sup>2</sup> *Kennedy v. Gibson*, 8 Wall. (U. S.) 498, 506; *Bank of Bethel v. Pahquioque Bank*, 14 Wall. (U. S.) 383, 401. The first of these cases was an appeal from a decision of the Circuit Court of the United States sitting in Maryland, a so-called “code State”; and the latter was a writ of error to the Supreme Court of Connecticut, the practice in which State is not understood by the writer. See also *post*, § 7280.

<sup>3</sup> *Glenn v. Marbury*, 145 U. S. 499; *ante*, § 3570.

*his title*,<sup>1</sup> and the same rule would equally apply where he sues in his own name. It was held that the averment is not sustained by *proof* of an appointment, where the governing statute required the receiver to enter into a prescribed *bond*; but the receiver must also submit proof that he *qualified* by giving the bond required by the statute; and the omission of this was held fatal to his right to recover.<sup>2</sup> But (reversing this ruling) it was held otherwise where the particular suit was brought in pursuance of the order of the court appointing the receiver, as this carried with it the presumption, in the absence of evidence to the contrary, that a suitable bond was given.<sup>3</sup> Where the record disclosed that the plaintiff had not been appointed a receiver, but was, by consent, allowed to manage a partnership estate on account of a disagreement between the partners,—it was held that he could not maintain the action, since he was not a receiver, a real party in interest, nor a trustee of an express trust.<sup>4</sup>

**§ 6982. Parties to Actions by and against Receivers.**—Where the creditor of a corporation had brought suit to reach the proceeds of land conveyed by the corporation to a director and trustee, and subsequently, in a proceeding by the Attorney-General for a dissolution of the corporation, a receiver was appointed,—the court refused to grant a motion to compel the receiver to become a party to the creditors' suit, the reason being that he had, by leave of court, himself brought suit to set aside the transfer.<sup>5</sup> It has been held that where the receiver of an insolvent corporation brings an action to determine which, if any, of a series of bonds issued in the name of the corporation are invalid, all the holders of the bonds of that series are proper parties.<sup>6</sup>

<sup>1</sup> Miami Exporting Co. v. Gano, 13 Ohio, 269.

\* Hegewisch v. Silver, 21 N. Y. St. Rep. 294.

<sup>5</sup> Colorado Nat. Bank v. Scott, 19 Abb. N. Cas. (N. Y.) 348.

<sup>3</sup> Hegewisch v. Silver, 140 N. Y. 414.

<sup>4</sup> Boyd v. Royal Ins. Co., 111 N. C. 372; s. c. 16 S. E. Rep. 389.

<sup>6</sup> Hubbell v. Syracuse Iron Works, 42 Hun (N. Y.), 182; s. c. 4 N. Y. St. Rep. 690.

§ 6983. **Not Necessary that Corporation should Join.**—It was held, in a case where an ostensible receiver of a partnership firm brought an action, that, if he was a receiver, he had capacity to sue, and the members of the firm were not necessary parties, and that a demurrer for their non-joinder was properly overruled.<sup>1</sup> For the same reason, the corporation need not join as plaintiff where the receiver brings an action, for example, to foreclose a mortgage executed to the receiver.<sup>2</sup>

§ 6984. **Actions by Receivers in Courts of the United States.**—The jurisdiction of courts of the United States to entertain actions by receivers appointed by courts of equity, whether State or Federal, evidently depends upon the same questions which must decide their jurisdiction where actions are brought by individuals in any other representative capacity. But there is a class of receivers to whom this rule does not apply, namely, receivers appointed by the Comptroller of the Currency to wind up the affairs of insolvent *national banks* under the provisions of the Revised Statutes of the United States.<sup>3</sup> Such a statutory trustee has been said to be the *agent* of the United States.<sup>4</sup> Another court has held him to be an *officer* of the United States, within the meaning of another provision of the Revised Statutes of the United States,<sup>5</sup> which allows officers of the United States to bring actions in the District Courts of the United States. The authority which he exercises is an “authority exercised under the United States,” within the meaning of another provision of the Revised Statutes of the United States, prescribing what judgments and decrees of State courts shall be subject to re-

<sup>1</sup> *Boyd v. Royal Ins. Co.*, 111 N. C. 372; *s. c.* 16 S. E. Rep. 389.

<sup>2</sup> *Iglehart v. Bierce*, 36 Ill. 133, 136.

<sup>3</sup> Rev. Stat. U. S., § 5234.

<sup>4</sup> *Ellis v. Little*, 27 Kan. 707; *s. c.* 41 Am. Rep. 434.

<sup>5</sup> Rev. Stat. U. S., § 563, cl. 4. The statute, so far as material, reads: “The District Courts of the United States shall have jurisdiction as fol-

lows: . . . . Fourth. Of all suits at common law brought by the United States, or by any officer thereof, authorized by law to sue.” For the construction of this statute, see *Parsons v. Bedford*, 3 Pet. (U. S.) 433; *Duncan v. United States*, 7 Pet. (U. S.) 435; *Stanton v. Wilkeson*, 8 Ben. (U. S.) 357.

view on writ of error in the Supreme Court of the United States.<sup>1</sup>

§ 6985. Jurisdiction of Federal Courts as Depending upon Citizenship.—The jurisdiction of the courts of the United States in actions by or against receivers, which depends upon the adverse parties being citizens of different States, is tested by the question *whether the receiver is a citizen of a different State* from that of the adverse party to the action, and not whether the *corporation* which he represents is a citizen of a different State from such adverse party.<sup>2</sup> A receiver of a railroad company, who is a resident of another State, and a practitioner of law there, does not become a resident of the State in which the railroad is situated by going into the State at intervals, staying at a hotel, making examinations into the conduct of the company, giving his instructions and directions to his agents and servants, and returning to the State where he and his family reside and where his regular business is carried on.<sup>3</sup> The theory of this view is, that the receiver, and not the corporation, is the real party in interest, and that the jurisdiction of a court of the United States, when it is based on the citizenship of the parties, depends upon the citizenship of the *parties to the record*, and not upon the citizenship of those whom they may represent.<sup>4</sup> It refers itself to the principle thus expressed: "Where the jurisdiction

<sup>1</sup> Rev. Stat. U. S., § 709; *McNulta v. Lochridge*, 141 U. S. 327, 331. The court regards its conclusions as a legitimate deduction from *Buck v. Colbath*, 3 Wall. (U. S.) 334; *Feibelman v. Packard*, 109 U. S. 421; *Pacific Railroad Removal Cases*, 115 U. S. 1; *Etheridge v. Sperry*, 139 U. S. 266; *Bock v. Perkins*, 139 U. S. 628. It has been held that a receiver appointed under the Michigan statute for the voluntary dissolution of bank corporations, etc., stands in the relation of the *assignee* of an insolvent debtor; and that, to maintain an action in behalf of the bank, in a court

of the United States, he must show that the court would have had jurisdiction as between the defendant and the bank, and further, that if such an action is founded on a *note payable to bearer*, the receiver cannot sue as bearer, since he does not hold the note in that right,—a questionable conclusion. *Bradford v. Jenks*, 2 McLean (U. S.), 130.

<sup>2</sup> *Brisenden v. Chamberlain*, 53 Fed. Rep. 307.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Bonnafée v. Williams*, 3 How. (U. S.) 574.

of the courts of the United States depends upon the citizenship of the parties, it has reference to the parties *as persons*. A petition for removal must, therefore, state the personal citizenship of the parties, and not their official citizenship, if there can be such a thing."<sup>1</sup> A receiver is held to be a representative as much as an executor; and on motion to *remand* to the State court an action against him which has been *removed*, his personal, and not his official, citizenship, will be alone regarded.<sup>2</sup>

**§ 6986. Reviving in Favor of Receiver Actions Commenced by Corporation.**— Under a statute of New York enacted in 1832, relating to the abatement of suits by or against corporations, a suit which had been brought by the corporation might be continued by a receiver appointed to take charge of the assets of the corporation, either in his own name as such receiver, or in the name of the corporation, under an order of the court made on a summary application. *Associations* under the general banking act of that State were *corporations*, and suits brought by them in the name of their president might be continued in the name of the receiver under a special order of the court; but, after the appointment of the receiver, and the transfer to him of all the property and effects of the association, such a suit could not be continued and prosecuted in the name of the *president* of the association.<sup>3</sup>

**§ 6987. Revivor of Actions Commenced by the Receiver and Pending at his Death or Removal.**— If the receiver brings an action and afterwards *dies*, and another person is appointed receiver in his place, the proper practice is to *revive* the action in the name of the new receiver as plaintiff. The case is similar to that of an executor or administrator, trustee, or other person suing in a representative capacity: the

<sup>1</sup> *Amory v. Amory*, 95 U. S. 186, — holding that a petition for removal, which stated that the plaintiffs, "as executors," were citizens of a partic-

ular State, did not show ground for removal.

<sup>2</sup> *Davies v. Lathrop*, 12 Fed. Rep. 353; *s. c.* 12 Fed. Rep. 854.

<sup>3</sup> *Talmage v. Pell*, 9 Paige (N. Y.), 410.

cause of actions does not abate at his death, but is properly revived by *scire facias*,<sup>1</sup> or, under the modern codes, by *motion*, in the name of his successor. So, in New York where the receiver of an insurance company brings an action as such, and, pending the action, he is *removed* and another person appointed in his place, it is the proper practice to substitute the successor as plaintiff in the action; and the subsequent *death* of the first receiver does not abate the action, nor affect it in any respect.<sup>2</sup>

**§ 6988. Effect of Discharge of Receiver on Actions Pending against Him.**—The general theory is, that the liability of a receiver is *official*, and that any judgment recovered against him is to be satisfied exclusively out of the trust funds in his hands, and is not leviable upon property belonging to him in his own right. It is a part of this theory that when the receiver is discharged from his trust, actions pending against him *abate*, and that no judgment can thereafter be rendered against him, unless the order of discharge provides for the continuance of such actions.<sup>3</sup> This doctrine has been explained in Texas in the following language: "The sole liability of a receiver, except in cases in which he is personally at fault, is official; and when his official career ceases, and the property through which alone his official liability may be discharged has passed from his hands in pursuance of the orders of the court that appointed him, and he has been by that court discharged from his trust, then no judgment can be rendered against him: with the termination of his official existence ends his official liability."<sup>4</sup>

**§ 6989. Compulsory Reference under the New York Statute.**—Statutes existing in the State of New York relating to the trial of controversies before referees, allow a compulsory reference where there is a controversy *in respect to a debt due to or by an*

<sup>1</sup> *Searcy v. Stubbs*, 12 Ga. 437.

<sup>2</sup> *Sheldon v. Adams*, 27 How. Pr. (N. Y.) 179.

<sup>3</sup> *Farmers' &c. Co. v. Central R. Co.*, 7 Fed. Rep. 537.

<sup>4</sup> *Ryan v. Hays*, 62 Tex. 42, 47; *Brown v. Gay*, 76 Tex. 444, 447.  
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*insolvent corporation.* It is held that such a reference does not violate the *right of trial by jury*, because it presents a case wherein, before the adoption of the constitution, a suit in equity would lie,—the controversy being an incident to the winding up of the affairs of the insolvent corporation and the distribution of its assets.<sup>1</sup> The fact that the receiver has brought an action at law upon notes held by the corporation does not preclude him from afterwards applying for a compulsory reference under the statute, and it is competent for the court ordering the reference to direct a *discontinuance* of the action, and it is in the discretion of the court whether or not the *costs* will be allowed the defendant therein.<sup>2</sup> Upon the filing of the report of the referees, in the absence of any explicit statutory directions as to what proceedings shall follow, the court has implied authority to enter up a judgment in conformity with the report,<sup>3</sup>—of course, after giving the parties a reasonable opportunity to except or object to it.

<sup>1</sup> *Sands v. Kinbark*, 27 N. Y. 147;      <sup>2</sup> *Crosby v. Day*, *supra*; affirming *Crosby v. Day*, 81 N. Y. 242, 244.      *s. c.* 16 Hun (N. Y.), 291.

<sup>3</sup> *Austin v. Rawdon*, 42 N. Y. 155.



## CHAPTER CLXIV.

### INCIDENTAL POWERS AND DUTIES IN ADMINISTERING THE TRUST.

SECTION	SECTION
6993. Following the statute.	7004. Power to lease.
6994. Federal court receiver must proceed according to the law of the State.	7005. Power to mortgage.
6995. Diligence required of the receiver.	7006. Authority of a receiver to invest.
6996. Redeeming from a mortgage.	7007. His power to make contracts.
6997. Affirming or disaffirming sales made after insolvency.	7008. Cannot control corporate elections.
6998. His obligation to pay rent.	7009. Granting right of way to another railroad.
6999. Remedies of landlord: distress — intervening petition — priority in distribution.	7010. Sales by receivers.
7000. Receiver's duty to pay taxes.	7011. Further of such sales.
7001. Railroad property not salable in parts for taxes.	7012. Control of the court over such sales.
7002. Whether a franchise tax collectible after appointment of a receiver.	7013. Purchaser takes subject to what liens.
7003. Judgment against receiver for taxes.	7014. Receiver purchasing at his own sale.
	7015. Subsequent judgment creditor cannot redeem.
	7016. Compensation of receiver.
	7017. When chargeable with interest.

§ 6993. **Following the Statute.** — It seems scarcely necessary to suggest that, in the case of what is called a "*statutory receiver*," where the proceeding is instituted and regulated by statute, the various steps taken in the proceeding must conform to its requirements;<sup>1</sup> and this, in many cases, will illustrate the inconvenience of attempting a close and strict codification of judicial procedure, which has the result of putting the court and the parties in a strait-jacket, so to speak, and of restraining, in particular instances, the taking of steps which may become necessary to justice. This may, per-

<sup>1</sup> Attorney-General v. Atlantic Mut. Life Ins. Co., 77 N. Y. 336.  
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haps, be illustrated by the case just cited, where a life insurance company had been put into the hands of a receiver under a statute of New York, and an *actuary* had been duly appointed, as prescribed by the statute, who made his report, which showed that the assets of the company were insufficient under the laws of the State to pay its liabilities. Thereupon the court made an order directing the receiver to sell and convert the assets into money and to pay out the proceeds thereof in the manner prescribed by the statute. It was held, on an appeal by the company from this order, that the Court of Appeals had no power to *send back the report of the auditor*, but that, if such a power existed, it was a discretionary one, resting in the court of original jurisdiction.<sup>1</sup>

**§ 6994. Federal Court Receiver must Proceed According to the Law of the State.** — An act of Congress, provoked by the notorious abuses of Federal court receiverships, reads: "That whenever, in any cause pending in any court of the United States, there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall willfully violate the provisions of this section, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine not exceeding three thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."<sup>2</sup>

**§ 6995. Diligence Required of the Receiver.** — It has been held, with reference to the business of a partnership, that the law requires of the receiver no more than the usual and ordi-

<sup>1</sup> Attorney-General *v.* Atlantic Mut. Life Ins. Co., 77 N. Y. 336. Remedy where receiver refuses to take possession and act: Moore *v.* Mercer Wire

Co., 15 Atl. Rep. 305; *s. c.* 4 Rail. & Corp. L. J. 473 (not officially reported).

<sup>2</sup> Act Cong. March 3, 1887, § 2.

nary reasonable diligence in the execution of his trust;<sup>1</sup> and this is no doubt applicable to every kind of receivership; and this reasonable diligence is the *diligens patrisfamilias* of the civil law, which Dr. Wharton, in his work on Negligence, translates as being the *diligence of a good business man*.

§ 6996. **Redeeming from a Mortgage.** — Where the property has been sold under a mortgage or deed of trust, under such circumstances that the mortgagor would have a right to maintain a suit in equity to redeem, a receiver may, it seems, maintain a similar action. Such an action was maintained where the mortgagees took possession, exposed the property to sale, and bid it in at one-sixtieth of its value; and it was held that a previous tender or offer to pay the balance due on the mortgage, over and above the amount of the bid, was not necessary. Nor need the receiver, in his complaint, offer to pay the amount which should be found due.<sup>2</sup> Whether the receiver is obliged to bring an action to redeem is a question which refers itself to the principle already stated,<sup>3</sup> that he is obliged to use the diligence of a good business man in the execution of his trust. It has been held that the receiver of an insolvent firm is not obliged to redeem stock which the firm has pledged, by paying the debt secured by such pledge, and that he would not have any right to do this at the risk of loss to the general creditors, for the benefit of the customers whose stock had been pledged.<sup>4</sup> The obligation of the receiver to redeem would seem to resemble his obligation to pay the rent accrued under a lease; and where he is appointed to wind up an insolvent corporation, his position is undoubtedly that of an assignee in bankruptcy, who is not bound to accept what is called *onerous property*, — a subject treated in another place.<sup>5</sup>

<sup>1</sup> Johnston v. Keener, 23 Ill. App. 220.

<sup>2</sup> Casserly v. Witherbee, 119 N. Y. 522; s. c. 23 N. E. Rep. 1000; 30 N. Y. St. Rep. 92.

<sup>3</sup> Ante, § 6995.

<sup>4</sup> Chamberlain v. Greenleaf, 4 Abb.

N. Cas. (N. Y.) 178, decision at special term. Where the receiver was not in possession or control of the stock, a tender made to him by the purchaser did not impose any special duty on him to redeem the stock. *Ibid*.

<sup>5</sup> Post, § 6998.

§ 6997. **Affirming or Disaffirming Sales Made after Insolvency.**—Receivers, appointed under the New Jersey statute relating to insolvent corporations, may, in their *discretion*, and on grounds of expediency, *ratify* a sale made by the corporation after insolvency, or even after a suspension of its business for want of funds, though such sale is declared by the statute null and void as against creditors.<sup>1</sup>

§ 6998. **His Obligation to Pay Rent.**—In the case of a receiver appointed to wind up an insolvent corporation, the principle which has been applied by the courts of England and this country, in the case of an *assignee in bankruptcy*,<sup>2</sup> undoubtedly obtains; which is that the receiver is not bound to accept what is termed *onerous property*. He is not bound, therefore, if to do so will be prejudicial to the interests of the creditors, to comply with the covenants of the lease by paying rent in full, but he may allow the lease to be forfeited, and allow the lessee to intervene *pro interesse suo*, to recover his distributive share of any rents accruing prior to the date of the forfeiture.<sup>3</sup> If, on the other hand, it becomes clear that it will be profitable and advantageous to the insolvent estate in his hands, to hold on to the lease, even for the purpose of selling it, where it is assignable, he may undoubtedly do this; and where he makes such an *election*, the estate in his hands will become liable to pay to the lessee the full amount of the rents already accrued, and thereafter accruing. In general, the same result will follow where the court orders him to take possession of the leased property, by an order, the terms of which leave him no election. But it seems that if he is appointed receiver of an estate where part of the estate consists of leased property, he *has an election* whether he will take possession of the leased property and assume the liability to

<sup>1</sup> *Suydam v. Receivers*, 3 N. J. Eq. 114.

<sup>2</sup> *Ante*, § 3122; *Re Merryfield*, 3 Nat. Bank. Reg. 98.

<sup>3</sup> This seems to the writer to be the result of the best adjudications

on the subject: *People v. National Trust Co.*, 82 N. Y. 283. Compare *Gaither v. Stockbridge* (Md.), 8 Cent. Rep. 789; *Hoyt v. Stoddard*, 2 Allen (Mass.), 442.

pay rent according to the covenants of the lease; and the mere fact of his appointment does not render him liable so to pay rent, until he makes his election, or does some act which, in law, would be equivalent to an election.<sup>1</sup>

**§ 6999. Remedies of Landlord: Distress—Intervening Petition—Priority in Distribution.**—In England, where a railway company, whose properties have passed into the hands of a receiver, holds a property under a lease subject to an annual rent charge, with the reservation to the lessor of the right to enter and *distrain* for rent in arrear, the appointment of a receiver will not oust the lessor of this right of *distress*, but the court will allow him, on application, to distrain, notwithstanding the possession of its receiver. The case is said

<sup>1</sup> *Com. v. Franklin Ins. Co.*, 115 Mass. 278; *Turner v. Richardson*, 7 East, 335; *Moore v. Higgins*, 20 Week. Dig. (N. Y.) 123; *s. c.* reported in full, N. Y. Daily Reg. Jan. 9, 1885; *People v. Insurance Co.*, 30 Hun (N. Y.), 142; *Re Oak Pits Colliery Co.*, 21 Ch. Div. 322, 330; *Re Lundy Granite Co.*, L. R. 6 Ch. 462; *Re Brown*, 18 Ch. Div. 649; *Woodruff v. Erie R. Co.*, 93 N. Y. 609 (reversing *s. c.* 25 Hun (N. Y.), 246). Compare *Miltenberger v. Logansport R. Co.*, 106 U. S. 286, 288; also *Re Bridge-water Engineering Co.*, 12 Ch. Div. 181. The English doctrine is thus expressed by Lord Justice Lindley, in giving the judgment of the English Court of Appeal: "When the liquidator retains the property for the purpose of advantageously disposing of it, or when he continues to use it, the rent of it ought to be regarded as a debt contracted for the purpose of winding up the company, and ought to be *paid in full*, like any other debt or expense properly incurred by the liquidator for the same purpose; and in such a case it appears to us that the rent for the whole period, during

which the property is so retained or used, ought to be paid in full, without reference to the amount which could be realized by a distress." *Re Oak Pits Colliery Co.*, 21 Ch. Div. 322, 330. On the same principle, where a receiver is appointed to take charge of a *leasehold estate*, which is *sublet* to various tenants, for the purpose of collecting the rents and profits,—such a receiver being usually called "a receiver of rents and profits,"—his primary duty is to pay the *head-rent*, or rent which is due from the debtor whose custody he has displaced, to the principal landlord; and he is bound to do this without any order of court to that effect, and without compelling the landlord to resort to any proceedings for the purpose of enforcing such payment. *Balfe v. Blake*, 1 Ir. Ch. (N. S.) 365; *Walsh v. Walsh*, 1 Ir. Eq. 209. This is obvious when it is considered that the very fact of his appointment, and of his taking possession of property which is thus liable to a head-rent, is an affirmation of the covenant in the lease under which such head-rent is due.

to be similar to that of an application by a stranger for leave to bring an action in ejectment.<sup>1</sup> It was held that the court ought not, under such circumstances, to grant permission to distrain upon the property of a *railway company* which had been conveyed to trustees for the benefit of creditors, nor upon locomotives passing over the land for the purpose of working the line.<sup>2</sup> It has been held that the mere fact that the receiver takes possession of leased property under an order of the court, will not operate as an affirmation of the covenants of the lease, in such a sense as to require the receiver to pay rent in full, where the order of court reserves to the lessor the option of *forfeiting the lease* for the non-payment of rent. And where the railway property consisted of an extensive railway system, several of the parts of which consisted of lines leased from other companies, and some of these leased lines did not, in the hands of the receiver, upon an account separately kept, pay operating expenses,—it was held that the lessees were not entitled to payment of rent in full, to the prejudice of the rights of the bondholders under a first mortgage upon those lines which did pay expenses;—in other words, that the money equitably belonging to the bondholders of the profitable lines could not be diverted to the payment of rent due to the lessors of the unprofitable lines.<sup>3</sup> In *America*, where rent due by the receiver is not paid, the proper practice of the landlord is to intervene *pro interesse suo*, and to procure an order from the court directing the receiver to make payment. As in other cases, a separate action against the receiver, without leave of court, would be a *contempt*;<sup>4</sup> and so, for stronger reasons, would a *distress*, if that remedy existed in ordinary cases under the law of the jurisdiction. The rents which go into the hands of the receiver

<sup>1</sup> *Eyton v. Denbigh &c. R. Co.*, L. R. 6 Eq. 14; *s. c. Ibid.* 488. *Granting leave to distrain for rent*: *Attorney-General v. Coventry*, 1 P. Wms. 306; *Martin v. Black*, 9 Paige (N. Y.), 641; *s. c.* 38 Am. Dec. 574.

<sup>2</sup> *Eyton v. Denbigh &c. R. Co.*, L. R. 6 Eq. 488.

<sup>3</sup> *Central Trust Co. v. Wabash &c. R. Co.*, 34 Fed. Rep. 259.

<sup>4</sup> *Riggs v. Whitney*, 15 Abb. Pr. (N. Y.) 388. That the *solicitor* in a case, who improperly assumes the character of receiver, makes himself responsible for rents lost by his *neglect*,—see *Wood v. Wood*, 4 Russ. 558.

from *subtenants* of the debtor whose property has passed into his custody, are not subject to distribution among the creditors, until the claim of the original landlord for rent has been extinguished. "The superior equity of the landlord," said the court, "in such a case is so obvious that it ought not to be deemed open for discussion; especially where, by the original letting, the right of the receiver to continue in the receipt of rent from the under-tenants must necessarily depend upon his performance of the lessee's covenant to pay the rent reserved to the landlord."<sup>1</sup>

§ 7000. **Receiver's Duty to Pay Taxes.** — On a principle elsewhere stated,<sup>2</sup> the appointment of a receiver can have no effect upon the *lien* of the State, or of a municipal corporation under a law of the State, upon the property for public taxes, though it may change the mode of enforcing the lien.<sup>3</sup> Taxes being, under most taxing systems, a lien upon private property, cutting under all other liens, the court appointing the receiver obviously will require him to devote the first moneys that come into his hands, available for the purpose, to the payment of public taxes; and the court will, in the distribution of the proceeds of a foreclosure sale, give the claim of the State for public taxes a *preference* over the mortgage bondholders, and will consequently give such a preference to receiver's certificates issued to raise money to pay such taxes.<sup>4</sup> As the

<sup>1</sup> *Riggs v. Whitney*, 15 Abb. Pr. (N. Y.) 388, 390.

<sup>2</sup> *Ante*, § 6963; *post*, §§ 7293, 7294.

<sup>3</sup> As to the right to levy upon and sell the property of a railway company in the hands of a receiver of a court of the United States, to satisfy unpaid taxes due the State, — see *State v. Atlantic & C. R. Co.*, 3 Woods (U. S.), 434. Suit for taxes assessed against a *national bank*: *Post*, § 7325.

<sup>4</sup> *Union Trust Co. v. Illinois Midland R. Co.*, 117 U. S. 434. A statute authorizing the collection of taxes by an action brought by the Attorney-

General at the instance of the Comptroller in the name of the people, does not restrict the general power of the court holding the property by means of a receiver, to direct its receiver to pay such taxes; but, on the contrary, a judgment recovered for taxes under the statute can be made effectual in no other way. *Central Trust Co. v. New York & C. R. Co.*, 110 N. Y. 250; *s. c.* 1 L. R. A. 260; 18 N. Y. St. Rep. 30; 4 Rail. & Corp. L. J. 462; 18 N. E. Rep. 92. It has been held in Pennsylvania, that the appointment, in a court of the United

receiver takes the property subject to all liens and other established rights, if the validity of a tax has already been established against the property, in a litigation in which the corporation was a defendant, that will be conclusive upon the receiver, and he will not be permitted to contest the question over again.<sup>1</sup> Taxes assessed upon the shares of a corporation, are, it has been seen,<sup>2</sup> assessed against the corporation itself and collected from it, under many taxing systems. But it has nevertheless been held that, in point of substance, such taxes are taxes due from the shareholders, and not from the corporation, and that the assessing of them against the corporation is merely a convenient mode of assessment and collection. From this the conclusion has been deduced that, after the corporation passes into the hands of a receiver by reason of insolvency, such taxes are not properly payable by him.<sup>3</sup>

**§ 7001. Railroad Property not Salable in Parts for Taxes.**

It is competent for the court, in cases of necessity, to authorize a sale of a part of the property to pay the public taxes assessed thereon; but it has been held that the order should specify the property which is to be sold, and should not be granted except upon satisfactory proof of the necessity of making such a sale.<sup>4</sup> It was held by Mr. Justice Bradley, at circuit in Georgia, that the writ of *fieri facias*, issued under the laws of that State to enforce the payment of taxes, is subject to the same rules as to its modes of execution as writs issued upon judgments in favor of private parties; and that, where a railroad is in the hands of a Federal court receiver, an application

States, of receivers of the property of a railway company, interposes no bar to what is called in that State a "settlement" for a tax on gross receipts, made against the corporation by the accounting officers of the State, in pursuance of a statute of the State. The court regarded the question as merely technical, whether the settlement was made in form against the corporation or against the receiver, since in either event the payment

must be made out of the corporate funds. *Philadelphia &c. R. Co. v. Com.*, 104 Pa. St. 80.

<sup>1</sup> *Hopkins v. Taylor*, 87 Ill. 436.

<sup>2</sup> *Ante*, § 2914, *et seq.*

<sup>3</sup> *Relfe v. Hudson*, 11 Mo. App. 374. In *Lionberger v. Rowse*, 43 Mo. 67, it was pointed out that such a tax is a tax against the shareholders, and not against the capital owned by the company.

<sup>4</sup> *Dixon v. Rutherford*, 26 Ga. 149.



made on behalf of the State for leave to sell the depot, freight-houses, passenger-houses, and offices of the railroad company, for taxes, under such a writ, will be denied, — the reason being that a railroad property, by reason of its public character, is a unit, and *cannot be cut up and sold in pieces under execution*.<sup>1</sup>

**§ 7002. Whether a Franchise Tax Collectible after Appointment of a Receiver.** — The prevailing idea of what is called the *franchises* of a corporation, when dealt with as the subject of *taxation*, is that it is the capacity possessed by the corporation of making money through the use of the special or exclusive privileges conferred upon it by the State.<sup>2</sup> Hence, where a receiver is appointed to *wind it up*, in a proceeding instituted by the State, it logically follows that a tax upon its franchise is no longer leviable, for the reason that the State has intervened and prevented it from further exercising its franchise.<sup>3</sup> But the mere act of taking possession of the property of a railroad company, by a receiver appointed by a court pending a proceeding to *foreclose a mortgage* thereon, does not put an end to the franchises of the corporation, though it divests the corporation itself, temporarily at least, from power to exercise them, and invests the receiver with that power. In operating the railroad, the receiver continues to exercise the franchises of the corporation, as the corporation itself had previously done; and therefore a franchise tax, laid by a stat-

<sup>1</sup> *State v. Atlantic &c. R. Co.*, 3 Woods (U. S.), 434. Proceeding against receiver to compel him to list fund in his hands for taxes: *Spalding v. Com.*, 88 Ky. 135.

<sup>2</sup> *Ante*, § 5560.

<sup>3</sup> *Com. v. Lancaster Sav. Bank*, 123 Mass. 493. In this case it was held that the tax, imposed on savings banks by the statutes of Massachusetts of 1862, chapter 224, and 1868, chapter 315, to be assessed annually on each bank, one-half on the average amount of their deposits for the six months preceding the first day of

May, and the other half on the average amount for the six months preceding the first day of November, is an *excise tax* upon the value of the franchise of a bank on those days; and if, on either day, such bank is in the hands of receivers, and perpetually enjoined from doing business by a decree of the Supreme Judicial Court, it is not liable to pay any part of the tax assessed on that day, although it has transacted business during a part of the six months preceding.

ute in general terms against such a corporation, is chargeable upon its property in the hands of its receiver, and the court appointing the receiver will, on the intervention of the State, require him to pay the same.<sup>1</sup>

§ 7003. **Judgment against Receiver for Taxes.**—Although taxes due the State are, under almost every taxing system, a *preferred demand*, yet where a judgment is rendered against a receiver for taxes, it ought not to be entered, in terms, against the corporation, but it should be so entered as to be enforced only against the funds that are, or ought to be, in the hands of the receiver.<sup>2</sup>

§ 7004. **Power to Lease.**—A receiver, whether appointed to wind up or to hold property *pendente lite*, has not, it may be assumed, any power to make a lease of the property, without the authorization of the governing statute, or of the order of the court appointing him. The receiver of a railroad in Tennessee, under an appointment of the Governor, has no power to lease the road so as to vest the lessees with an interest in the road and its franchises, which could not be divested by a subsequent act of the legislature.<sup>3</sup>

§ 7005. **Power to Mortgage.**—The power of the court to authorize the receiver to *mortgage* the property in his hands is essentially the same as its power to authorize him to issue *receiver's certificates* chargeable as a *first lien* upon the property, cutting under existing liens,—a subject hereafter considered.<sup>4</sup> The power can only be exercised on the principle of *absolute necessity*, especially in the case of a private estate, which is not, like the property of a railroad company, charged with any duty toward the public. Nevertheless, it has been held, in the case of a private estate, that the court may authorize the receiver to mortgage it, when necessary to raise money

<sup>1</sup> Central Trust Co. v. New York &c. R. Co., 110 N. Y. 250; reversing s. c. 45 Hun (N. Y.), 587; 1 L. R. A. 260; 18 N. Y. St. Rep. 30; 4 Rail. & Corp. L. J. 462; 18 N. E. Rep. 92.

<sup>2</sup> Com. v. Runk, 26 Pa. St. 235. Compare *post*, §§ 7324, 7325.

<sup>3</sup> McMinnville &c. R. Co. v. Huggins, 12 Heisk. (Tenn.) 177.

<sup>4</sup> *Post*, § 7168, *et seq.*

to *redeem it from sales for taxes*, even though it be held upon a trust which does not provide for selling or mortgaging. The court took the view that a court might exercise, for the purpose of protecting the property, all the powers of absolute ownership, and might authorize the receiver so to mortgage, although no notice of the application so to do was given to the parties in interest, this being excused by the shortness of time.<sup>1</sup>

§ 7006. **Authority of a Receiver to Invest.**—Where the statute goes no further than to authorize the receiver to *collect* and *pay*, and no directions are given him by the court, it is simply his duty to keep and protect the trust fund and to hold it ready for distribution; and he has no power to *invest* it. If the parties interested desire it to be invested, they may apply to the court for such an order, and if they neglect to do so, a loan of it by the receiver, even temporarily, is a breach of trust.<sup>2</sup>

<sup>1</sup> *Burroughs v. Gaither*, 66 Md. 171.

<sup>2</sup> *Utica Ins. Co. v. Lynch*, 11 Paige (N. Y.), 520, 522; recognized but not applied in *Attorney-General v. North American Life Ins. Co.*, 89 N. Y. 94, 107. In this last case, the receiver of a life insurance company, without authority of the court, but, as the Court of Appeals found, acting "in entire good faith and without a trace of any wrong intention," and without receiving any personal benefit from the transaction, placed the securities in his custody in the hands of brokers to be *loaned on call*, and charged himself with the amounts received for interest, and no part of the fund was lost, and the parties interested were not thereby injured, but were probably benefited. The court held that the order *charging the receiver with interest* beyond the amount received, was error. *Attorney-General v. North American Life Ins. Co.*, 89 N. Y. 94. A decision on its face so

questionable deserves some explanation, and explanation does not better it, but makes it worse. It refers itself to the practice of brokers in New York, in their gambling transactions, of *borrowing* from each other securities in order to *deliver*, where they have made sales for future delivery and are required to deliver in kind. It will puzzle a lawyer or judge whose ideas of equity have not been corrupted and obscured by the atmosphere of stock-gambling transactions, to understand how the receiver of an insolvent corporation can lend the securities in his hands to a broker, without an order of court, "in entire good faith," or in any other good faith. A receiver thus dealing with the funds in his custody ought to be charged the highest rate of interest, and it ought to be compounded, for he is acting in gross breach of his trust.

§ 7007. **His Power to Make Contracts.**—The power of a receiver to make contracts is derived from the *order of the court* appointing him, or, where he is a *statutory receiver*, from the *statute* under which he is appointed. We shall hereafter see that his power to issue what are called *receiver's certificates* is derived from the order of the court appointing him, and that the obligation embraced in such certificates is not the personal obligation of the receiver, but is rather the obligation of the court itself, or the promise made by the court to the lawful holder of each certificate that the court will see to it that it is paid out of the funds in its hands, or secured, before the court relinquishes the fund.<sup>1</sup> It has been held that the receiver of a railroad has power to contract with another company for the interchangeable use of the track of the two companies,<sup>2</sup> and this power would seem to arise under the operation of a general order of appointment authorizing him to operate the road, *pendente lite*. It has been held that the fund in the hands of receivers of a railroad, who had contracted with another such company to pay for a portion of the repairs of a track and bridge *used jointly* by the two companies, is liable for its due proportion of the repairs; although, after making the contract, the receivers surrendered the property and road in connection with which the track and bridge were operated, to the receiver of the property of another company, under a *lease* from which company the receivers making the surrender were operating them.<sup>3</sup>

§ 7008. **Cannot Control Corporate Elections.**—A receiver being appointed for the *administration* of the property of the corporation, and for no other purpose, it seems scarcely necessary to say that he cannot control or interfere with the election of directors by the corporation, or do any other constituent act affecting its organization.<sup>4</sup>

<sup>1</sup> *Post*, § 7168, *et seq.*

<sup>2</sup> *Jourdan v. Long Island R. Co.*, 42 Hun (N. Y.), 657, *mem.*; *s. c.* 6 N. Y. St. Rep. 89.

<sup>3</sup> *Central Trust Co. v. Wabash & C. R. Co.*, 52 Fed. Rep. 908.

<sup>4</sup> *Farmers' & C. Bank v. Philadelphia & C. R. Co.*, 14 Phila. (Pa.) 456.

§ 7009. **Granting Right of Way to Another Railroad.** — For similar reasons, a receiver of a railroad has no power to grant to another railroad company the privilege of crossing the tracks of the railroad in his possession, especially at a different grade, without first obtaining leave of the court to make the grant,<sup>1</sup> unless the order appointing him is large enough to include such a power.

§ 7010. **Sales by Receivers.**<sup>2</sup> — Where the receiver makes a *fraudulent sale* of any part of the assets in his hands, to the prejudice of the creditors of the estate, their remedy, under the remedial system of New York, is not restricted to an application for relief to the court appointing the receiver, but they may bring a separate action in equity to vacate and set aside his order of sale.<sup>3</sup> It has been held in New York that *receivers* or *trustees* of the effects of an *insolvent corporation domiciled in another State*, appointed under the laws of such State, with power to take possession of all the effects of such corporation, “and to sell, convey, or assign its real and personal estate,” — have power to *sell and assign a debt* due to the corporation, from a citizen of New York; and that such a sale and assignment give to the purchaser an equitable right of action, as against the debtor, in the courts of New York.<sup>4</sup> Where the receiver has power to *assign* the property passing into his custody, he may exercise this power in his own name, without using the name of the corporation or the *corporate seal*.<sup>5</sup> A sale by foreign receivers or trustees is said to be in the nature of a *judicial sale*, and not open to objection on the ground of *champerty* or *maintenance*. The principles of the common law and the statutes in relation to *champerty* do not apply to judicial sales, or to sales under a judgment, order, or decree of a court having competent jurisdiction to order the sale.<sup>6</sup>

<sup>1</sup> Howlett v. New York & c. R. Co., 14 Abb. N. Cas. (N. Y.) 328.

<sup>2</sup> Compare *ante*, § 6219, *et seq.*

<sup>5</sup> *Ibid.*

<sup>3</sup> Hackley v. Draper, 60 N. Y. 88; affirming *s. c.* 2 Hun (N. Y.), 523; 4 Thomp. & C. (N. Y.) 614.

<sup>4</sup> Hoyt v. Thompson, 5 N. Y. 320; reversing *s. c.* 3 Sandf. (N. Y.) 416.

<sup>6</sup> *Ibid.* On the question of *champerty* in making judicial sales, see Stevens v. Hauser, 39 N. Y. 302; Coleman v. Manhattan Beach Improvement Co., 94 N. Y. 229, 234.

Where the receiver is appointed at the instance of judgment creditors, and the primary object of the sale by the receiver of the property of the corporation is to satisfy judgments, no legal principle stands in the way of the *creditors bidding* at the sale. One can bid for the benefit of all, or all can bid together.<sup>1</sup>

§ 7011. **Further of Such Sales.**—It seems that the receiver, making sale of the property under the order of the court, retains a *lien* thereon as a security for any balance of purchase-money which may remain unpaid. At least, this doctrine has been applied in the case of the sale of a railroad property by a statutory trustee.<sup>2</sup> It seems that the property may be subsequently ordered to be resold for the purpose of enforcing this lien; but it has been held that, where it consists of *two railroads*, and there is a balance due on a prior sale of *each* railroad, they should not be sold together, for the payment of the aggregate amount of the liens, but should be *sold separately*.<sup>3</sup> The court may provide, in the order of sale, that the proceeds of the sale, after payment of the expenses of the receivership and the costs of the foreclosure proceeding, and all such claims as have been awarded a priority, may be *paid in the first mortgage bonds* given by the company.<sup>4</sup> The receiver is an officer of the court, and must obey the orders of the court; and where he is ordered by the court to make a sale of the property which has come into his custody, he is not a *trespasser* for making such sale, and all persons aiding and assisting him enjoy the protection of the court, just as he does.<sup>5</sup> A purchase of land at a receiver's sale is not rendered *void* by the circumstance that the purchaser is an *attorney* for the party prosecuting the suit in which the receiver has been appointed, and that the sale is for an inade-

<sup>1</sup> Libby v. Rosekrans, 55 Barb. (N. Y.) 202.

<sup>2</sup> State v. Anderson, 91 U. S. 667;      <sup>4</sup> McIlhenny v. Binz, 80 Tex. 1; followed in State v. Jacksonville &c. s. c. 26 Am. St. Rep. 705.  
R. Co., 16 Fla. 708.

<sup>5</sup> Walling v. Miller, 108 N. Y. 173;

<sup>3</sup> State v. Jacksonville &c. R. Co., s. c. 2 Am. St. Rep. 400.

*supra*.

quate price, influenced by erroneous, though not fraudulent, representations, by the attorney; but it is said that objections to the sale on such grounds must be raised by a motion to set aside the sale.<sup>1</sup>

§ 7012. **Control of the Court over Such Sales.**—The receiver is subject to the direction and control of the court in the matter of making sale of property in his hands. If he makes a contract of sale, the court may, in the exercise of its supervisory power over him, refuse to sanction it, so long as it remains executory, provided the terms of it appear to be inequitable,—as, for instance, where the purchaser, at the time of the sale, had information of facts unknown to the receiver, which greatly enhanced the value of the property.<sup>2</sup> Moreover, the court has power, in entering the decree of sale, to order that the sale shall not be made for less than a stated price. Such an order may be found necessary to prevent a sacrifice of the property.<sup>3</sup>

§ 7013. **Purchaser Takes Subject to What Liens.**—As in case of other judicial sales, there is *no warranty of title*, express or implied, and the purchaser takes only the title which the corporation had, and he takes this title subject to any paramount liens or equities subsisting against the property. But we have seen that the corporation is incapable of annexing any lien to its property, or of creating any equity against it, after it has passed into the hands of a receiver;<sup>4</sup> and, following out this principle, it has been held that, as against the purchaser at a valid receiver's sale, no lien can be made to attach to the property, which did not rest upon it at the time of the *institution of the suit* under which the sale was made.<sup>5</sup>

<sup>1</sup> Chautauqua County Bank v. White, 6 N. Y. 236; s. c. 57 Am. Dec. 442.

<sup>2</sup> Attorney-General v. Continental Life Ins. Co., 94 N. Y. 199.

<sup>3</sup> McIlhenny v. Binz, 80 Tex. 1; s. c. 26 Am. St. Rep. 705. Selling "clear of incumbrances," under a statute of New Jersey: Statute reme-

dial: Trustees in possession of railroad to operate it, leaving mode of sale to be settled at conclusion of proceedings: Randolph v. Larned, 27 N. J. Eq. 557.

<sup>4</sup> Ante, § 6903; post, §§ 7293, 7294.

<sup>5</sup> Texas Trunk R. Co. v. Lewis, 81 Tex. 1; s. c. 26 Am. St. Rep. 776.

But this must be qualified with the statement that the purpose of the suit was, on the face of the bill, the appointment of a receiver; for otherwise, there is no sound principle on which the subsequent appointment of a receiver on a supplementary application, on an amendment to the bill, can be held to operate so as to displace equities which have been created in the mean time. Where the receiver is appointed in sequestration proceedings, a judgment creditor, who recovers judgment after the property is thus taken *in custodia legis*, has no right to *redeem* real estate sold by the receiver under direction of the court, but the sale is absolute.<sup>1</sup>

§ 7014. **Receiver Purchasing at his Own Sale.**—As in the case of any other trustee, the receiver will not be permitted to purchase, *for his own benefit*, property which he holds as receiver; because he cannot be both buyer and seller, and to permit him to purchase at his own sale would hold out a direct inducement to corruption in making the sale.<sup>2</sup> The rule is a rule of *public policy*, and is not at all dependent upon the question whether *fraud*, in fact, supervened at the sale. Nor is it necessary that the receiver himself should have conducted the sale; he cannot bid at a judicial sale of the property in his custody, conducted by a *master in chancery* even, where the proceeding which has resulted in the sale has been an adversary proceeding in court against himself.<sup>3</sup> One court has carried the rule to the extent of holding that the receiver

<sup>1</sup> *Watkins v. Minnesota Thresher Man. Co.*, 41 Minn. 150.

<sup>2</sup> *Herrick v. Miller*, 123 Ind. 304; *Jewett v. Miller*, 10 N. Y. 402; *s. c.* 61 Am. Dec. 751; *Carr v. Houser*, 46 Ga. 477; *Alven v. Bond*, 3 Ir. Eq. 365; *Anderson v. Anderson*, 9 Ir. Eq. 23; *Eyre v. McDonnell*, 15 Ir. Ch. (N. s.) 534; *Titherington v. Hodge*, 81 Ky. 286. This doctrine has been carried to the length of holding that, where a receiver is appointed to receive the rents and profits of mortgaged land pending a foreclosure, and,

during the year allowed for redemption, acquires title to the mortgaged premises in his hands as such receiver, his act in so doing may be treated, by the parties to the suit in which he was appointed, as absolutely void, and as conferring upon him no right to the rents and profits which he was appointed to receive. *Ibid.* For the corresponding rule as to *directors*, see *ante*, § 4071, *et seq.*

<sup>3</sup> *Jewett v. Miller*, 10 N. Y. 402; *s. c.* 61 Am. Dec. 751.



ought not to be allowed to become the purchaser of property of which he has had the *previous management* in his character of receiver,—the view being, that to allow this would subject him to temptations to compromise his duties as receiver.<sup>1</sup> A receiver, thus purchasing at his own sale, or at a judicial sale of property in his custody, holds the subject of the purchase as *trustee* for the benefit of the *cestui que trust*, who may elect to adopt the purchase or demand a resale.<sup>2</sup>

**§ 7015. Subsequent Judgment Creditor cannot Redeem.** Where the proceeding is instituted by judgment creditors, under a statute under which all the property of an insolvent corporation is sequestered, by means of a receiver, and sold to satisfy the judgments, the one who recovers a judgment against the corporation, after the property is thus taken into the custody of the law, has *no right to redeem the real estate* of the corporation sold by the receiver under the direction of the court, but the sale is absolute.<sup>3</sup> In so holding, the court proceed upon the well-known principle that where property has been taken from the debtor into the custody of the law, to be converted into money for the payment of all the debts, to the payment of which it should be lawfully appropriated, the right of creditors subsequently to interfere with or acquire liens upon it, or rights against it, the enforcement of which would affect the rights of those acquiring title under the receiver's sale, made by authority of the court, no longer exists.

**§ 7016. Compensation of Receiver.**—Where the total receipts of the receivership were about \$95,000, and most of the

<sup>1</sup> *Anderson v. Anderson*, 9 Ir. Eq. 23.

<sup>2</sup> *Jewett v. Miller*, *supra*. In this case the sale was under an older mortgage than the mortgage under which the receiver was in possession. So, where the receiver had purchased, at an under-valuation, an *annuity* which was a charge upon certain lands of which he was receiver,

which annuity it was his duty to collect,—it was held that the personal representatives of the vendor were at liberty to rescind the sale and to recover the annuity. *Eyre v. McDonald*, 15 Ir. Ch. (N. S.) 534.

<sup>3</sup> *Watkins v. Minnesota Thresher Man. Co.*, 41 Minn. 150; s. c. 42 N. W. Rep. 862.

real work was done during the first six months, and, during this time, the receiver had clerks and assistants who received a separate compensation, and he gave to the administration of the trust only a part of his time, and used the trust moneys in a bank of which he was the owner, mingling them with his own funds, and deriving a profit from their use; and where it appeared that he had unduly delayed the administration, and had refused to account until ruled by the court to do so; — it was held that \$3,000 for the first year and \$1,000 for the subsequent two years-and-a-half of the receivership, were ample compensation, in lieu of the modest demand of something over \$11,000 made by him.<sup>1</sup>

§ 7017. **When Chargeable with Interest.** — A receiver who deposits money of the estate in a bank of which he himself is proprietor, and to his own individual credit, instead of placing it to his credit as receiver, thereby mingling it with his own funds, is guilty of a *breach of trust*, and this is not cured by direction to clerks of the bank to be ready to pay over the money at any time when called upon. Where a receiver so deposited and kept the moneys which came into his possession, delayed the administration of the trust, did not make his first account until ruled to do so, kept the money in his own hands as banker, and loaned it out, as other moneys of his bank were loaned out, at interest, although another solvent banker offered to borrow fifty thousand dollars of it at five per cent on good security, — it was held that he was chargeable with interest upon the amount of money which thus came into his hands, and which was thus held and used by him for his personal benefit.<sup>2</sup>

<sup>1</sup> *Schwartz v. Keystone Oil Co.*, 153 Pa. St. 283; s. c. 25 Atl. Rep. 1018. The opinion in this case is a scathing rebuke administered to the receiver for the manner in which he discharged his trust, and for his greed in demanding excessive compensation.

<sup>2</sup> *Schwartz v. Keystone Oil Co.*, 153 Pa. St. 283; s. c. 25 Atl. Rep. 1018. Compare *ante*, § 7006.

## CHAPTER CLXV.

## PROVING CLAIMS AGAINST THE FUND.

## SECTION

7022. Duty and power of the receiver in respect of the allowance of claims.

7023. Compromising claims against the corporation.

7024. Adjudication of claims against the estate.

7025. Claimants against the fund should intervene *pro interesse suo*.

7026. Practice of making examinations *pro interesse suo*.

## SECTION

7027. Compelling third parties to be examined *pro interesse suo*.

7028. Claimants of property intervening by petition.

7029. Evidence before the master.

7030. Conclusive effect of decree limiting time for proving claims.

7031. Proving claim does not bar separate action.

§ 7022. **Duty and Power of the Receiver in Respect of the Allowance of Claims.**— This will depend upon the directions of the *statute* under which the receiver is appointed, where there is such a statute, or upon the directions contained in the *order of the court* appointing him, where there is no such statute. Ordinarily the receiver is required to pass upon claims *in the first instance*, and to allow or disallow them, accordingly as they appear to him to be just and proper, or not. If he allows claims which the officers of the corporation deem to be unjust, no doubt *the corporation* may *file exceptions*, where it has not been dissolved, and the court will review the action of the receiver upon such exceptions. In many cases *creditors* are allowed to file exceptions; but there must obviously be a limit to this privilege, especially where the creditors are numerous; otherwise the court would find its time entirely consumed in listening to the arguments preferred by the various creditors against each others' claims. If the proceeding is a proceeding to foreclose a mortgage upon corporate property in a court of the United States, the *trustees* in the

mortgage represent all the bondholders under the mortgage, upon a principle already stated.<sup>1</sup> If the receiver is not appointed by the court, and is consequently not the officer of the court proceeding under its direction and superintendence, but is appointed by a ministerial officer under a statute, such as the receiver of a *national bank* appointed by the Comptroller of the Currency,—it is unquestionably his duty, as the representative of all the creditors, to resist the prosecution of demands against the corporation which he regards as unfounded; and he is a proper *party* in a proceeding in a State court for the adjudication of such demands.<sup>2</sup> It may be assumed that a similar position is occupied, in most statutory proceedings to wind up an insolvent corporation, by the receiver appointed therein; and that, *as the representative of all the creditors*,<sup>3</sup> it will be his duty to resist the allowance of unfounded demands. Accordingly, in New York in a proceeding by the Attorney-General to wind up an insolvent life insurance company, the receiver appointed therein has the right to *file exceptions* to the report of a referee appointed to take proof of claims.<sup>4</sup> If the receiver is appointed by, or is placed by the governing statute under the superintendence of a court of justice, he should, when doubtful as to the allowance of a particular claim, or class of claims, *seek the advice of the court appointing him*.<sup>5</sup>

<sup>1</sup> *Ante*, § 6209.

<sup>2</sup> *Turner v. First Nat. Bank*, 26 Iowa, 562.

<sup>3</sup> *Ante*, § 6939.

<sup>4</sup> *Attorney-General v. North American Life Ins. Co.*, 82 N. Y. 172. Where the statute requires creditors to come in and prove their claims before the receivers of an insolvent bank, a mere *service* upon the receivers of a *copy* of the *writ* in a suit pending against the bank, is not a compliance with the statute, as it does not tend to facilitate the purpose of the statute, of having all claims against the bank adjudicated within a prescribed time. *Read v. Frankfort Bank*, 23

Me. 318. If, in New York, where, at the time of the appointment of a receiver of an insolvent corporation, a suit is pending against it, the plaintiff therein may, at any time before the entry of a final decree excluding all creditors who have not presented their claims, be permitted to come in, prove his claim, and participate equitably in the distribution of the fund still in the hands of the receiver. *Smith v. Manhattan Ins. Co.*, 4 Hun (N. Y.), 127.

<sup>5</sup> See, for example, *Petition of Eddy*, 15 R. I. 474; *s. c.* 8 Atl. Rep. 694.

**§ 7023. Compromising Claims against the Corporation.—**

Where a claim against the corporation is presented to the receivers which they may regard as not deserving of full payment, whether the case is one which, taking all the circumstances into consideration, presents proper grounds of equity and good conscience for a compromise, and if so, upon what just and reasonable terms the compromise should be made,—is said to be a question for the receivers to judge of in the first instance. Certainly a court will not direct its receivers to compromise a claim against the corporation, where it is of opinion that no just claim exists, and especially where the claim has been previously adjudged by the court to be unfounded.<sup>1</sup>

**§ 7024. Adjudication of Claims against the Estate.—**

In the case of a receivership *pending a railway mortgage foreclosure*, it is said to be the better practice for the judge or court appointing the receiver to stipulate, at the time of the appointment, what debts and liabilities of the railway company shall be made a charge on the property, and paid by the receiver. The reason is that this practice concludes the trustees in the mortgage, and the bondholders by representation through him; and if he, as their representative, does not choose to submit to the terms imposed, the foreclosure can proceed without a receivership. But this does not preclude the power in the court, where no such order has been made at the time of the appointment of the receiver, to make it afterwards.<sup>2</sup> The propriety of this view is entirely obvious, when it is considered that the court cannot possibly foresee in every case what classes of claims, and especially what particular claims, will be presented for allowance; nor would it be proper for the court to undertake to adjudicate at once, and without hearing the claimants and other parties in interest, upon the

<sup>1</sup> *Suydam v. Bank of New Brunswick*, 3 N. J. Eq. 276. As to the power of receivers to compromise claims of the corporation against third persons, see *ante*, § 6973; *post*, § 7281.

<sup>2</sup> *Central Trust Co. v. St. Louis & R. Co.*, 41 Fed. Rep. 551; *Fosdick v. Schall*, 99 U. S. 235, 253; *Blair v. St. Louis & R. Co.*, 22 Fed. Rep. 471.

merits of all claims which might possibly be presented. The most that the court can do is to impose on the bondholders applying for the receivership the payment of those meritorious claims for recent service or supplies which have been necessary in keeping the railroad property a going concern.<sup>1</sup>

§ 7025. Claimants against the Fund should Intervene *pro Interesse Suo*.—Instead of allowing each claimant to bring a separate action against the receiver, the regular and proper practice is to require him to file, in the court appointing the receiver and in the action in which he is appointed, what is called an *intervening petition*, or a petition in which he intervenes *pro interesse suo*, setting up his own claim, whatever the foundation of it may be. If the claim is contested by the receiver, and in many cases without referring it to the receiver, it is *referred to a master in chancery* for examination and report. Upon an examination by the master, after notice to the proper parties in interest and the presentation of his report to the court, and after the usual time for excepting thereto, it is, if no exceptions are filed to it, confirmed as a matter of course, and an order is made accordingly; but if exceptions are filed to it, those exceptions are heard by the court, which either refers the cause back to the master for further examination, or makes an order allowing or disallowing the claim, or otherwise disposing of it, as justice and equity may require. This is the regular and usual practice obtaining in the Circuit Court of the United States in equity, and it was the practice of the Chancery Court of the State of New York while that court was in existence.<sup>2</sup>

<sup>1</sup> See for instance, an order already set out, *ante*, § 6825.

<sup>2</sup> Where a final order had been made by that court for the appointment of a receiver of the property and effects of a corporation, and to close up its concerns and to distribute such property and effects among its creditors and stockholders, under the provisions of the Revised Statutes of

that State relative to the proceedings against corporations in equity, such order was in the nature of the usual decree in a creditors' suit against executors or administrators; and any creditor who had a claim upon the fund, but who was not a nominal party to the suit, might make himself a party thereto, in fact, by coming in and presenting his claim under the

§ 7026. **Practice of Making Examinations pro Interesse Suo.**—The writer states, on experience, that the practice in the courts of the United States in equity, is for the claimant, whatever the nature of his claims may be, whether for the restoration of property in the hands of the receiver, or for the payment by the receiver of a demand against the corporation, or for the like payment of a demand arising upon a contract with the receiver, or for damages for injuries done by the servants of the receiver in managing the property in his charge, — to file what is commonly called an *intervening petition*, entitled in the cause and addressed to the court, setting forth, in clear language, the nature of his demand, and asking that it be referred to a master, or otherwise examined and passed upon, according to the course of the court. It has been laid down by a Chancellor of great learning and experience, that such a petition must set out the title of the claimant to the relief which he seeks; since, from its very nature, an examination *pro interesse suo* requires a statement of the charge or case of the party to be examined; otherwise, it would be impossible for his adversary to know how to point

decree and submitting himself to the jurisdiction of the court, for the settlement and adjustment of his claim upon the fund to be distributed, as directed by the decree of the court under which such claim was presented. *Re City Bank*, 10 Paige (N. Y.), 378. It was also held that a creditor who came in and made his claim under such a decree became *quasi a party* to the suit, and entitled to the benefit of the decree as such party, and that he might be restrained from proceeding at law for the recovery of his claim. *Ibid.* Creditors thus coming in were regarded as parties to the suit for very substantial purposes; so that if the nominal complainant neglected to proceed with due diligence, they might apply to the court and obtain

leave to prosecute the suit; and if the suit became *abated* by the death of the sole complainant, it was said to be a matter of course to permit any creditor who had established his debt before the master under such a decree, to file a bill in the nature of *revivor* and supplement, to revive and continue the proceedings. *Ibid.* Any creditor entitled to come in under the decree, by reason of having a claim upon the fund, had also the right to file such a bill to *revive* and *continue* the proceeding and to have the benefit of it, — stating in his bill the existence of his debt. But if the existence of his debt was denied by the defendant's answer, he was required to establish it by proof, before he would be entitled to a decree reviving and continuing the proceedings. *Ibid.*

his interrogatories.' The practice has been thus stated in an English chancery case: "A party claiming an interest in estates sequestered, or in the hands of a receiver, an order is obtained upon notice of motion, to come in, and be examined *pro interesse suo*, wherein a time is to be limited for filing interrogatories. After the examination the other side hath liberty to examine witnesses, to falsify the examination, and a commission of course issues, if necessary, wherein the claimant may join if he thinks fit; and the commission (if any) is returned. Publication passeth by order. Then an order is made to refer it to the master, to look into the examination and depositions, and to certify whether the claimant hath made out any, and what, interest in the premises, or in any, and what, part thereof. The report the master makes is set down to be heard for directions; and the court pronounces a final order."<sup>2</sup> It should be observed that a great deal of the technicality of form in chancery practice in regard to examinations *pro interesse suo*, is entirely obsolete in the United States, owing to the universal prevalence of *statutes permitting parties to testify* in civil cases. The ordinary practice of the courts of the United States is, to *refer* the intervening petition to a master, provided the receiver, or any party before the court interested in the fund, makes objection; but sometimes a general order of reference is made, under which all such petitions go to the master. There, an examination takes place, which is substantially in the nature of a trial before a referee. The master takes testimony in the form of depositions, hears argument by counsel, and files a report, accompanied with the testimony so taken, embodying his findings of fact and conclusions of law as to the claim, and recommending what order be passed in respect of the same. If no exceptions are filed to the report, it is confirmed and the order goes as a matter of course. If *exceptions* are filed, they are reheard before the court, and the court will re-examine the case upon the evidence taken before the master, and will confirm the report, or refer it back for further examination,

<sup>1</sup> Brien v. Paul, 3 Tenn. Ch. 357.<sup>2</sup> Hunt v. Priest, 2 Dick. 540.



or make such other decree as to the court may seem just and proper.<sup>1</sup>

§ 7027. **Compelling Third Parties to be Examined pro Interesse Suo.** — While, under the general principles of equity procedure, a court will not permit its officer to be drawn into a litigation which it cannot control,<sup>2</sup> on the other hand, it has no authority to compel a party who is a stranger to the litigation, to come into court and be examined *pro interesse suo*; but such an order can only be made upon the application of a party, or by his consent.<sup>3</sup> But this principle has not been acted upon in all cases. In another case, a *sequestration* having issued for the non-performance of a decree, and a motion having been made for a *writ of assistance*, and the defendant having alleged that he had assigned the house and goods subjected by the decree, for a valuable consideration, to a third person, — it was ordered that such third person should come in and be examined *pro interesse suo*, unless he showed cause to the contrary.<sup>4</sup> But this seems to indicate that an exception to the principle first stated is, that the court may compel third parties to come in and be examined *pro interesse suo*, who have *interfered* with the execution of its decree, or with the possession of property by its receiver. The principle was thus stated by Chancellor Walworth: "Where the property is legally and properly in the possession of the receiver, it is the duty of the court to protect that possession, not only against acts of violence, but also against suits at law; so that a third person, claiming the same, may be compelled to come in and

<sup>1</sup> Points of practice in respect of examinations *pro interesse suo*, in the English Court of Chancery prior to the new procedure act: Russell v. East Anglian R. Co., 3 Macn. & G. 104. Exhibiting interrogatories in rebuttal: Rowley v. Ridley, 3 Swanst. 306, 308, n. Conclusive effect of the examination: Attorney-General v. Mayor of Coventry, 3 Swanst. 312, n.

Leave to the complainant to proceed *in forma pauperis*: James v. Dore, 2 Dick. 788. Costs of an application to compel receiver to pay over: People v. City Bank, 96 N. Y. 32.

<sup>2</sup> Post, § 7128.

<sup>3</sup> Kaye v. Cunningham, 5 Mad. 408.

<sup>4</sup> Bird v. Littlehales, 3 Swanst. 299, n.

ask to be examined *pro interesse suo*, if he wishes to test the justice of such claim."<sup>1</sup>

§ 7028. Claimants of Property Intervening by Petition. — If *property* of the corporation has passed into the hands of a receiver, which is claimed by a third party, under a bill of sale from the corporation or otherwise, his proper course is to file an *intervening petition* in the court in which the receivership is depending, praying for the custody of the property.<sup>2</sup> His claim will be examined, either by the court or a master, and if an order is made denying it, it is quite clear, under nearly all, if not all, American remedial systems, that the order denying it will be in the nature of a *final decree*, and subject to correction by *appeal*.<sup>3</sup> It seems plain that *replevin*, *ejectment*, or other *possessory action* will not lie against the receiver, provided he is a receiver appointed by a judicial court; since in that case his possession is the possession of the court, and the property sought to be recovered is *in custodia legis*;<sup>4</sup> but the rule might be otherwise in the case of a *statutory receiver*, appointed by a mere ministerial officer, such as a receiver of a *national bank*, whose office is that merely of a statutory trustee.<sup>5</sup>

<sup>1</sup> *Parker v. Browning*, 8 Paige (N. Y.), 388, 391; s. c. 35 Am. Dec. 717. In a work of considerable authority on equity procedure, — Seton on Decrees, p. 1220, — it is said that the decision in *Kaye v. Cunningham*, above cited, holding that an order for the examination of a party *pro interesse suo* can only be made upon his application, or by his consent, is not in accordance with the current of authority. It was formerly held in New York that the remedy of a receiver of the rents and profits of real estate, against an adverse claim to such rents and profits, was by an order for an examination of the claimant *pro interesse suo*, and for such proceedings thereon as would lead to an adjudication of the rights of the parties. *Foster v. Townshend*, 68 N. Y. 203; s. c.

2 Abb. N. Cas. (N. Y.) 29; reversing s. c. 6 Daly (N. Y.), 136, and overruling, in part, s. c. 12 Abb. Pr. (N. Y.) 469. It is now pointed out by Dr. Abbott, 19 Abb. N. Cas. (N. Y.) 379, that "the court having power, under the new procedure, to *refer a motion*, and the parties to the reference having the right to testify and to compel each other to testify, a formal direction for such an examination is not necessary."

<sup>3</sup> *Ante*, § 7127.

<sup>4</sup> See *Bates v. Elmer Glass Man. Co.* (N. J. Eq.), 15 Atl. Rep. 246; s. c. 13 Cent. Rep. 351.

<sup>5</sup> *Ante*, § 6931.

<sup>6</sup> *Post*, § 7327. Right of receiver to "*reconvene*" under *Texas Code*, against intervening petitioner, and scope of the plea of reconvention:

§ 7029. **Evidence Before the Master.** — Where the application for a receiver contains no charge of fraud or deceit on the part of the officers of the railroad company, a master to whom intervening claims are referred may be authorized to pass upon *uncontested claims*, without any other evidence than the admissions in the company's books, where the facts upon which such claims rest fully appear from the books, and where additional evidence appears to him unnecessary.<sup>1</sup>

§ 7030. **Conclusive Effect of Decree Limiting Time for Proving Claims.** — Where a corporation passes into the hands of a receiver of a court of the United States, in a proceeding to foreclose a mortgage; and, pending the proceeding, a scheme of reorganization is agreed to by nearly all the creditors; and the court, in proceedings anterior to its final decree, gives notice to all creditors to prove their claims; and, after the limitation of time prescribed by such notice, proceeds to a final decree, determining the rights of all the parties in the property; — this decree is *not interlocutory* in its nature, but *final*, and every creditor, affected with notice or knowledge of the order fixing the time for proving claims, is precluded by it and debarred from reopening the proceeding after a final decree and preferring his particular claim.<sup>2</sup> But a decree thus limiting the time for proving claims will not be conclusive, so far as to *affect the jurisdiction of a State court* subsequently to entertain an action *against the corporation*, by a claimant who was *not a party* to the foreclosure proceeding; since it is not competent for one court to make orders affecting the jurisdiction of other co-ordinate courts.<sup>3</sup>

Continental Nat. Bank v. Weems, 69 Tex. 489; s. c. 5 Am. St. Rep. 85. Proceeding where receiver claims a *set-off*: Vanderbilt v. New Jersey Cent. R. Co. (N. J. Eq.), 2 Cent. Rep. 228. Where an *agent* was *employed by the receiver* to assist him in the duties of his trust, and it was agreed that the value of his services should be deducted from a claim

which the estate held against him, — it was held that the amount due for his services constituted an *equitable set-off*. Davis v. Stover, 16 Abb. Pr. (N. S.) (N. Y.) 225.

<sup>1</sup> Blair v. St. Louis & c. R. Co., 22 Fed. Rep. 471.

<sup>2</sup> Leadville Coal Co. v. McCreery, 141 U. S. 475.

<sup>3</sup> *Ante*, § 6894.

§ 7031. Proving Claim does not Bar Separate Action. —

The mere fact of the creditor *proving his claim* before the receiver appointed to wind up an insolvent bank, does not bar his right to proceed in an action against the bank, where he does not surrender to the receiver the evidence of his debt, or receive from the receiver a certificate of indebtedness, or his share of any dividend paid in liquidation.<sup>1</sup> This proposition does not touch the power of the court superintending the administration of the insolvent estate, to *enjoin the prosecution of separate actions* against the corporation.<sup>2</sup> The case where a bank commissioner of the State had taken action to wind up an insolvent bank and had procured the appointment of a receiver, was held to be not like the case of a creditors' bill, where injunctions are granted to restrain creditors from proceeding at law when the suit is brought in behalf of all the creditors; nor like the case of a party who is pursuing his remedy in two courts at the same time, and is enjoined in equity from prosecuting his claim in more than one court.<sup>3</sup>

<sup>1</sup> *Watson v. Phoenix Bank*, 8 Met. (Mass.) 217; *s. c.* 41 Am. Dec. 500.

<sup>2</sup> *Ante*, § 6897.

<sup>3</sup> *Watson v. Phoenix Bank*, 8 Met. (Mass.) 217, 222; *s. c.* 41 Am. Dec.

500. Enjoining the prosecution of more than one suit: *Jackson v. Leaf*, 1 Jac. & Walk. 229; 1 Story Eq. Jur., § 541.

## CHAPTER CLXVI.

### DISTRIBUTION OF THE FUND IN THE HANDS OF THE RECEIVER.

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- 7076. Distribution of assets deposited in another State.
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§ 7035. **Receiver cannot Distribute without Order of Court.**—When it is recollected that a *receiver appointed by a court of equity* is the mere custodian of the property or fund pending the litigation, and that he is subject to the orders of the court in the most plenary manner,<sup>1</sup> and that the fund in his hands is deemed to be in the *custody of the court* and subject entirely to the disposition of the court,—it must follow, as a general proposition, that a receiver cannot pay out any money which has come into his hands, in virtue of his office, without being authorized thereto by an order of the court, general or special,<sup>2</sup>—unless indeed, he is a *statutory receiver*, when it is equally necessary that he should derive such authority from the statute. In either of these cases, he must have, in order to justify the payment, either express or implied authority from the governing source, which is either *the court or the statute*.<sup>3</sup>

<sup>1</sup> *Ante*, § 6940, *et seq.*

<sup>2</sup> *Adams v. Woods*, 15 Cal. 206.

<sup>3</sup> See *Re Hollister Bank*, 23 N. Y. 508, for some analogy on this point. This case holds that under the New York Statute of 1849, for winding up insolvent corporations, all assets which can be realized by collections, or by a sale, when no reasonable objection exists thereto, within 180 days, must be converted into cash, and distributed to the creditors; but at the end of that time, this being first done, the debts unpaid may be assessed on the stockholders, and the remaining assets, when realized, divided among them: distinguishing *Re Reciprocity Bank*, 22 N. Y. 9. A

receiver should not enter upon the distribution of the moneys in his hands without an order of the court appointing him, and such order will not, in general, be made until he has *accounted*. *Duffy v. Casey*, 7 Rob. (N. Y.) 79. Even where *money* has been *paid* to him *under a mistake*, he cannot, it seems, restore it without an order of the court; and an action to recover it will not lie, unless the consent of the court to the bringing of such action is had. *Getty v. Campbell*, 2 Rob. (N. Y.) 664. It has been held that, where judgment creditors have acquired a lien upon a fund in the hands of a receiver, the court will not, on their petition, order the re-

§ 7036. **Discretion as to Ordering Receiver to Pay Money.** Not only is it within the discretion of the court to order the receiver to deliver property, which he has taken into his custody, but it is equally within its discretion to order him to pay over money in any special case. This discretion is plainly subject only to review on appeal, according to the course of procedure in the particular jurisdiction.<sup>1</sup>

§ 7037. **Appeal Lies from Order to Pay out of Fund in Court.** — It has been held that an *appeal* lies from a decree in equity for *costs*, when they are directed to be paid, not by a particular party, but out of a *fund* in the hands or under the control of the court; and that a decree made by a Circuit Court of the United States directing that a complainant be paid his costs and expenses out of a fund in court, — the fund, in the mean time, to remain in the court in the course of administration, is, *pro tanto*, a *final decree*, from which, if the amount be sufficient, an appeal will lie.<sup>2</sup> By parity of reasoning, the conclusion may be reached that an appeal will lie from orders directing the payment of the *compensation of court receivers* out of the fund in court, and that some of the gross abuses which have characterized receiverships, in allowing excessive fees, may be thereby corrected.<sup>3</sup> Appeals have fre-

ceiver to satisfy the judgment, until a decree has been made in the action in which he was appointed, and notice has been given to all creditors interested in the fund. But, in order to protect the petitioners, the receiver was forbidden to make any payments out of the fund, without notice to them, and allowing them to institute such action as might be advised. *Hubbard v. Guild*, 2 Duer (N. Y.), 685.

<sup>1</sup> In New York, in an action to set aside conveyances of real estate, on the ground of their having been obtained by fraud, an interlocutory judgment was rendered, determining the title to be in the plaintiff, subject to certain liens of the defendant, and

directing an accounting. A receiver had been appointed by consent, to receive the rents during the accounting. It was held to be within the discretion of the court, subject to review in the General Term, to order the receiver to pay over to the plaintiff the rents collected, upon such terms as might be proper. *Platt v. Platt*, 66 N. Y. 360.

<sup>2</sup> *Trustees v. Greenough*, 105 U. S. 527.

<sup>3</sup> That an appeal lies from an order in equity directing payment of costs out of a particular fund, — see *Angell v. Davis*, 4 Mylne & C. 360. But see, *contra*, *Taylor v. Dowlen*, L. R. 4 Ch. 697.

quently been prosecuted to the Supreme Court of the United States, from orders or decrees made in the Circuit Courts, disposing finally of substantial rights upon intervening petitions in receivership cases.<sup>1</sup>

§ 7038. **Remedy to Compel Distribution.**—If a receiver appointed by a court of equity fails to make distribution within a reasonable time, the obvious remedy is an application to the court whose officer he is, for an order requiring him so to do. But in the case of a statutory trustee, appointed under a judgment of forfeiture against the corporation, or otherwise, who fails seasonably to make distribution, a *bill in equity* will lie by any of the stockholders for the benefit of all, to compel him to do so; and where the citizenship of the parties gives jurisdiction to the Circuit Court of the United States, such suit may be brought in that court, although the trustee against whom it is brought has been appointed by a State court, on the rendition of a judgment dissolving the corporation.<sup>2</sup>

§ 7039. **Duty of Statutory Receiver to Settle Priority of Incumbrances.**—In cases arising *under the statute of New Jersey concerning insolvent corporations*, it is said that receivers have the authority, and that it is their duty, to settle the priorities of incumbrancers, and, in case of dissatisfaction, for those incumbrancers to prosecute an appeal to the Chancellor, which, right is expressly given by statute; and further that, in settling such priorities, the receiver must inquire into the validity of the several claims, and refuse to allow any which he may believe to be fraudulent or illegal.<sup>3</sup> Such being the duty of

<sup>1</sup> See, for instance, *Savannah v. Jessup*, 106 U. S. 563.

<sup>2</sup> *Bacon v. Robertson*, 18 How. (U. S.) 480. This holding can only be sustained on the theory that the trustee, appointed in this case by a State court under a statute of Mississippi, was a *statutory trustee*, and not merely a receiver or officer of the court ap-

pointing him; for if he had been such, the necessary effect of the proceeding in the Federal court would have been to infringe the jurisdiction of the State court in the control of its own officer.

<sup>3</sup> *Smith v. Trenton Delaware Falls Co.*, 4 N. J. Eq. 505; *Demott v. Stockton Paper &c. Co.*, 32 N. J. Eq. 124, 132.



receivers under the statute referred to, it is held that a bill cannot be maintained by a creditor of the insolvent corporation, after the appointment of a receiver, to settle the validity and priority of claims and incumbrances upon the property of the company, — the duty of adjusting them being cast upon the receiver, subject to the right of appeal; nor, for a like reason, can a bill be sustained by a creditor to inquire into the validity of assignments or transfers of property made by the corporation.<sup>1</sup> As to those demands which have passed into *judgment*, within the knowledge of the receiver, the judgment should be regarded by him as conclusive.<sup>2</sup> Creditors who have *attached* the property of the insolvent corporation before the court appointing the receiver acquired jurisdiction, are entitled to a *preference*,<sup>3</sup> unless there is a statute vacating attachments in such cases, or otherwise providing. Creditors who have prosecuted their demands to judgment and levied their *execution* on personalty prior to the commencement of the suit to wind up, are entitled to a like *preference*, under principles hereafter considered,<sup>4</sup> unless there is a statute denying to them such preference. Under the provisions of a statute of Pennsylvania,<sup>5</sup> where there is a sale of the personal property of an insolvent corporation, *no preference* is to be given to execution creditors, but the distribution must be made as in cases of insolvency.<sup>6</sup>

§ 7040. **Costs of the Proceeding Preferred.**—Costs of the proceeding in which the receiver has been appointed constitute the highest lien or preference. Where a national bank had gone into *voluntary liquidation*, suit was brought by a judgment creditor, alleging the scheme of liquidation to be fraudulent, and seeking to obtain a judicial winding up, and

<sup>1</sup> *Smith v. Trenton Delaware Falls Co.*, 4 N. J. Eq. 505.

<sup>2</sup> *Demott v. Stockton Paper &c. Co.*, 32 N. J. Eq. 124, 132. That such a judgment is *conclusive* as respects the subsequent mortgagee, — see

*Jacobus v. Mutual Benefit Life Ins. Co.*, 27 N. J. Eq. 605.

<sup>3</sup> *Roseboom v. Whittaker*, 132 Ill. 81; *s. c.* 23 N. E. Rep. 339.

<sup>4</sup> *Post*, § 7059.

<sup>5</sup> Pa. Act April 7, 1870, § 1.

<sup>6</sup> *Hopkins's Appeal*, 90 Pa. St. 69.

in this action a receiver was appointed, and subsequently, by an amendment of the creditor's bill, it was transformed into a suit to enforce an individual liability of the stockholders, — it was held that the costs and expenses of the receivership *should not be charged upon the stockholders* as a part of their individual statutory liability, but should fall upon the creditors at whose instance the receiver was appointed; since the appointment was not necessary to enforce the liability of the stockholders.<sup>1</sup>

§ 7041. **Priorities in the Distribution.** — An extensive discussion of the question of priorities among the creditors of an insolvent corporation, in the distribution of its funds, involves principles of law and equity not at all peculiar to corporations. It has been seen that there is a difference of opinion as to the power of a corporation to make assignments of its property for the purpose of preferring particular creditors before others.<sup>2</sup> But whichever way this question may be resolved, it is clear that when a corporation passes into the hands of a receiver, for the purposes of a winding up and distribution, by reason of its insolvency, its power to create preferences is at an end. Accordingly, it has been held that when a *national bank* becomes insolvent, and passes into the hands of a receiver under the provisions of the national banking

<sup>1</sup> *Richmond v. Irons*, 121 U. S. 28. Where a receiver was appointed on the *dissolution* of a corporation, and advertised for claims, and made personal service of notice to present claims, upon the plaintiff in a pending action against the corporation, but the plaintiff presented no claim, — it was held that he could not, after the receiver had duly distributed the assets, reserving only sufficient to meet the expenses, cast the costs of his action against the corporation upon the receiver, by making him a party thereto. *Owen v. Kellogg*, 56 Hun (N. Y.), 455; s. c. 31 N. Y. St. Rep. 600; 10 N. Y. Supp. 75. Under

the Wisconsin banking law of 1852, all expenses, except the salary of the bank comptroller, of administering the trust fund for the holders of bank bills, — namely, the public bonds deposited with the State Treasurer and personal bonds given as additional security, — were payable from the fund itself, and not chargeable to the State. Thus, the Comptroller could not charge the State with the costs of an action unsuccessfully brought on a personal bond, nor could the defendant in such an action so charge the State. *Porter v. State*, 46 Wis. 375.

<sup>2</sup> *Ante*, §§ 6492, 6494.

law, the respective rights and liabilities then existing between it and its creditors and debtors become fixed, and all its property and assets thereupon subject, after satisfying the prior claim (if any) of the government, on account of its notes, to disposal and ratable distribution among its general creditors, upon the principle of equality. No subsequent lien can be created, or right of preference obtained, in respect to any of the assets or property of the bank after the appointment of a receiver.<sup>1</sup> Similarly, after a vote of the directors of such a bank, to close their bank and go into liquidation, any transfer of the assets of the bank to a creditor, whereby that creditor secures a preference, will be *presumed* to be made with a *fraudulent* intent.<sup>2</sup> On the other hand, it has been held that, under the governing statute,<sup>3</sup> a transfer or payment by such a bank, to be void, must be made after the commission of an act of insolvency, or in contemplation thereof, and with a view of giving a preference to one creditor, over another, or with a view to prevent the application of its assets as provided by law.<sup>4</sup> On this principle the property of a *national bank*, which has been *attached* by an individual creditor after the bank has become insolvent, cannot be subjected to sale for the payment of his demand against a claim for the property set up by a receiver subsequently appointed.<sup>5</sup>

**§ 7042. Creditors Preferred Before Stockholders.**—In the winding up of every corporation, the creditors are to be paid first and the stockholders next, and the stockholders are to get nothing until the creditors are paid;<sup>6</sup> and then the stock-

<sup>1</sup> Balch v. Wilson, 25 Minn. 299; s. c. 33 Am. Rep. 467. See National Bank v. Colby, 21 Wall. (U. S.) 609.

<sup>2</sup> National Security Bank v. Price, 22 Fed. Rep. 697. See also Re Silverman, 1 Sawy. (U. S.) 410; s. c. 4 Nat. Bank. Reg. 523; Sawyer v. Turpin, 2 Lowell (U. S.), 29, 33.

<sup>3</sup> Rev. Stat. U. S., § 5242.

<sup>4</sup> National Security Bank v. Price, 22 Fed. Rep. 697, 698; Case v. Citizen's Nat. Bank, 2 Woods (U. S.), 23.

<sup>5</sup> National Bank v. Colby, 21 Wall. (U. S.) 609.

<sup>6</sup> Hollister v. Hollister Bank, 2 Abb. App. Dec. (N. Y.) 367; Dabney v. Bank, 3 S. C. 124; Farmers' Loan & Co. v. Missouri & C. R. Co., 21 Fed. Rep. 264; State v. Commercial State Bank, 28 Neb. 677; s. c. 44 N. W. Rep. 998; Christian's Appeal, 102 Pa. St. 184; s. c. 12 Week. Not. Cas. (Pa.) 489.

holders are to receive dividends in liquidation *pro rata*.<sup>1</sup> The costs and expenses of the proceeding and of the administration are to be paid first; the lien and preferential creditors, according to their respective priorities, next; the general creditors next; and finally the stockholders ratably, unless some of them are entitled to preferences as already stated.<sup>2</sup> In the winding up of an insolvent *building association*, after deducting the expenses incident to the administration of its assets, the general creditors, if any, should be paid in full, and the residue of the fund should be distributed *pro rata* among those whose claims are based on the stock of the association, whether they have withdrawn and hold orders for the *withdrawal value* of their shares or not. Both claims, it is held, are equally meritorious, so that, in marshaling the assets, neither class is entitled to priority over the other.<sup>3</sup> Where such an association is authorized by its charter to receive money on deposit from its stockholders, which money is to bear interest at a certain rate, in case of its insolvency such stockholders are to be deemed creditors of the association in respect of their deposits, and in the payment of such deposits are entitled to share *pro rata* with the other creditors of the association in preference to the general stockholders.<sup>4</sup> Special circumstances may exist which will entitle some stockholders to be paid a larger distributive share than others in the general liquidation.<sup>5</sup>

<sup>1</sup> Hill v. Glasgow R. Co., 41 Fed. Rep. 610.

<sup>2</sup> Ante, §§ 2145, 4453.

<sup>3</sup> Christian's Appeal, 102 Pa. St. 184; s. c. 13 Week. Not. Cas. (Pa.) 181.

<sup>4</sup> Criswell's Appeal, 100 Pa. St. 488; s. c. 12 Week. Not. Cas. (Pa.) 489.

<sup>5</sup> Such a case was presented by Krebs v. Carlisle Bank, 2 Wall. Jr. (U. S.) 33, where, according to the syllabus of the capable reporter, A., B., and C. each subscribe, in 1814, to the stock of a bank, whose shares are \$50,

to be paid as the bank board shall direct. In 1817, the board directs that all the stockholders pay \$30 a share; and allows them to pay part, or all the balance. B. pays \$10 of the balance, and A. \$20, the whole balance; so that A. has paid in all \$50, B. \$40, and C. \$30. The bank makes semi-annual dividends on profits till 1845, when, having \$200,000 of its allowed capital paid in, it meets with a loss of \$50,000, and goes into liquidation. A. is entitled to receive \$10 on his share, before B. receives anything. And A. is entitled to \$10 more on his share,

§ 7043. **Stockholders Subscribing to a Guarantee Fund.** Stockholders who, by a mutual agreement, subscribe to and form a guarantee fund to support the solvency of a corporation and pay its debts, do not, upon the failure of the corporation, become preferred creditors to the extent of the indebtedness thereby accruing to them from the corporation, but *stand on the same footing as other creditors*; and where such stockholders had previously advanced more to the corporation than they were required to do under the agreement, such advances were regarded as contributions under the agreement, and as placing them on the footing of general creditors.<sup>1</sup>

§ 7044. **Special Liens to be Preserved in Making Distribution.**—Where, under the principles of the law, a special lien in favor of a particular creditor attaches to a particular fund in the hands of the receiver, this lien must be respected in making distribution; but it will often be a nice question for the decision of the court, whether a particular fund has come into the hands of the receiver subject to a special lien.<sup>2</sup> In many cases the circumstances will be such that personal property will come into the hands of the receiver, subject to a valid lien created by the *delivery of an execution* against the defendant to the sheriff. In such a case, if the property of the debtor is sold by the receiver, the lien attaches, in theory of equity, to the proceeds of sale in the receiver's

and B. \$10 on his share, before C. receives anything; and then, the loss being deducted, they are to receive ratably. That a *creditor who is also a stockholder* must pay up first and take his dividend afterwards, and has no right of *set-off*,—see *ante*, § 3786. Estate of Humboldt Safe Deposit &c. Co., 3 Pa. County Ct. 621.

<sup>1</sup> Huston's Appeal, 127 Pa. St. 620; s. c. 18 Atl. Rep. 419. This case consists chiefly on *conclusion of fact* and of deductions drawn from facts.

<sup>2</sup> It has been held that where a

*factor* has made *advances* to his consignor, in the form of *notes* and *acceptances*, and has afterwards become insolvent, and his estate has passed into the hands of a receiver,—the latter must, in making distribution, apply the proceeds derived from the sale of the consigned goods, which have been kept distinct, in payment of such notes and acceptances, making distribution *pro rata* in respect to the different instruments. *Francklyn v. Sprague*, 10 Hun (N. Y.), 589.

hands, and the court will, on motion, order the receiver to satisfy the same.<sup>1</sup>

§ 7045. **Marshaling the Assets so as to Require Exhaustion of Special Security.** — It is a general principle, in the allowance of demands against *bankrupt* estates, that, where a creditor has a *special security*, and nevertheless insists upon proving his demand, he must deliver up the security for the benefit of the creditors at large.<sup>2</sup> If he proves his debt under the commission in bankruptcy, and receives a dividend, he will not be allowed to enforce his special security until he has restored the dividend.<sup>3</sup> Or he may, according to the best opinion, be required first to exhaust his special security, and then be allowed to prove for the balance;<sup>4</sup> though there is a contrary view that he may make the most he can out of his special security.<sup>5</sup> The case refers itself to the well-known principle of equity, that where one of the creditors of an insolvent has *two* funds against which he can proceed, and the other creditors can proceed only against *one* of those funds, the former creditor must first exhaust the fund against which the other creditors cannot proceed, before he can come in and share *pro rata* with them out of the fund which alone is available to them.<sup>6</sup> The justice of the rule has been so strongly

<sup>1</sup> Hooley v. Gieve, 7 Abb. N. Cas. (N. Y.) 271; *s. c.* affirmed without opinion, 73 N. Y. 599.

<sup>2</sup> Alston v. Munford, 1 Brock. (U. S.) 266; State Bank v. Bank of New Brunswick, 3 N. J. Eq. 266.

<sup>3</sup> Ex parte Grove, 1 Atk. 104.

<sup>4</sup> Greenwood v. Taylor, 1 Russ. & Myl. 185; Ex parte Twogood, 19 Ves. 229; Brocklehurst v. Jessop, 7 Sim. 438.

<sup>5</sup> Mason v. Bogg, 2 Myl. & Cr. 443, 448; overruling Greenwood v. Taylor, *supra*.

<sup>6</sup> State Bank v. Bank of New Brunswick, 3 N. J. Eq. 266; Averall v. Wade, Lloyd & G. 255, 268; Wiggins v. Dorr, 3 Sumn. (U. S.) 410, 414;

York &c. Steamboat Co. v. Jersey Co., Hopk. (N. Y.) 460; Alston v. Munford, 1 Brock. (U. S.) 266; Hudkins v. Ward, 30 W. Va. 204; *s. c.* 8 Am. St. Rep. 22; Hawley v. Mancius, 7 Johns. Ch. (N. Y.) 174; Evertson v. Booth, 19 Johns. (N. Y.) 486; Ramsey's Appeal, 2 Watts (Pa.), 228; *s. c.* 27 Am. Dec. 301; Herriman v. Skillman, 33 Barb. (N. Y.) 378; General Ins. Co. v. United States Ins. Co., 10 Md. 517; *s. c.* 69 Am. Dec. 174, and note 181; Carter v. Neal, 24 Ga. 346; *s. c.* 71 Am. Dec. 136, and note 142; Ellis v. Temple, 4 Coldw. (Tenn.) 315; *s. c.* 94 Am. Dec. 200; Cummings's Appeal, 25 Pa. St. 268; *s. c.* 64 Am. Dec. 695; Georgia Chemical

felt that it has been recognized and adopted even in a court of law.<sup>1</sup> It seems to apply in the administration by courts of equity of the estates of *insolvent corporations*, in all cases where there is no statutory direction implying the contrary. When, therefore, receivers of a corporation had been appointed under the New Jersey statute "to prevent frauds by incorporated companies," a creditor of the corporation, having security for his debt in part, was required first to apply such security to the satisfaction of his debt, and was allowed only the balance against the general fund in the hands of the receivers: was not allowed to prove his whole debt against the general fund, and also to hold his security to be applied to so much of his debt as he should not realize out of the general fund.<sup>2</sup>

§ 7046. **Priorities among Lien Creditors.** — The *priorities among creditors* having an *incumbrance* or other *lien* upon the fund in the hands of the receiver, assignee, or trustee, are to be adjusted and distribution made *according to priority in date* of the liens or incumbrances,<sup>3</sup> excepting always cases governed by the admiralty and maritime law, and cases of railway mortgage foreclosures, where unsecured creditors are frequently allowed a priority, under principles separately considered.<sup>4</sup>

*Works v. Cartledge*, 77 Ga. 547; *s. c.* 4 Am. St. Rep. 96, note 98. Some of these cases deny the application of the doctrine under the circumstances before the court.

<sup>1</sup> *Amory v. Francis*, 16 Mass. 308.

<sup>2</sup> *State Bank v. Bank of New Brunswick*, 3 N. J. Eq. 266.

<sup>3</sup> *Corrigan v. Trenton & c. Falls Co.*, 5 N. J. Eq. 232.

<sup>4</sup> *Post*, § 7114, *et seq.* See, for example, *Farmers' Loan & c. Co. v. Missouri & c. R. Co.*, 21 Fed. Rep. 264. In adjusting priorities among the claimants against the funds of an insolvent corporation not a railway company, it was held, on facts too

complicated for recapitulation, that an assignment by the company, of the rents to accrue on certain leases, as security for the payment of certain notes, did not constitute a lien on the fund in court, for the amount of the notes, in preference to subsequent mortgage and judgment creditors; that, where there was a bank judgment, which was a lien on the whole fund in court, including the rents, and next to it, in priority of date, was a mortgage, whose lien was only on the proceeds of the sale, and not on the rents, and next to the mortgage, in priority of date, was a judgment, whose lien was on the

§ 7047. **How under Massachusetts Insolvent Laws.**—The Massachusetts insolvent laws<sup>1</sup> provide that when a creditor has “a mortgage or pledge of real or personal estate of the debtor, or a lien thereon, for securing the payment of a debt claimed by him,” he may require the property so held to be sold, and the proceeds applied towards the payment of his debt, and be admitted as a creditor for the residue; or he may release and deliver up the property to the assignee, and be admitted as a creditor for the whole of his debt; and that, if the property is not so sold or delivered up, the creditor shall not be allowed to prove any part of his debt. These provisions have no application to a case where an insolvent corporation has executed a mortgage of its real and personal property to a trustee for the purpose of securing its *negotiable bonds*, pledged by it as *collateral security* for money borrowed for its business occasions, since the bondholders have no right to control the property.<sup>2</sup> A *general assignment* by an insolvent corporation to its creditors for their benefit, assented to by them, does not create a mortgage, pledge, or lien, such as is contemplated by this statute, and therefore the creditors receiving the property are not debarred of their right to

whole fund in court, including the rents, and the fund in court, exclusive of the rents, was sufficient to pay the bank judgment and part of the mortgage,—it was not the duty of the court to apply the rents to the payment of so much of the bank judgment, in aid of the mortgage, and in prejudice of the subsequent judgment creditor; and that, although there was a mortgage on a part of the land sold by the receiver, which was on the land when the company bought it, the purchaser at the receiver's sale should take the land free from all incumbrances whatever. *Corrigan v. Trenton &c. Falls Co.*, 5 N. J. Eq. 232. In another case, in adjusting the priorities of several incumbrancers on lands of an insolvent manufacturing corporation in the hands of a receiver, the same court held: 1. That banks which had loaned money to the corporation, on

notes indorsed by its directors, were entitled to be subrogated to the rights of such directors, under a mortgage given to them by the corporation to indemnify them for such indorsements. 2. That the receiver had power to adjust, by agreement, the rights of claimants under the mechanic's lien law, although no steps beyond filing their claims had been taken. 3. That where such claims have passed into judgment with the receiver's knowledge, they should be regarded as established. 4. That where a lien claim was filed after the beginning of the insolvency proceeding, it was not necessary to pursue such claim to judgment, unless so required by the court or receiver. *Demott v. Stockton Paper Ware Man. Co.*, 32 N. J. Eq. 124.

<sup>1</sup> Pub. Stat. Mass., ch. 157, § 28.

<sup>2</sup> *Merchants' Nat. Bank v. Greene*, 150 Mass. 317; s. c. 23 N. E. Rep. 103.



prove their claims.<sup>1</sup> Where the owner of a parcel of land mortgaged it, and subsequently conveyed his equity of redemption, and several years after went into insolvency, and the mortgagee sold the land under the power of sale contained in the mortgage, without obtaining any order of the insolvency court, and applied the proceeds in part satisfaction of his debt, — it was held that he was entitled to prove against the estate of the insolvent the balance of his claim, notwithstanding this statute.<sup>2</sup>

§ 7048. **Expenditures of the Receiver in Operating the Property Preferred.** — These are in the nature of *costs* of the litigation, and, as such, are entitled to the *highest preference*.<sup>3</sup>

§ 7049. **Prior Liens or Mortgages Preferred.** — Where the receiver is appointed to hold the property pending a proceeding to foreclose a mortgage, and a prior mortgagee is made a party, and subsequently brings an action to foreclose his mortgage, and there is a deficiency of assets, the court may order the receiver to pay the same to the prior mortgagee.<sup>4</sup>

§ 7050. **Claims for Damages for Torts not Preferred.** — Claims for damages for torts committed by the corporation prior to the appointment of the receiver, whether reduced to judgment or not, are not to be preferred before existing liens in the distribution of the funds in the hands of the receiver, but such claimants stand on the footing of *general creditors*.<sup>5</sup> An exception to this rule is, that it is within the discretion of

<sup>1</sup> Dickison v. Metacomet Nat. Bank, 130 Mass. 132.

<sup>2</sup> Wilson v. Bryant, 134 Mass. 291. Other circumstances where claimant entitled to prove for balance notwithstanding the statute: Franklin County Nat. Bank v. First Nat. Bank, 138 Mass. 515. Circumstances under which claimant not entitled to prove: Bristol County Sav. Bank v. Woodward, 137 Mass. 412; Wilson v. Bryant 134 Mass. 291.

<sup>3</sup> Ante, § 7040. That they may be made a *preferred claim*, see Hale v. Nashua &c. R. Co., 60 N. H. 333.

<sup>4</sup> Cincinnati Nat. Bank v. Tilden, 50 N. Y. St. Rep. 366; s. c. 22 N. Y. Supp. 11.

<sup>5</sup> Central Trust Co. v. East Tennessee &c. Railroad, 30 Fed. Rep. 895; Davenport v. Receivers, 2 Woods (U. S.), 519; Re Dexterville Man. &c. Co., 4 Fed. Rep. 873; Hiles v. Case, 14 Fed. Rep. 141 (damages for destruction of property by fire); Central Trust Co. v. Wabash &c. R. Co., 28 Fed. Rep. 871 (damages for loss of property by common carrier).

the court applied to for the appointment of a receiver, to refuse the appointment, unless the petitioning bondholders will consent to an order that claims of this nature shall be preferred.<sup>1</sup>

§ 7051. **Other Demands not Preferred.**—Where a railroad company purchases the property and franchises of other railroad companies, and assumes payment of the indebtedness of the selling companies, the judgment creditors of the selling companies do not thereby acquire an equitable lien upon the properties so sold, for the payment of their claims: they merely acquire the right to look for payment to the purchasing company.<sup>2</sup> Where the order of the court, appointing the receiver, directs him to carry out and perform the contracts of the company, this will not be construed as an adoption, by the court, of a *speculative contract*, partially performed, which the company is endeavoring to carry out at the time of its suspension, which is, in no sense, a contract for supplies, or entitled to a preference on that footing,—there being nothing in the order of the court, in terms, expressing such an idea.<sup>3</sup>

§ 7052. **Taking and Renewing the Note not a Waiver of Priority.**—The taking of a promissory note, either by the original claimant or by his assignee, is no waiver of any right of priority which the claimant may have, under the rule under consideration.<sup>4</sup> Nor will the *renewal* of such a note operate as a waiver.<sup>5</sup>

§ 7053. **Simple Contract Debts Contracted in Constructing the Works of a Corporation Other than a Railroad Company not Preferred.**—Simple contract debts contracted in the building of the works of a corporation other than a railroad

<sup>1</sup> *Ante*, §§ 6824, 6825. That the lien of the trustees of the Florida Internal Improvement Fund is prior to that of the State,—see *State v. Jacksonville &c. R. Co.*, 16 Fla. 708.

<sup>2</sup> *Hervey v. Illinois Midland R. Co.*, 28 Fed. Rep. 169.

<sup>3</sup> *Olyphant v. St. Louis &c. Ore Co.*, 28 Fed. Rep. 729.

<sup>4</sup> *Burnham v. Bowen*, 111 U. S. 776, 783; *McIlhenny v. Binz*, 80 Tex. 1; *s. c.* 26 Am. St. Rep. 705, 728.

<sup>5</sup> *Burnham v. Bowen*, *supra*.

company,—such, for instance, as a water works company,—consisting of advances of money for that purpose, or other advances, for which the law gives no lien, are not entitled to priority over existing mortgages, under the doctrine of the Supreme Court of the United States in *Fosdick v. Schall*.<sup>1</sup> It was said, though without *deciding* the question, for the decision of the court was rested upon other grounds,—that there was a broad distinction between a *railroad company*, discharging a great public work, and a merely *private concern*.<sup>2</sup>

**§ 7054. Principle Which Denies a Lien for Beneficial Services Rendered to Corporation.**—By the principles of the common law, a man cannot make another man his debtor by voluntarily and officiously paying his debt owing to a third party, or by voluntarily or officiously rendering services in his behalf, without his request, however beneficial such services may be. It is merely an extension of the same principle to say that, where A. has a lien, by mortgage or otherwise, upon the property of B., C. cannot, by any convention which he may make with B., and much less by merely rendering services to B. without a contract for a lien, impose a lien upon the property of B. which shall cut under and displace the lien of A., or which shall be discharged out of the proceeds of a sale of the property accruing in a proceeding to foreclose the lien of A. That courts of the common law and of equity have uniformly acted upon this principle, except when administering the affairs of insolvent railroad companies by means of receivers, is absolutely clear. The principle has been roundly stated by the Supreme Court of South Carolina, thus: “No one can legally claim compensation for voluntary services to another, however beneficial they may be, nor for incidental benefits and advantages to one, flowing to him on account of services rendered to another, by whom he may have been employed. Before legal charge can be sustained, there must be a contract of employment, either expressly made or super-

<sup>1</sup> 99 U. S. 235.

<sup>2</sup> *Wood v. Guarantee & Co.*, 128 U. S. 416, 418.

induced by the law upon the facts.”<sup>1</sup> It is proposed to consider, in this chapter, what cases lie within this principle, and what have been held to constitute an exception to it, under the theory which has sprung up in recent years when dealing with the assets of insolvent railroad companies.

§ 7055. **Whether Lien for Attorney's Fees.**—Under the operation of this principle, an attorney and counselor at law has no lien upon the property of a railroad company, which can take precedence of a pre-existing mortgage, for legal services rendered to the company, in maintaining, before the courts, the validity of municipal aid bonds, however beneficial such services may have been, incidentally and collaterally, to the bondholders under the mortgage, they not having been parties to the contract of employment,—and especially where such services were rendered *two years* prior to the appointment of the receiver.<sup>2</sup> In another case, decided upon the same principle, the receiver of a railroad employed counsel, who, after a protracted litigation, very much reduced the claims of a certain lien-holder. Afterwards the property was sold, subject to that lien, and the receiver was discharged. The purchasing company recognized the attorney's claim for fees for services thus rendered to the receiver, and made a payment on account of it. Later the property passed into the hands of *another* receiver, in a proceeding to foreclose a lien created by the *new* company. It was held that the attorney had no claim upon the funds in the hands of the *second* receiver as against the new lien-holder. The reason was, that the services rendered were not necessary to keep the road a going concern, and were, therefore, not a first charge upon the property, under principles elsewhere considered; and that the recognition of the claim by the new company amounted to no more than a recognition of it as a debt due by simple contract, which was not entitled to priority over a lien there-

<sup>1</sup> *Hand v. Savannah &c. R. Co.*, 21 S. C. 162, 179; quoted again in *Finance Co. v. Charleston &c. R. Co.*, 52 Fed. Rep. 678, 680; and in *Bound v. South Carolina R. Co.*, 51 Fed. Rep. 58, 60.  
<sup>2</sup> *Finance Co. v. Charleston &c. R. Co.*, 52 Fed. Rep. 678.

after created by the company. Nor did the fact that the services may have incidentally benefited the subsequent bondholders constitute it a prior lien.<sup>1</sup> A distinction has been taken, under this head, between *recent services* rendered to a railroad company, which secure an additional interest to the lien-holders, and services which do not. It has been held not erroneous to give a priority to reasonable fees for recent services, rendered prior to the receivership, which have resulted in the recovery of property to which the lien of the bondholders procuring the appointment of the receiver attaches. The principle is thus stated by Lord Kenyon:<sup>2</sup> "A party should not run away with the fruits of a cause without satisfying the legal demands of his attorney, by whose industry and expense these fruits were obtained."<sup>3</sup> On the

<sup>1</sup> *Bound v. South Carolina R. Co.*, 51 Fed. Rep. 58.

<sup>2</sup> *Read v. Dupper*, 6 T. R. 361.

<sup>3</sup> *Louisville &c. R. Co. v. Wilson*, 138 U. S. 501, 507. It is to be noted that in *Read v. Dupper*, *supra*, and in nearly all other cases where the lien of an attorney, at common law, upon the funds recovered through his exertions, has been asserted and upheld, the question arises *between him and his client*, and not between him and prior lien-holders, who hold a lien upon the property given by that client. Such was the case of *Renick v. Ludington*, 16 W. Va. 378, also cited by the court. Such also was the case of *Mahone v. Southern Tel. Co.*, 33 Fed. Rep. 702, where the lien that was allowed the attorneys was a lien upon the dividends accruing to their own clients from the sale of their bonds pending the litigation. Such also was the case of *Re Paschal*, 10 Wall. (U. S.) 483, the lien there asserted being a lien on moneys collected by the attorney and belonging to his client. As it is the duty of a client to protect the lien which he has previously created, and as he can-

not confer any higher rights against the property than those which he has, there is no sound principle which will allow a preference in favor of the attorney, which was allowed by the Supreme Court of the United States in the case first above cited. The decision also gives an attorney at law a better right than is given, by the decision of the same court, to one who advances money to build the road,—that is, to create the property itself,—or to a contractor who furnishes the labor and material which creates it. This is shown by the decision of the same court in *Cowdrey v. Galveston &c. R. Co.*, 93 U. S. 352, and in *Dunham v. Cincinnati &c. R. Co.*, 1 Wall. (U. S.) 254. In the latter case it was held that a mortgage by a railroad company of their "road, built and to be built,"—the ordinary mortgage on after-acquired property,—has precedence, even as regards the claim of a contractor who, in the inability of the company to finish the road, has himself finished it, under an agreement that he should retain possession of it and apply its earnings to the liquidation of the debt due

other hand, services rendered by an attorney and counselor, to a railroad company, which could not be regarded as directly beneficial to the mortgagee, but the allowance of which was characterized as a "taking of funds belonging to a former mortgagee to pay counsel to devise a scheme by which the subsequent lender of money is preferred before him,"—were held not entitled to such a preference.<sup>1</sup> The same was held concerning a claim for fees for services rendered at the instance of the railroad company, to retain the control of a portion of its road not covered by the lien of the bondholders, before whose lien it was sought to have the attorney's claim preferred.<sup>2</sup>

**§ 7056. Governing Principle as to the Allowance of Such Fees.**—Without dwelling upon a question not strictly germane to the present work, it may be stated that the governing principle, often misapplied and abused, which should determine whether such fees ought to be paid out of the fund in the hands of the receiver of the court in preference to other liens subsisting upon that fund, whether prior or subsequent to the rendition of the services of the attorney,

him, and who has never surrendered possession of the road to the company. *Dunham v. Cincinnati & C. R. Co.*, 1 Wall. (U. S.) 254. It is to be remembered, however, that this decision was rendered before the court had taken the serious departure from its former holdings on the subject, and from the ordinary conception of courts of law and equity, as to the sacredness of prior liens, which it took in *Fosdick v. Schall*, 99 U. S. 235.

<sup>1</sup> *Louisville & C. R. Co. v. Wilson*, 138 U. S. 501, 508.

<sup>2</sup> *Ibid.* Cases in which claims for the payment of attorney's fees out of the common fund were *denied*: *Estate of Brown*, 131 Pa. St. 352; *McGraw v. Walker*, 74 Md. 554; *s. c.* 22 Atl. Rep. 132. Where a bill was

brought by the minority stockholders of the corporation, to prevent a judgment belonging to the corporation from being appropriated by the majority stockholder to his own use, and the action was sustained, and the court ordered a distribution of the fund under its supervision,—it was held that the attorneys, through whose labors the fund was obtained, and who had conducted the action for a contingent fee, under an agreement with the majority stockholder to whom they supposed the claim belonged individually, were entitled to their fees, as against the minority stockholders, who stood by and saw the work done and made no objection. *Davis v. Gemmell*, 73 Md. 530; *s. c.* 21 Atl. Rep. 712.

seems clearly to be that laid down by that exceptionally learned, just, and clear-headed judge, Mr. Justice Bradley, in a case in the Supreme Court of the United States. That principle is, that one jointly interested with others in a *common fund*, who, in good faith, maintains a litigation to save it from waste and secure its proper application, is entitled, in equity, to the reimbursement of his *costs as between solicitor and client*, either out of the fund itself, or by proportionate contributions from those who receive the benefit of the litigation.<sup>1</sup> This, it is perceived, is substantially the doctrine of the Supreme Court of South Carolina, as explained in the decision quoted in the preceding section. The contrary principle, founded in the just conception that an attorney-at-law is no better than anybody else, is that which denies to him the right to make another person his debtor without his consent, and which holds that the mere fact that the attorney, by his exertions, incidentally benefits someone, or the estate of someone, does not entitle him to recover his fees from that one, or to charge them as a lien upon the estate so benefited.<sup>2</sup> The true principle is that expounded by the Supreme Court of South Carolina, in the quotation given in the preceding section and in other subsequent decisions, that it is only where one party is, under the principles of equity, *entitled* to proceed for the benefit of all who stand in a like situation with him, and consequently where the counsel whom he employs stands, in a sense, as *representing* all, that counsel are entitled to have their fees paid out of the common fund which they have recovered for the benefit of all.<sup>3</sup> On the other

<sup>1</sup> *Trustees v. Greenough*, 105 U. S. 527.

<sup>2</sup> *Hand v. Savannah &c. R. Co.*, 21 S. C. 162, 178, *et seq.*, where the governing principle is explained at length by Simpson, J. See also *Westmoreland v. Martin*, 24 S. C. 238, 240; *Hubbard v. Camperdown Mills*, 25 S. C. 496; *Ex parte Lynch*, 25 S. C. 193; *Wilson v. Kelly*, 30 S. C. 483; *Roselius v. Delachaise*, 5 La. An. 481.

<sup>3</sup> This may be illustrated by a case where one distributee in an estate brought an action against her common distributees for settlement and distribution, and, through her attorney, defeated a claim asserted by one of the heirs, and reduced a claim presented by a judgment creditor of the estate, — and it was held that her attorney was not entitled to a fee out of the common fund, although his

hand, where bonds had been issued by a corporation, secured by a trust fund, and the trustee was wasting and misapplying the fund, and refusing and neglecting to apply it in payment of the bonds, and a holder of a portion of the bonds filed, in good faith, a bill to secure a due application of the fund, and succeeded in bringing it under the control of the court for the common benefit of the bondholders,—it was held that he was entitled to be paid out of the fund, before its distribution, his *fees as between solicitor and client*, by which is meant, not merely the ordinary costs of suit, which are called fees as between party and party,<sup>1</sup> but also his counsel fees and necessary disbursements.<sup>2</sup>

§ 7057. **Expenditures by Stockholders in Behalf of the Corporation.**—These rest on the footing of ordinary debts.<sup>3</sup> So, if a stockholder advances goods to the corporation, as a consideration paid for the stock for which he subscribes in the corporation, such payment or contribution will furnish

services were incidentally beneficial to the other heirs. *Wilson v. Kelly*, 30 S. C. 483. Similarly, see *Roselius v. Delachaise*, 5 La. An. 481; *s. c.* 52 Am. Dec. 597; *Taylor v. Gorman*, 1 Drury & W. 235.

<sup>1</sup> See the distinction as to these two kinds of fees explained in *Re Paschal*, 10 Wall. (U. S.) 483, 493.

<sup>2</sup> *Trustees v. Greenough*, 105 U. S. 527. The court, at the same time, disallowed his claim for *private expenses*, such as traveling fares and hotel bills, and for his time, personal services, etc., and took occasion to observe that the practice of allowing to trustees, complainants, and receivers, and their counsel, large and extravagant counsel fees and commissions, payable out of trust funds under the control of the court, is to be reprehended. In this case Mr. Justice Miller filed the following notable opinion: "While I agree to the decree of the court in this case, I

do not agree to the opinion, so far as it is an argument in favor of a principle on which is founded the grossest judicial abuse of the present day, namely, the absorption of a property or a fund which comes into the control of a court, by making allowances for attorneys' fees and other expenses, pending the litigation, payable out of the common fund, when it may be finally decided that the party who employed the attorney, or incurred the costs, never had any interest in the property or fund in litigation. This system of paying from a man's property those engaged in the effort to wrest it from him can never receive my approval; and as I have had no opportunity to examine the authorities cited in the opinion, I can do no more than protest against the doctrine." *Ibid.* 538.

<sup>3</sup> *Gibson v. Trowbridge Furniture Co.*, 96 Ala. 357; *s. c.* 11 South. Rep. 365.



him no valid claim against the assets of the corporation, until all its debts are paid.<sup>1</sup>

§ 7058. **Debts Contracted Prior to or at the Time of Mortgages.**—Debts contracted prior to the execution of mortgages, or contemporaneously therewith, are, of course, postponed to the mortgage, with possibly the single exception of debts contracted for labor and supplies to keep a railroad in operation, under principles elsewhere stated.<sup>2</sup> But there is a *statute in North Carolina* providing that corporate debts, contracted prior to, or at the time of, the execution of a mortgage by a corporation, shall remain a first lien upon the corporate property.<sup>3</sup> It is held that this statute applies to corporations generally, and not merely to those created under its particular provisions.<sup>4</sup>

§ 7059. **Judgments.**—The rank which judgments recovered against the corporation will take in the distribution of its assets, will depend generally upon the statute law of the State relating to the liens of judgments, and not specially upon the statute law relating to corporations. Obviously if, under the statute law of the jurisdiction, the judgment becomes, upon its rendition, a *lien* upon the property which has passed into the hands of a receiver, such lien will be preserved in making distribution, unless some other governing statute, such as exists in the case of *national banks*,<sup>5</sup> leads to a contrary conclusion. Under a statute providing that, “in payment of the creditors and distribution of the funds of any such [insolvent] company, the creditors shall be paid pro-

<sup>1</sup> *Gibson v. Trowbridge Furniture Co.*, *supra*, following *s. c.* 93 Ala. 579; 9 South. Rep. 370.

<sup>2</sup> *Post*, § 7114, *et seq.*

<sup>3</sup> *Bat. Rev. N. C. Stat.*, ch. 26, § 48; *N. C. Code*, § 685. The language of the statute is as follows: “That all debts and contracts of any corporation, prior to or at the time of the execution of any mortgage or deed of trust by such corporation, shall have

a first lien upon the property, rights, and franchises of said corporation, and shall be paid off or secured before such mortgage or deed of trust shall be registered.”

<sup>4</sup> *Traders' Nat. Bank v. Lawrence Man. Co.*, 96 N. C. 298; *s. c.* 3 S. E. Rep. 363. The statute is, of course, *not retroactive*. *Ibid.*, 96 N. C. 307.

<sup>5</sup> *Post*, § 7269.

portionately to the amount of their respective debts, excepting mortgage and judgment creditors, when the judgment has not been by confession for the purpose of preferring creditors,"—it is held that judgment creditors of insolvent corporations are preferred, in the distribution of their funds, only so far as they have acquired *liens*,—as for instance, if real estate has become subject to the judgment, or if a lien upon personal property has been created by the *delivery* to the sheriff of an execution under it.<sup>1</sup> One who pays a judgment against a railroad company (and it may be assumed against any other corporation), prior to the appointment of a receiver, under an agreement with the corporation for its repayment to him, is not entitled to be paid prior to the mortgage bondholders; because if he had taken a mortgage to secure his advance to the corporation, it would have been junior to theirs.<sup>2</sup> When an action is brought to wind up the affairs of an insolvent corporation, and an order for injunction and the appointment of a receiver is obtained, no judgment afterwards recovered by a creditor entitles it to any priority over other claims.<sup>3</sup> *Equitable circumstances* may operate to postpone the preference which usually follows the lien of a judgment. Thus, where, at a meeting of creditors of an insolvent corporation, the corporation confessed judgment to one creditor for his debt, with the understanding that he would file a creditor's bill for the benefit of all, he was properly denied a preference over the others.<sup>4</sup>

<sup>1</sup> Doane v. Millville Ins. Co., 45 N. J. Eq. 274, 282; s. c. 17 Atl. Rep. 265; reversing s. c. 43 N. J. Eq. 522. In the case in the court below (New Jersey Court of Chancery), it was held that where a judgment is entered on the same day that a bill of complaint against the corporation is filed, and a restraining order thereon is issued, the judgment creditor is entitled to no preference. 43 N. J. Eq. 522.

<sup>2</sup> Blair v. St. Louis &c. R. Co., 23 Fed. Rep. 521, per Brewer, J.

<sup>3</sup> Clinkscales v. Pendleton Man. Co., 9 S. C. 318. But it has been held in New York that one holding a judgment against an insolvent insurance company, over which a receiver has been appointed, can claim no preference, over other creditors, even though, at the time of the recovery of the judgment, it constituted a lien on the company's real estate. Attorney-General v. Continental Life Ins. Co., 28 Hun (N. Y.), 360.

<sup>4</sup> Talcott v. Grant Wire &c. Co., 33 Ill. App. 155.

**§ 7060. Judgments Recovered after Assignment or Filing Bill for Receiver.**—Judgments recovered against an insolvent person or corporation, after the commencement of the proceeding in equity instituted to secure the appointment of a receiver, do not generally become a *lien* upon the assets in the hands of the receiver, and the creditors in such judgments are not entitled to priority of payment.<sup>1</sup> The reason is, that the proceeding in which the receiver is appointed, is a *judicial assignment* of the property of the insolvent for a ratable distribution; and no creditors are allowed, therefore, by any act subsequently done, to get liens or preferences in respect of it.<sup>2</sup> There may be room for some difference of opinion upon the question whether, in the application of this principle, the date which deprives the judgment of its preferential quality is the *date of the filing of the bill, or of the injunction* against the prosecution of actions against the corporation, or of the appointment of the receiver. If the theory of some of the courts that the appointment of the receiver takes effect by

<sup>1</sup> Jackson v. Lahee, 114 Ill. 287; Kelly v. Neshanic-Min. Co., 7 N. J. Eq. 579. In this last case, the judgment was not entered until *after* the appointment of the receiver. There are cases holding, contrary to the cases just cited, that where one *partner* files a bill for a dissolution of the firm and for a receiver, and creditors recover judgments prior to the decree of dissolution, such judgments are *liens upon the partnership assets*, and, as such, are entitled to a preference. Ross v. Tittsworth, 37 N. J. Eq. 333; Ellicott v. United States Ins. Co., 7 Gill (Md.), 307; Adams v. Woods, 8 Cal. 152; s. c. 68 Am. Dec. 313, and 9 Cal. 24. The *lien of a judgment* is confined to the actual interest of the judgment debtor. Coombs v. Jordan, 3 Bland Ch. (Md.) 284; s. c. 22 Am. Dec. 236. An attachment or judgment lien does not take precedence over a *prior unrecorded deed or mort-*

*gage*, of which the creditor had no notice. First Nat. Bank v. Hayzlett, 40 Iowa, 659; Hoy v. Allen, 27 Iowa, 208; Churchill v. Morse, 23 Iowa, 229; s. c. 92 Am. Dec. 422. See also Cook v. Dillon, 9 Iowa, 407; s. c. 74 Am. Dec. 354, and note 357; also Buchan v. Sumner, 2 Barb. Ch. (N. Y.) 165; s. c. 47 Am. Dec. 305.

<sup>2</sup> See Law v. Ford, 2 Paige (N. Y.), 310; Van Alstyne v. Cook, 25 N. Y. 489; Maynard v. Bond, 67 Mo. 315. On the winding up of an insolvent manufacturing corporation, it was held that certain judgment creditors were entitled to a priority over persons claiming under a trust deed to secure unissued bonds, the *conditions of acceptance having failed*, and that certain other hypothecated bonds were entitled to priority except as against the lien of the judgment creditors. McKinley v. Smith, 25 Ill. App. 168.

*relation*,<sup>1</sup> as of the date of the filing of the bill where the bill prays for such an appointment, is to be applied, — then the doctrine will be as first above stated; but Chancellor Halstead, in a case already cited, took the view that no judgment is entitled to preference unless it was obtained before the granting of the injunction provided for in the statute under which the proceeding took place.<sup>2</sup> Upon a similar principle, a *judgment* obtained against a corporation *subsequent to an assignment for the benefit of its creditors*, creates no lien upon its assets, such as gives the judgment creditor a priority in the distribution of the funds. It has been so held where the judgment was recovered against an insurance company upon a *loss* which had been *sustained by fire* at the time when the assignment was made. The court reasoned that the damages of the plaintiffs had not at that time been ascertained and fixed by proof. The claim, therefore, had that grade only which contracts of a similar description have. And the judgment could not be made to relate back and be classed with judgments existing when the assignment was made.<sup>3</sup>

**§ 7061. Wages of Employés, Operatives, and Laborers.** — We have already had occasion to notice, when treating of the liability of stockholders, a class of statutes which make stockholders in corporations individually liable for debts due to the employés of the corporation.<sup>4</sup> We have now to consider the same class of statutes, in so far as they give a preference to the same class of creditors in the *distribution* of the funds of insolvent corporations. Such a statute in New York enacts that, “where a receiver of a corporation . . . shall be appointed, the wages of the employés, operatives, and laborers thereof shall be preferred to every other debt or claim against such corporation, and shall be paid by the receiver from the moneys of such corporation which shall first come to his hands.”<sup>5</sup> The preference created by this statute did not ex-

<sup>1</sup> *Ante*, § 6919.

<sup>5</sup> *McCallie v. Walton*, 37 Ga. 611;

<sup>2</sup> *Kelly v. Neshanic Min. Co.*, 7 N. J. Eq. 579, 589, 590.

<sup>4</sup> *Ante*, § 3141, *et seq.*

<sup>5</sup> *Laws N. Y.* 1885, ch. 376.

tend to wages earned before it went into effect, which was in May, 1885.<sup>1</sup> Nor does the preference given by it pass by an *assignment* of a laborer's claim prior to the appointment of a receiver. The reasoning of the court is, that the preference given by the statute does not become a *vested legal right*, but remains merely *expectant*, until the receiver is appointed;<sup>2</sup> whereby the conclusion,—which, it is submitted, is a palpable *non-sequitur*,—is drawn, that if an *assignment* of the wages is made before a receiver is appointed, the quality which the statute annexes to the demand is thereby lost. Accordingly, the holder of an order payable generally, drawn by a laborer upon the corporation in favor of a third person, and accepted by the corporation, was not entitled to the preference given by the statute.<sup>3</sup> And where the holders of such orders surrendered them to the corporation, and received in lieu thereof its *promissory notes*, or credits upon its books, the laborer's wages were deemed paid by delegation, and such notes and credits were not entitled to preference.<sup>4</sup> This is unsound and unjust. The statute was intended for the protection of a necessitous class of laborers, who may even be obliged to assign their wages to boarding-house keepers before they are earned; and, in case of a corporation of doubtful solvency, the preferential quality which the statute attaches to such wages may be the only thing which will give them any value in the estimation of an assignee. Judicial holdings, elsewhere considered,<sup>5</sup> are directly opposed to this unjust and oppressive conclusion. An *assignment* by a manufacturing company of its entire business to creditors for the purpose of *preferring* them, made at the request of the debtor and not the creditor company, and not in any way brought about by legal proceedings, is within the meaning of a statute<sup>6</sup> giving to *employés* a prior lien for wages to a certain amount, when such business

<sup>1</sup> *People v. Remington & Sons*, 45 Hun (N. Y.), 329; *s. c.* 6 N. Y. Supp. 796; 10 N. Y. St. Rep. 310; *s. c.* affirmed, 109 N. Y. 631, *mem.*

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ante*, § 3143.

<sup>6</sup> Ind. Rev. Stat. 1881, § 5206.

“shall be *suspended* by the action of creditors, or be put into the hands of an *assignee*, receiver, or trustee.”<sup>1</sup>

§ 7062. **Who Within Such Statutes and Who not.** — In determining who are within the protection of such statutes, the purpose of enacting them must be constantly borne in mind, which was to secure a preference to a needy and meritorious class of laborers, who work for small wages, and who may be presumed to have families dependent upon such wages for their support. Keeping this in view, it has been held that one employed by the general manager of a manufacturing company, to assist in *keeping its books*, whose duty it was also to clean the office and show room of the company, and to assist in putting together, taking apart, and shipping the goods sold by the company, was an *employé* within the protection of the statute.<sup>2</sup> A *drayman* in the regular employ of a corporation, whose services were of a kind or class which the corporation required in its business, was entitled to the protection of a similar statute,<sup>3</sup> giving a prior lien to employés.<sup>4</sup> On the other hand, the *superintendent* of a corporation, and its *attorney*, are not “*employés, operatives, or laborers*,” nor are their earnings “*wages*,” within the meaning of the New York act quoted in the preceding section;<sup>5</sup> nor is a person *who contracts* to do a piece of work at a fixed price, and who employs another to do a whole or a part of the actual labor;<sup>6</sup> nor is a person *who contracts* with a telegraph company to do the specified work of putting up certain lines of wires or poles, an *employé* within the meaning of another similar statute;<sup>7</sup> nor is a person who is under a *contract* to do the whole of a particular portion of the business of a railroad corporation, and to assume the liability of a common carrier, and who, in the

<sup>1</sup> Bass v. Doerman, 112 Ind. 390; s. c. 14 N. E. Rep. 377; 11 West. Rep. 871.

<sup>2</sup> Brown v. A. B. C. Fence Co., 52 Hun (N. Y.), 151; s. c. 5 N. Y. Supp. 95.

<sup>3</sup> N. J. Rev., p. 188, § 63.

<sup>4</sup> Watson v. Watson Man. Co., 30 N. J. Eq. 588.

<sup>5</sup> People v. Remington, 45 Hun (N. Y.), 329; s. c. 10 N. Y. St. Rep. 310; 6 N. Y. Supp. 796; s. c. affirmed, 109 N. Y. 631.

<sup>6</sup> Ibid.

<sup>7</sup> Vane v. Newcombe, 132 U. S. 220.

performance of his contract, avails himself of the labor and services of others,—since the right to be preferred is personal, inhering in the person who actually performs the labor or service, and, the act being in derogation of the right of creditors to be paid equally, is not to be extended by construction;<sup>1</sup> nor is the officer or other employé occupying a superior position of *trust and profit*, such as an agent employed to sell goods in a foreign country at a salary of two thousand dollars per annum and commission.<sup>2</sup> A claim for *damages*, for a breach of employment by an insolvent corporation, is not entitled to the preference provided for by such statute, not being for *wages due*.<sup>3</sup>

§ 7063. **Debts Barred by Limitation.**—It may be assumed that unsecured debts which are barred by limitation cannot be proved as claims, and that a receiver or assignee paying them, without an order of the court, would not justly be allowed credit for them in his final account.<sup>4</sup> But where a debt is secured by a mortgage or deed of trust, the security takes the debt out of the statute of limitations, to the extent that *it* will not be barred by any period of time short of that sufficient to raise a *presumption of payment*, unless there is a statute prescribing a shorter period as applicable to mortgages or deeds of trust. The statute of limitations may operate to bar any *remedy at law* by an *action* upon the debt, but it does not discharge the *lien* of the mortgage or deed of trust;<sup>5</sup> and hence, where all the property of a corporation, some or all of which is so incumbered, passes into the hands

<sup>1</sup> Lehigh Coal & Nav. Co. v. Central R. Co., 29 N. J. Eq. 252. There is an unreported decision in New York to the effect that persons who *supply the materials* for the conduct of the business of a manufacturing corporation, are entitled to be paid before the capital used in the enterprise shall be applied to the payment of any debts not arising out of the business. *Gautier v. Douglass Man.*

*Co.*, 44 Hun (N. Y.), 629, *mem.*; *s. c.* 9 N. Y. St. Rep. 310.

<sup>2</sup> *People v. Remington, supra.*

<sup>3</sup> *Spader v. Mural Decoration Man. Co.*, 47 N. J. Eq. 18; *s. c.* 20 Atl. Rep. 378.

<sup>4</sup> Compare *ante*, § 3116.

<sup>5</sup> *Bowie v. Poor Schools Soc.*, 75 Va. 300, 304; *Coles v. Withers*, 33 Gratt. (Va.) 186; *Smith v. Washington City &c. R. Co.*, 33 Gratt. (Va.) 617.

of an assignee or receiver, the incumbrance follows it, unless barred by the presumption of payment already stated, and the incumbrancer will be entitled to share in the distribution accordingly.<sup>1</sup>

§ 7064. **Demands of Foreign Receivers, Assignees, etc.** — On principles hereafter considered,<sup>2</sup> a judicial assignment, *in invitum*, of the property of an insolvent corporation in one State, will not operate upon property, real or personal, situated in another State, except by *comity*, and this comity will not be extended to the prejudice of local creditors. If there are insolvency proceedings in two States, the receivers, assignees, or commissioners, appointed to conduct the winding up in the State of the domicile of the corporation, can claim nothing as distributees in the other State, except by virtue of the laws of such other State, or of such comity as the courts of such other State may choose to extend to them.<sup>3</sup>

§ 7065. **Ordinary Bank Deposits.** — An ordinary bank deposit creates the relation of *debtor and creditor* between the bank and depositor, and not that of *trustee* and *cestui que trust*;<sup>4</sup> and therefore depositors stand on the footing of *general creditors* in the distribution of the assets of the bank when it becomes insolvent.<sup>5</sup> And where a savings bank had two classes of deposits, one called by the bank "special deposits," but which were really special only when distinguished from the general mass of its deposits, the distinction being that the depositors did not participate in the profits, and were entitled

<sup>1</sup> *Hamilton v. Glenn*, 85 Va. 901, 906; s. c. 9 S. E. Rep. 129.

<sup>2</sup> *Post*, § 7334, *et seq.*

<sup>3</sup> Pursuing this theory, it has been held in Ohio that the order of a Kentucky court, made under the law of that State, appointing commissioners to take possession, for the benefit of creditors, of the assets of a banking institution there, does not operate so as to divest any title or interest of that institution in property of any

description in Ohio, or to prevent legal remedies directed against that property to satisfy a debt. To give such commissioners a priority, they must establish their claims under the laws of Ohio. *Finnell v. Burt*, 2 Handy (Ohio), 202.

<sup>4</sup> *Post*, § 7098.

<sup>5</sup> *Stockton v. Mechanics' &c. Sav. Bank*, 32 N. J. Eq. 163; *Bruyn v. Receivers*, 9 Cow. (N. Y.) 413, note.



to check out their deposits without notice as in the case of an ordinary bank deposit,—it was held that such depositors were not entitled to any priority in distribution.<sup>1</sup>

§ 7066. **Deposits in Savings Banks.**—The order of distribution of the assets of an insolvent *savings bank*, or *safety fund society*, will depend principally upon the scheme under which it is organized. Such a bank sustains a close resemblance to a mutual insurance company, and the corporation is a *trustee* for the depositors for the safe investment of the funds which they deposit. A savings bank, created under a special New Jersey charter, was authorized to receive and invest deposits for the benefit of the depositors, the income or profits to be divided among them, after reasonable deductions for necessary expenses, and the principal to be repaid to them at such times and with such regulations as the board of managers should, from time to time, prescribe. Under their regulations, they not only received deposits participating in the profits and not payable except on thirty days' notice, but also another kind of deposits, called by them "special deposits," which were not to participate in the profits, and were to be repaid (not delivered) to the depositors, without any preliminary notice. Both kinds of deposits were intermingled in the funds of the bank, indistinguishably. A receiver having been appointed in insolvent proceedings, it was held:—

1. That such an institution is a mere trustee for the benefit of depositors.
2. That a depositor who borrowed money from the bank, secured by his note or mortgage, cannot offset his debt against the amount of his deposit at the time when the decree of insolvency was made.
3. That the so-called "special" depositors were not entitled to priority in payment over the other class of depositors.
4. That debts and expenses contracted by the bank in carrying on its ordinary business were to be preferred.
5. That a claim, under a covenant in the lease, for rent accruing after a surrender of the premises to the lessor by the receiver, could not be maintained.

<sup>1</sup> *Stockton v. Mechanics' &c. Sav. Bank*, 32 N. J. Eq. 163.

6. That money paid to the bank in exchange for its check, given for the accommodation of the payee, which was dishonored, presumably went into the funds, and the debt should be preferred. 7. The checks given to depositors on account of deposits were not to be preferred.<sup>1</sup>

**§ 7067. Deposits Made by Savings Banks.** — A statute of New York relating to savings banks<sup>2</sup> provides that savings banks shall have a preference for moneys deposited, over other creditors of an insolvent bank. This statute is held to apply only to deposits made by a savings bank with another bank, in the ordinary course of business and subject to its drafts, and to an amount not exceeding that authorized by section 27 of the same act. It does not apply to *loans* made by a savings bank to another bank, whether payable on time or on call; nor is such a loan changed into a deposit, so as to secure the preference of the statute, by reason of any want of authority in the managers of the savings bank to make the loan, or for the reason that it may have been made in violation of law.<sup>3</sup>

<sup>1</sup> *Stockton v. Mechanics' &c. Sav. Bank*, 32 N. J. Eq. 163. Another such charter authorized the bank to accept and execute any trusts committed to such bank, by any person, by will or otherwise, or by order of any court. Under a family agreement, \$25,000 were deposited in the bank to pay \$1,460 per annum to the widow for life, and the surplus of the income from such deposit, if any, to her children. The bank was subsequently taken under the control of the chancery court, on a deficiency of assets to pay its depositors in full. It was held:—1. That it was not established by proof that such deposit was taken by the bank as a special trust, or as a deposit differing materially from the other ordinary deposits of the bank. 2. That such deposit was not entitled to preference in payment over others. 3. That even if the trust claimed had been

shown, nothing in the charter gave the fund the priority claimed, and it would not be entitled to it. *Vail v. Newark Sav. Inst.*, 32 N. J. Eq. 627.

<sup>2</sup> Laws New York 1875, ch. 371, § 48.

<sup>3</sup> *Rosenback v. Manufacturers' &c. Bank*, 69 N. Y. 358; affirming *s. c.* 10 Hun (N. Y.), 148. See this case for an instance of a transaction held to be a *loan*, and not a *deposit*, within the meaning of the statute. It has been held that the statute applies to deposits made before, as well as since, the passage of the act; and extends to moneys received under a general agreement and course of business for the savings bank to pay in funds from day to day, by pass-book, like an ordinary bank depositor, the same to be repayable, on call, with interest. *Upton v. New York & Erie Bank*, 13 Hun (N. Y.), 269.

§ 7068. **Billholders of Banks.**— We may commence the subject to be considered in this section with the platitude that the capital stock of an incorporated bank is a trust fund for the payment of its note-holders and creditors.<sup>1</sup> If this has any meaning, it means that such assets are the trust fund for the *equal benefit* of the note-holders and creditors,<sup>2</sup> and that neither class is entitled to a preference over the other, and that no member of either class is entitled to a *preference* over members of the same class, unless there is a statute giving it. Thus, it has been held that no diligence on the part of one note-holder can defeat the right of another to a *pro rata* distribution of such assets.<sup>3</sup> In the absence of such a statute, the billholders are not entitled, in the distribution of the assets of an insolvent bank, to any preference over other creditors.<sup>4</sup> But there is *some* reason why the legislature should enact such a preference. That reason is, that the circulating notes of the bank become a part of the money of the country; that they pass repeatedly from hand to hand in the exchanges of the country; and that, in a greater number of instances, they are taken by persons who do not deal directly with the bank, and who have not the means of knowing its condition. Such persons hence stand on a different footing from that of the depositors of the bank, who are its immediate customers, and who are brought into daily contact with its officers. This consideration has, no doubt, induced some of the State legislatures, in chartering special banks, and in enacting general banking laws, to create a preference in favor of billholders, in the event of insolvency, over other creditors. This legislative policy was pursued in Georgia at an early day.<sup>5</sup> In that State where the road of a “banking and

<sup>1</sup> King v. Elliott, 5 Smedes & M. (Miss.) 428; Schley v. Dixon, 24 Ga. 273; s. c. 71 Am. Dec. 121; Wood v. Drummer, 3 Mass. (U. S.) 308; *ante*, §§ 1569, 2951.

<sup>2</sup> *Ante*, § 6492.

<sup>3</sup> Marr v. Bank of West Tennessee, 4 Coldw. (Tenn.) 471.

<sup>4</sup> Stockholders v. Colt, 1 Gray (Mass.), 382.

<sup>5</sup> See Robinson v. Bank of Darien, 18 Ga. 65. But this holding seems to violate the well-known principle that one who buys up the demands against an insolvent corporation after it has passed into the hands of a re-

railroad company," on which billholders had a lien for the payment of their bills, was sold under a decree to raise a fund for the payment of such bills,—it was held that the billholders were entitled to dividends only on the *amount actually paid* by them respectively for their bills, and not on the amount originally received by the bank.<sup>1</sup> After the rendition of this decision, the holder of some of the bills, which had been filed as claims in the case, assigned them to another. It was held that the amount paid by the holder at the time of this decision, and not the amount paid by *his* assignee, was the amount which the assignee was entitled to receive for them.<sup>2</sup>

**§ 7069. Salaries of Officers.**—The *arrears of salaries* due to the officers of a corporation at the time of its suspension

ceiver, can prove his demand only to the extent of what he has disbursed. *Ante*, §§ 3797, 3798, 6967, 6968. Thus, the statutory lien of billholders, under the charter of the Monroe Railroad and Banking Company, attached equally upon all the property and effects of that company, to the *exclusion of judgment creditors*. Woodward v. Central Bank, 4 Ga. 323.

<sup>1</sup> Collins v. Central Bank, 1 Ga. 435.

<sup>2</sup> Griffin v. Central Bank, 3 Ga. 371. It has been held that the holder of protested bank bills, issued under the general banking law of Illinois, should receive his proportion of the proceeds of the sale of the stocks deposited with the auditor as collateral, to be estimated upon the principal amount of such bills and *damages* computed at *twelve and one-half per centum* on the amount of bills protested, the same to be calculated from the date of protest. Willare v. Dubois, 29 Ill. 48. Compare Ringo v. Bisco, 13 Ark. 563, where a Federal District Judge, who was also an Ex-chief Justice of the

Supreme Court of Arkansas, and who, as such, had participated in a decision involving the validity of an assignment of all the assets of the Land Bank of the State of Arkansas (*Ex parte Conway*, 4 Ark. 302), some years afterwards claimed the right of set-off, in respect of a quantity of bills of the bank, against a debt owed by him to the bank, which right of set-off was allowed in full, including *damages* under the charter of the bank for suspending specie payments. If the judge was a creditor and billholder of the bank at the time of participating in the former decision, then, although he rendered a dissenting opinion, his participation in it was indefensible. If he purchased the bills subsequently to the assignment, then, on principles understood by every lawyer, he was not entitled to a set-off (*ante*, §§ 6967, 6968) to any greater extent than what he actually paid for them, under any theory of set-off which has ever been applied in such cases, except perhaps in this particular case.

are *not to be preferred*; the officers have no *lien* upon the assets of the corporation for their services, in the absence of a special statute creating it; but they must take their dividend with other *general creditors*.<sup>1</sup> But it has been held that the annual salary of an *attorney of a railroad company*, amounting to one thousand dollars, falling due immediately prior to the appointment of a receiver, was entitled to a preference over the mortgage bondholders, on the ground that the services of the attorney were presumptively necessary, under a doctrine elsewhere considered,<sup>2</sup> to keep the road a "going concern."<sup>3</sup>

§ 7070. **Debts Due the United States.**—A statute of the United States enacts as follows: "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor, are attached by process of law, as to cases in which an act of bankruptcy is committed."<sup>4</sup> We shall

<sup>1</sup> Bruyn v. Receiver, 9 Cow. (N. Y.) 413, note; Matter of Croton Ins. Co., 3 Barb. Ch. (N. Y.) 642; *ante*, § 4704, *et seq.* We have already had occasion to note one monstrous decision, which upheld the power of a banking corporation to make an assignment preferring creditors; and to place the salaries of its officers, whose offices were continued, at the head of the list (*Ex parte Conway*, 4 Ark. 302); but it may be assumed that this will never be drawn into a precedent.

<sup>2</sup> *Post*, § 7114.

<sup>3</sup> Blair v. St. Louis & C. R. Co., 23 Fed. Rep. 521.

<sup>4</sup> Act Cong. March 3, 1797, ch. 20, § 5; 1 U. S. Stat. at Large, p. 515; Act

Cong. March 2, 1799, ch. 22, § 65; 1 U. S. Stat. at Large, p. 676; Rev. Stat. U. S., § 3466. Cases construing this statute are: *United States v. Fisher*, 2 Cranch (U. S.), 358; *United States v. Huoe*, 3 Cranch (U. S.), 73; *Harrison v. Sterry*, 5 Cranch (U. S.), 289; *Prince v. Bartlett*, 8 Cranch (U. S.), 431; *United States v. Bryan*, 9 Cranch (U. S.), 374; *Thelusson v. Smith*, 2 Wheat. (U. S.) 396; *United States v. Howland*, 4 Wheat. (U. S.) 108; *Conard v. Atlantic Ins. Co.*, 1 Pet. (U. S.) 386; *Hunter v. United States*, 5 Pet. (U. S.) 173; *United States v. State Bank*, 6 Pet. (U. S.) 29; *United States v. Hack*, 8 Pet. (U. S.) 271; *Brent v. Bank of Washington*, 10 Pet. (U. S.)

see<sup>1</sup> that this statute does not govern in the distribution of the assets of *insolvent national banks*, and that the United States is not entitled to a preference in such cases. The Supreme Judicial Court of Massachusetts have held that an incorporated bank is not a "person" within the meaning of this statute; so that, where the assets of such a bank are put into the hands of receivers under a statute of the State, the United States is not entitled to priority of payment; nor is such a case such an *insolvency* of a debtor of the United States as is contemplated by the statute.<sup>2</sup>

§ 7071. **Sureties on Appeal Bonds.**—Where a judgment is recovered against a railroad company, upon a claim not entitled to priority in a distribution after its insolvency, and an appeal is taken from the judgment, and an attorney of the company becomes its surety on the appeal bond, and a receiver of the road is thereafter appointed, and, after his appointment, a judgment is recovered in the appellate court against the company and also against the surety in the appeal bond, and the latter pays the judgment,—his claim is *not entitled to priority* over the mortgage bondholders.<sup>3</sup>

§ 7072. **Ultra Vires Debts.**—It has been held that, as between the creditors of an insolvent bank, those whose debts were created under a lawful power, given by the charter, must be *preferred* to those who claim under a contract that the bank under its charter had no power to make. In such case, the bank is not *estopped* from denying the illegality or want of power to make the contract.<sup>4</sup>

§ 7073. **Sham Stock Subscriptions with an Agreement for Rescission.**—We have seen that a person who subscribes to the shares of an intended or existent corporation for the

596; *Beaston v. Farmers' Bank*, 12 Pet. (U. S.) 102; *United States v. Heron*, 20 Wall. (U. S.) 251; *Bayne v. United States*, 93 U. S. 642.

<sup>1</sup> *Post*, § 7312.

<sup>2</sup> *Com. v. Phoenix Bank*, 11 Met. (Mass.) 129.

<sup>3</sup> *Blair v. St. Louis &c. R. Co.*, 23 Fed. Rep. 523.

<sup>4</sup> *Bank of Chattanooga v. Bank of Memphis*, 9 Heisk. (Tenn.) 408.

purpose of inducing others to subscribe, and under a *secret agreement* that he is to be released from the obligation of his subscription, is, as against creditors and subsequent subscribers, held to the obligation of his contract as ostensibly made.<sup>1</sup> Upon the same principle, where a stockholder, for the purpose of giving the company credit with the public, subscribes to its stock, but upon agreement that the company will redeem the shares at any time, on specified terms, and claims the right to be reimbursed on the insolvency of the company, he must be *postponed* to the demands of creditors and *bona fide* stockholders.<sup>2</sup>

§ 7074. **Rights Accruing Subsequently to the Dissolution.** The rights of creditors of an insolvent corporation become fixed by a decree of the court ordering the dissolution thereof. No rights can be subsequently acquired by a creditor which will entitle him to a larger participation in its assets. If, therefore, an *insurance company* is dissolved, and passes into the hands of a receiver to wind up its affairs, and a *loss* subsequently happens, the policy-holder cannot prove and take distribution in respect of the entire loss, but only to the extent of the *surrender value* of his policy at the time of the dissolution,—that is, he is only entitled to a *ratable proportion* of his *unearned premium*.<sup>3</sup>

§ 7075. **General Deposit of Court Funds.**—A general deposit of court funds and of the funds of court officers, in a bank which does a general commercial business, which deposit is made by order of court, *has no preference* over claims of other creditors, in the distribution of the assets of the bank by a receiver upon its insolvency; though it is admitted that the rule would be different if such funds were *specially deposited*, so as to create a *bailment*, and so as to be followed and identified as *trust funds*. The reason of the rule is that those beneficially interested in a general deposit of court funds have

<sup>1</sup> *Ante*, §§ 1400, 1401, 1513, 1514.

<sup>2</sup> *Eisenlord v. Oriental Ins. Co.*, 29 N. J. Eq. 437.

<sup>3</sup> *Dean's Appeal*, 98 Pa. St. 101; *post*, § 7226.

no superior natural equity to other depositors of the bank and that there is no just reason why they should not share equally with other creditors in the common misfortune.<sup>1</sup> The rule is different where the court appoints a particular person a depositary of the funds under control of the court, and such person, knowing of the order, accepts the deposit; for he then becomes, *pro hac vice*, an officer of the court. The court may make an order for him to pay the money, and if he fails to do so, without showing some sufficient reason, he may be proceeded against for a *contempt*.<sup>2</sup> The same rule, it is suggested, would apply to a corporation and its officers, having the means of payment in their hands belonging to the corporation, and if they should refuse to pay, they might be proceeded against for a *contempt*.<sup>3</sup>

**§ 7076. Distribution of Assets Deposited in Another State.**

A Missouri charter of a mutual life insurance company provided that, on its dissolution, all its property should vest in the Superintendent of Insurance of Missouri, who should wind up its affairs. It was held that, as all the policy-holders were members and had assented thereto, those residing in Louisiana were entitled to no priority of payment, or of security, in respect of the assets in Louisiana, but such assets must be turned over to said Missouri officer.<sup>4</sup> But certain policy-holders, residing in Virginia, *did* secure a priority out of the deposit made by the same company in that State, and it was held in Missouri, that this must be deducted from the dividend declared by the Superintendent of Insurance of Missouri, before they could receive any balance of such dividend.<sup>5</sup>

**§ 7077. Validity of Retroactive Statutes Touching Distribution of Assets.** — A statute creating a rule of distribution of the assets of an insurance company, in the event of its

<sup>1</sup> *Otis v. Gross*, 96 Ill. 612; *s. c.* 36 Am. Rep. 157.

<sup>2</sup> *Re Western Marine &c. Ins. Co.*, 38 Ill. 289.

<sup>3</sup> *Otis v. Gross*, *supra*.

<sup>4</sup> *Rundel v. Life Asso. of America*, 4 Woods (U. S.), 94.

<sup>5</sup> *Matter of Life Association of America*, 91 Mo. 177.



insolvency, may operate, in respect of policies of such a company existing before the enactment of the statute, provided the statute, in terms or by necessary implication, does not relieve the insurance company from the obligation of performing what it contracted to do. It was therefore held that the following statute was operative in the distribution of the assets of a dissolved insurance company, in respect of policies issued before its enactment, as well as policies issued thereafter: — “If any company of this State shall, under the requirements of any law of another State or foreign government, have on deposit, in such other State or foreign government, securities, upon which the citizens or residents of such State or government have, by virtue of its laws, a lien, claim, or right, prior or superior to that of the citizens or residents of other States, — then no citizen or resident of the State or country in which such deposit is held shall be entitled to share in the distribution of the proceeds of the deposits or other assets in this State, until the amount deposited in such other State or country shall be deducted from the claims of the persons who, by the laws of such State or country, hold such prior or superior lien, and until the other policy claimants and creditors of said company shall have received from the proceeds of deposits or other assets an equal per centum upon their claims.”<sup>1</sup>

**§ 7078. Order of Distribution under New York Statute.** — A statute of New York<sup>2</sup> provides that the assets of insolvent corporations shall be distributed in the following order: 1. All debts entitled to preference under the laws of the United States. 2. Judgments actually obtained against such corporation, to the extent of the value of the real estate on which they shall respectively be liens. 3. All other demands, without preference. Construing this statute, it is held that a *judgment* rendered after the appointment of a receiver, who received no real estate belonging to the corpora-

<sup>1</sup> 2 Rev. Stat. Mo. 1879, § 6034;  
Matter of Life Association of America,  
91 Mo. 177, 182. Compare *ante*, § 5475.

<sup>2</sup> Rev. Stat. N. Y. (7th ed.), p.  
2401, § 79.

tion, belongs in the third, and not in the second, class.<sup>1</sup> A short history of this statute is that, in 1825 the Legislature of New York passed an act to prevent fraudulent bankruptcies by incorporated companies, to facilitate proceedings against them, and for other purposes.<sup>2</sup> This statute adopted the principle, as to insolvent corporations, that equality among creditors is equity, and directed that, upon the return of an execution unsatisfied, the property and effects of the corporation should be sequestered, and distributed equally, and in a just proportion among all its creditors. This provision was re-enacted substantially in the same form in the thirty-sixth and thirty-seventh sections of the article of the Revised Statutes of New York, which related to proceedings against corporations in equity;<sup>3</sup> so that the manner in which the effects of insolvent corporations were to be distributed, *after a decree in equity upon a creditor's bill*, was the same as was prescribed by the seventy-ninth section of the article relating to the voluntary dissolution of corporations;<sup>4</sup> that is, by *giving no preferences* except such as were created by the laws of the United States, and such as had been acquired by the docketing of the judgment or decree so as to create a lien upon the real estate of the corporation.<sup>5</sup>

<sup>1</sup> Attorney-General v. Guardian Mut. Life Ins. Co., 5 N. Y. Supp. 84. See *ante*, § 7059.

<sup>2</sup> N. Y. Laws 1825, p. 449, § 5.

<sup>3</sup> 2 Rev. Stat. New York, 463.

<sup>4</sup> *Ibid.* 471.

<sup>5</sup> Morgan v. New York &c. R. Co., 10 Paige (N. Y.), 290; s. c. 40 Am. Dec. 244, per Walworth, C.

## CHAPTER CLXVII.

### RESTORATION OF TRUST FUNDS BY THE RECEIVER.

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#### § 7084. Receivers must Restore Trust Funds in Full.—

If funds come into the custody of the corporation impressed with a special trust in favor of the depositor, so that the *beneficial title* does not pass to the corporation, that trust will adhere to the fund when it passes into the hands of the receiver, and he will be required to restore it in full to the

third party to whom it belongs, and cannot compel such party to take a *pro rata* share with the other creditors.<sup>1</sup> This principle works no injustice to the general creditors, who are only entitled to share in the assets which belong honestly to their debtor. But care must be taken, in applying it, to avoid injustice to *subsequent purchasers* from the corporation, *without notice* of the trust under which it holds the funds; and here comes in the difficulty and the nicety of distinction which so many of the cases present. That distinction is that, where the depositary of the fund keeps it segregated from the common mass of his property, so that it preserves its original earmarks, so to speak, or other means of identification, the mere fact that he wrongfully transfers it to a *bona fide purchaser for value* does not prevent the real owner from reclaiming it from such purchaser, just as he might reclaim from such a purchaser his horse wrongfully sold and delivered to him by one to whom he had delivered it in bailment,—unless the trust is of such a nature that the trustee has *power* to sell or to “vary the securities”;—then, in the absence of notice or fraud, the purchaser is not concerned with the trustee’s disposition of the purchase-money.<sup>2</sup> But it is to be remembered that the receiver of an insolvent corporation is not, even as the representative of its creditors, a purchaser for value; and therefore, in respect of the right to follow trust funds into his hands, the case stands exactly as though the depositor of the

<sup>1</sup> Cases affirming this general principle are *Re Le Blanc*, 14 Hun (N. Y.), 8; *Moffitt v. McDonald*, 11 Humph. (Tenn.) 457, 460; *Overseers v. Bank*, 2 Gratt. (Va.) 544; *s. c.* 44 Am. Dec. 399; *Kip v. Bank*, 10 Johns. (N. Y.) 63; *Thompson v. Perkins*, 3 Mas. (U. S.) 232; *Whitley v. Foy*, 6 Jones Eq. (N. C.) 34; *s. c.* 78 Am. Dec. 236; *L’Apostre v. Le Plaistrier*, cited 1 P. Wms. 320; *Copeman v. Gallant*, 1 P. Wms. 320; *Burdett v. Willet*, 2 Vern. 638; *Whitecomb v. Jacob*, 1 Salk. 160; *Scott v. Surman*, Willes,

400; *Ryall v. Rolle*, 1 Atk. 165, 172; *Taylor v. Plumer*, 3 Maule & S. 562; *Miller v. Race*, 1 Burr. 452, 457; *Pennell v. Deffell*, 4 De Gex, M. & G. 372; *s. c.* 23 Eng. L. & Eq. 460; *National Exch. Bank v. Beal*, 50 Fed. Rep. 355. See a learned note upon the subject of “Following Trust Property,” by Hon. James O. Pierce, 5 Cent. L. J. 51, where all of the foregoing cases are examined. Compare *Merchants’ &c. Bank v. Austin*, 48 Fed. Rep. 25. Compare with this chapter, *ante*, § 2642.

<sup>2</sup> *Ante*, §§ 4930, 5707, 6041.

fund were attempting to reclaim it from the corporation while a going concern. The principle which applies in such a case was thus laid down by the Lords Justices in a case in the English Court of Appeal: "As between *cestui que trust* and trustee, and all parties claiming under the trustee, otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, — whether in its original or in its altered state, — continues to be subject to, or affected by, the trust."<sup>1</sup>

**§ 7085. No Matter how Much Altered by the Corporation.** — While, therefore, in a case where the trust fund consists of *money*, and it is mingled with the mass of money in the treasury of the depositary, and so paid out to those who deal with it in good faith, it cannot be reclaimed *from them* as a trust fund, because, to give the reason of Lord Mansfield, "it has *passed in currency*";<sup>2</sup> yet as between the depositary, or a receiver representing the depositary, and his creditors, it makes no difference whatever that the fund has been mingled with his other funds in his treasury.<sup>3</sup> On the contrary, the corporation, and possibly its receiver, may be in a *worse position*, by reason of having unlawfully or improperly mingled the funds of the bailor or depositor with its own, than it would occupy if it had kept them separate. It may become liable to have the *whole mass* taken by the depositor, on the principle which applies in the case of the wrongful *confusion of goods*. That principle, briefly stated, is that, if one unlawfully mixes and confuses his own goods with those of another, so that they cannot be distinguished, the innocent owner of the goods so confused becomes entitled to the whole,<sup>4</sup> and the

<sup>1</sup> Pennell v. Deffell, 4 De Gex, M. & G. 372, 388; s. c. 23 Eng. L. & Eq. 460.

<sup>2</sup> "The true reason is upon account of the *currency* of it; it cannot be recovered after it has *passed in currency*": Lord Mansfield in Miller v. Race, 1 Burr. 452, 457.

<sup>3</sup> Moore v. Robertson, 16 N. Y. Supp. 403.

<sup>4</sup> First Nat. Bank v. Schween, 127 Ill. 573; s. c. 11 Am. St. Rep. 174; Robinson v. Holt, 39 N. H. 557; s. c. 75 Am. Dec. 233.

*burden* is upon the party making the confusion to *identify* his own property or to lose it.<sup>1</sup> So, if an *agent* confuses his own property with that of his *principal*, he does it at his own risk, and the case is subject to the above rule.<sup>2</sup> Corporations can only act through agents, and when so acting they become responsible for the frauds and wrongs of their agents, in like manner as a natural person is responsible for his own frauds and wrongs;<sup>3</sup> and accordingly, this rule of law relating to the confusion of goods operates against a corporation which has wrongfully confused the goods of another with its own, as well as against a natural person.<sup>4</sup> When it is considered that it is the duty of the trustee to keep the trust fund separately and ear-marked, so that it can be identified, and not to mingle it with his own individual property,<sup>5</sup> this principle would seem to apply to the case of a trustee holding trust funds. Clearly, then, where a corporation receives a fund in the character of a trustee, it receives it subject to the principle that, as between trustee and *cestui que trust*, and all parties claiming under the trustee, otherwise than by purchase for a valuable consideration without notice, all property belonging to the trust, however much it may be changed or altered in its nature or character, and all the fruits of such property, whether in its original or in its altered state, continue to be subject to or affected by the trust.<sup>6</sup>

<sup>1</sup> *Diversey v. Johnson*, 93 Ill. 547; *Fuller v. Paige*, 26 Ill. 358; *s. c.* 79 Am. Dec. 379; *Beach v. Schmultz*, 20 Ill. 185; *Little Pittsburg & c. Min. Co. v. Little Chief & c. Min. Co.*, 11 Colo. 223; *s. c.* 7 Am. St. Rep. 226.

<sup>2</sup> *Hall v. Page*, 4 Ga. 428; *s. c.* 48 Am. Dec. 235.

<sup>3</sup> *Ante*, § 6321, *et seq.*

<sup>4</sup> *Little Pittsburg & c. Min. Co. v. Little Chief & c. Min. Co.*, 11 Colo. 223; *s. c.* 7 Am. St. Rep. 226.

<sup>5</sup> *Coffin v. Bramlitt*, 42 Miss. 194; *s. c.* 97 Am. Dec. 449.

<sup>6</sup> *Englar v. Offutt*, 70 Md. 78; *s. c.* 14 Am. St. Rep. 332. In a case which

called for the application of this principle, a bank, which we will call bank A., received from a customer of another bank, which we will call bank B., a check upon the latter bank, and sent it to that bank for payment. Bank B., upon paying the check, charged the amount of it to the drawer, whose account was then good for the amount, and returned the check to him as paid. It sent to bank A. a draft on a bank in New York for the amount of the check. Two days afterwards, bank B. closed its doors, and a receiver of its assets was appointed. The draft, which it thus

§ 7086. **Following the Proceeds of Trust Funds.**—The Supreme Court of the United States have, in several cases, adopted the principle laid down by Lord Ellenborough in an early case,<sup>1</sup> that, whether the disposition of the fund be rightful or wrongful, the beneficial owner is entitled to the proceeds, whatever be their form, provided only he can identify them. If they cannot be identified, by reason of the trust money being mingled with that of the trustee, then the *cestui que trust* is entitled to a charge upon the new investment to the extent of the trust money traceable into it; that in this respect there is no distinction between an express trustee and an agent, or bailee, or a collector of rents, or anybody else in a fiduciary position; that there is no difference between investments in the purchase of lands, or chattels, or bonds, or loans, or moneys deposited in a bank account; and that it makes no difference in reason or law, into what other form,

sent to bank A. in payment of the check, was not paid by the New York bank on which it was drawn. Bank A. then made an application to the court whose receiver held the custody of the assets of bank B., for an order on the receiver to pay the full amount of the check, basing its claim on the ground that the assets of bank B. had passed into the hands of the receiver, impressed with a trust in favor of bank A. to that amount. It was held that the order was properly denied; that, in order to authorize the relief prayed for, it was necessary to *trace into the hands of the receiver money or property which belonged to bank A., or which had, before the receivership, been set apart and appropriated to the payment of the check; that the act of bank B. in charging the check against its drawer and in returning it to him, did not amount to a payment and setting apart of sufficient of the drawer's funds to cover it, and that it did not impress a special trust upon any part*

of the drawer's assets; but that the effect of the transaction was simply to reduce the indebtedness of bank B. to its depositor by the amount of its check, and to constitute bank B. a debtor to him, or a debtor to the holder of the check, to a corresponding amount. *People v. Merchants' &c. Bank*, 78 N. Y. 269; *s. c.* 34 Am. Rep. 532. On the other hand, *money paid by stockholders for additional shares*, upon representations of the managing officers that it is required for specific purposes necessary to the business of the corporation, has been held to constitute *a trust fund* to be used for that purpose and no other, and, where it has not been applied for that purpose, it is to be restored by the receiver of the corporation in full. *Moore v. Robertson*, 16 N. Y. Supp. 403. See *post*, § 7296; *ante*, § 4466.

<sup>1</sup> *Taylor v. Plumer*, 3 Maule & S. 562; reaffirmed by the English Court of Appeal in *Re Hallett's Estate*, 13 Ch. Div. 696.

different from the original, the change may have been made, whether it be into that of promissory notes for the security of money, which was produced by the sale of the goods of the principal, or into other merchandise; for the product or substitute for the original thing still follows the nature of the thing itself as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail.<sup>1</sup> A general tendency is discovered in the courts to adopt this view.<sup>2</sup>

§ 7087. Reason of the Confusion on This Subject. —

Before proceeding further with this subject, attention ought to be drawn to a circumstance which has produced much of the confusion among judicial decisions in dealing with it. This circumstance is a failure on the part of the judges to keep in their minds a clear image of the different conditions under which the question arises, where it arises between the original parties to the transaction, and where it arises between one of the parties to the transaction and a receiver, assignee, or other *representative of creditors*, after the other party has become insolvent and his assets have been assigned or impounded for a ratable distribution among his creditors. To illustrate this confusion, it is proposed to cite a recent decision of the Supreme Court of the United States, where the proposition is laid down that if a bank is hopelessly insolvent, and to the knowledge of its managing officer, when a deposit is made with it, the acceptance of the deposit constitutes such a *fraud* as entitles the depositor to reclaim either the paper deposited or its proceeds.<sup>3</sup> To this proposition the court cites a decision of the Court of Appeals of New York, which is directly in point, and which asserts that, in such a case, there is a *right of rescission on the ground of fraud*, which the depositor may exercise even after suspension, and against

<sup>1</sup> National Bank v. Insurance Co., 104 U. S. 54, 68, 69.

<sup>2</sup> Stoller v. Coates, 88 Mo. 514; Peak v. Ellicott, 30 Kan. 156; s. c. 46 Am. Rep. 90; People v. City Bank,

96 N. Y. 32; Harrison v. Smith, 83 Mo. 210; s. c. 53 Am. Rep. 571.

<sup>3</sup> St. Louis & C. R. Co. v. Johnston, 133 U. S. 566, 576.



the other creditors of the bank.<sup>1</sup> But it confuses the question, by citing in the same category a previous decision of its own, in which the question arose between the original parties while the bank was a going concern, and which related merely to the liability of the bank for permitting an agent to convert a special deposit belonging to his principal, the bank having knowledge of the real party to whom the deposit belonged.<sup>2</sup>

§ 7088. **Proceeds of Paper Deposited for Collection not a Trust Fund.**—There is no doubt whatever that where the customer of a bank deposits with it paper for collection, and the bank fails while holding the paper and before it has made the collection, its receiver or assignee will be bound to restore the paper to the depositor; since, until collected, he would have the right to recall it at any time,—unless the banker might choose to assert his *lien* upon it to make good an *overdrawn account* of the customer.<sup>3</sup> But suppose the bank makes the collection and gives the customer credit for the amount collected, in the usual way, by entering it to his credit in his general deposit account,—does the fund so collected remain a *trust fund*, payable by the receiver in full, or does it fall into the mass of the deposits of the customer, in respect of which the relation is that of debtor and creditor merely? The writer believes that the money so collected, when passed into the general account of the depositor, ought to be treated like any other deposit, and that it ought to be regarded as assets of the bank, and not as a special deposit of the customer.

<sup>1</sup> *Cragie v. Hadley*, 99 N. Y. 131; s. c. 52 Am. Rep. 9.

<sup>2</sup> *Manhattan Bank v. Walker*, 130 U. S. 267. It may be noted that, in the same category, and to the same proposition, the court cited *Martin v. Webb*, 110 U. S. 7, 15, which had nothing to do with the question of following trust funds, but which merely turned on the question whether a bank was affected, through its directors, with the knowledge of facts re-

lating to one of its transactions, which was possessed by its cashier.

<sup>3</sup> Reasoning of Lott, J., in *Scott v. Ocean Bank*, 23 N. Y. 289; reasoning of Nixon, J., in *Balbach v. Frelinghuysen*, 15 Fed. Rep. 675; reasoning of Peckham, J., in *National Butchers' &c. Bank v. Hubbell*, 117 N. Y. 384; s. c. 15 Am. St. Rep. 515; *National Exch. Bank v. Beal*, 50 Fed. Rep. 355.

This rule of law would conform to the custom of the bank, assented to by the customer, and it would therefore conform to the intent of both parties to the transaction,—if indeed they may be supposed to have any intent in view of an approaching insolvency. As soon as a bank makes a collection for its general customer, it passes the amount to his credit in his general account; it goes to swell his general balance, against which he checks; it is mingled with his ordinary deposits; and there is no ground for distinguishing it from that of an ordinary deposit. As both parties assent to its treatment as an ordinary deposit, it can make no difference with its real quality whether the bank received it direct from the customer or from a creditor of the customer. This was the view taken by the Supreme Court of Mississippi; and that court, while conceding that other courts have attached to such collections the qualities of a trust fund, declined to “follow their lead to this absurd result.”<sup>1</sup> The same doctrine has been held by the Court of Appeals of New York,<sup>2</sup> and by other courts.<sup>3</sup>

§ 7089. **Illustrations.**—A check was forwarded, by a collecting bank, to the bank on which it was drawn, with directions to that bank to collect and apply the proceeds to a debt owed to the drawee bank by the collecting bank. On the day that it received the check, and before it had assented to the direction of the collecting bank, the drawee bank failed, and its assets passed into the hands of a receiver. It was held that the drawer of the check, who had subsequently paid it, did not thereby acquire a right to sue either the collecting bank, or to claim priority over the creditors of the drawee bank in the payment of the check. Under the circumstances, the refusal of the drawee bank to accept and pay the check gave only a right of action against it on the instrument, and this remitted the plaintiff in such action to the foot-

<sup>1</sup> Billingsley v. Pollock, 69 Miss. 759; s. c. 30 Am. St. Rep. 585.

<sup>2</sup> National Butchers' &c. Bank v. Hubbell, 117 N. Y. 384; s. c. 15 Am. St. Rep. 515.

<sup>3</sup> Balbach v. Frelinghuysen, 15

Fed. Rep. 675; Merchants' &c. Bank v. Austin, 48 Fed. Rep. 25; Philadelphia Nat. Bank v. Dowd, 38 Fed. Rep. 172 (learned opinion by Seymour, J.); First Nat. Bank v. Armstrong, 42 Fed. Rep. 193; s. c. 39 Fed. Rep. 231.

ing of a general creditor.<sup>1</sup> The plaintiff, a bank doing business in Pennsylvania, sent, for collection, a paper to a national bank in North Carolina, "indorsed for collection and immediate return" to the plaintiff. The paper was collected, and the proceeds were mingled with other moneys of the national bank, instead of being forwarded to the plaintiff. The national bank, while the money was in this condition, went into the hands of a receiver. During all the time that it held the money prior to the appointment of the receiver, it had on hand cash to a greater amount than the amount collected. The bank in Pennsylvania brought a bill in equity against the receiver, praying to be paid in full, on the ground that the national bank, by receiving the paper for collection and immediate return, became a trustee, and that either its entire property or the money in its vaults became impressed with a trust. It was held, in a learned opinion by Seymour, J., that, if the mingling of the money collected with its own funds was a breach of trust on the part of the national bank, it was a conversion of such funds, and that a right of action for damages for a conversion placed the plaintiff in the category of a creditor at large, without any right of preference.<sup>2</sup>

**§ 7090. Otherwise if Proceeds Collected by Receiver.**—It is entirely consistent with this principle to hold that if such paper has been deposited with the bank for collection, prior to its suspension, but the money due thereon has not been collected prior to the suspension, but has been afterwards paid over by the collecting agent to the assignee or receiver,—it comes into his hand as a trust fund, to be by him paid over in full to the customer who deposited the paper for collection;<sup>3</sup> so that if he does not pay it over in full, he will be personally liable. Nor will it be any defense to him, against an action to enforce his personal liability, that he paid it out in the form of a dividend in *good faith*, for the title of a bailor to his property cannot be changed by the mere fact that his bailee *converts* it in good faith; nor will the order of the court superintending the administration, requiring him to pay the dividend, justify him in including it therein; nor will the failure

<sup>1</sup> *Romanski v. Thompson* (Miss.),  
11 South. Rep. 828.

<sup>2</sup> *Philadelphia Nat. Bank v. Dowd*,  
38 Fed. Rep. 172.

<sup>3</sup> *First Nat. Bank v. Armstrong*, 42 Fed. Rep. 193.

of the customer to demand payment of it from him before the payment of such dividend be such *laches* as will deprive him of the right to maintain the action.<sup>1</sup>

§ 7091. **Unless Credited as Cash by the Bank Before its Suspension.** — It is the well-known practice in many banks to receive checks and drafts from their customers, and to credit them in the account of the customer as so much cash, and to allow the customer to check against such credit immediately; and afterwards, if the check or draft is not paid, to charge it back against its customer in his account, and notify him of that fact, and require him to make the account good if the failure to collect the paper has created a deficiency. Such also is the well-known custom of banks in dealing with each other. Where such was the custom, and a bank sent to a national bank certain drafts for collection and credit, and the national bank, pursuing the custom, immediately entered the amounts of the draft as a credit to the transmitting bank, and afterwards failed, and the collections were made by a receiver subsequently appointed, — it was held that such collections were *not a trust fund*, but belonged to the national bank; since the bank, by giving credit to the transmitting bank to the extent of the paper, had made the paper its own.<sup>2</sup> If this decision is correct, it qualifies the doctrine of the preceding section, with the proviso that the national bank has not credited the transmitting bank with the proceeds of the paper sent for collection, prior to its failure. Whether this decision embodies a sound conclusion must depend upon the question elsewhere discussed,<sup>3</sup> whether, on being notified of the failure of the national bank, the transmitting bank had the *power to withdraw* the paper from its hands. If it had the power of withdrawal or revocation of the agency to collect, the existence of the power could only rest upon the fact of its still

<sup>1</sup> *National Butchers' &c. Bank v. N. Y. St. Rep. 600; 10 N. Y. Supp. Hubbell*, 117 N. Y. 384; *s. c.* 15 Am. 75.  
<sup>2</sup> *First Nat. Bank v. Armstrong*, 39 St. Rep. 515. Compare *Owen v. Kellogg*, 15 Hun (N. Y.), 455; *s. c.* 31 Fed. Rep. 231.

<sup>3</sup> *Post*, § 7109.

being the owner of the paper, and the national bank its bailee or agent merely; and if it had such power, the decision here considered is plainly unsound. But it is obvious that the question whether the arrangement between the transmitting bank and the national bank was such as to create the relation of debtor and creditor, or merely the relation of principal and agent, will be in most cases a *question of fact*. So treating the question, and examining it upon the evidence as to the intent of the parties, Mr. Circuit Judge Jackson subsequently rendered a decision which must be regarded as overruling the one just cited, by holding that the evidence showed that the relation between another transmitting bank and the same insolvent national bank, in respect of paper transmitted for collection, was not that of creditor and debtor, but was that of principal and agent.<sup>1</sup>

**§ 7092. Necessary to Trace the Paper or its Proceeds into the Hands of its Receiver.**— Under any theory on this sub-

<sup>1</sup> Commercial Nat. Bank v. Armstrong, 39 Fed. Rep. 684; following White v. National Bank, 102 U. S. 658, 660; Winters v. Armstrong, 37 Fed. Rep. 508; and First Nat. Bank v. Armstrong, 36 Fed. Rep. 59. In the particular case, the Fidelity National Bank offered to "collect at par" all paper sent to it by the Commercial National Bank. The latter bank accepted the offer on a printed letter-head containing the printed words, "For collection, .....; for credit, ....." All paper sent under this agreement was, at the suggestion of the Fidelity National Bank, indorsed, "Pay Fidelity National Bank for collection ....., for Commercial National Bank." The Fidelity National Bank thereafter wrote to the Commercial National Bank: "We collect at par, and include in our remittances everything collected to date." All paper sent by the Commercial National Bank was charged on its books

to the Fidelity National Bank, the "cash items" on being transmitted, and the "time items" on being collected by the Fidelity National Bank, on whose books like credit entries to the Commercial National Bank were made. The cashier of the Commercial National Bank testified that, in making such charges, he understood that the Fidelity National Bank became indebted to the Commercial National Bank; but he also stated that it was not intended to transfer the paper to, or to open a deposit account with, the latter bank. Upon this evidence, the court held that the relation between the Commercial National Bank and the Fidelity National Bank, in respect of paper sent for collection by the former to the latter, was that of principal and agent, and not that of creditor and debtor; and hence that the proceeds of such paper was a trust fund to be restored by the receiver in full. *Ibid.*

ject, in order to require the receiver to account for paper passed to the bank for collection, or for its proceeds when collected, on the footing of its being a trust fund, it is necessary to *trace the funds into his hands*, — that is, to show by *affirmative evidence*, either that the paper itself, or the proceeds of it when collected, actually passed into the hands of the receiver.<sup>1</sup> This is merely a branch of the general doctrine that, “in seeking to follow and impress a trust character upon funds which an agent has misapplied, it is incumbent upon the principal to clearly trace such funds into the hands of the party against whom the relief is sought; and, so long as the trust fund or property, in either its original or substituted form, can be traced and identified, it may be followed and recovered by the true owner, provided it has not come into the possession of some *bona fide* holder for value without notice. This right of the principal ‘only ceases when the means of ascertainment fails,’ or when his property or fund has reached a *bona fide* holder for value, and without notice of the trust.”<sup>2</sup>

**§ 7093. Contrary View that Such Collections a Trust Fund.** — The contrary rule, laid down in a standard work on the law of banking, has met with the approval of an able Federal judge. It is thus expressed: “Where the customer deposits in the bank commercial paper for collection, at the same time indorsing it over to the bank, the parties understanding that it is only intended by the indorsement to put the paper in such shape that the bank can collect upon it, the title in the paper does not thereby pass to the bank, nor does the bank owe the amount to the customer, until such time as the

<sup>1</sup> *Commercial Nat. Bank v. Armstrong*, 39 Fed. Rep. 684.

<sup>2</sup> *Commercial Nat. Bank v. Armstrong*, 39 Fed. Rep. 684, 692, opinion by Jackson, J.; citing *Taylor v. Plumer*, 3 Maule & S. 562; *Overseers v. Bank*, 2 Gratt. (Va.) 544; *Whitley v. Foy*, 6 Jones Eq. (N. C.) 34; s. c. 78 Am. Dec. 236; *Thompson v. Perkins*, 3 Mas. (U. S.) 232; *Kip v. Bank*,

10 Johns. (N. Y.) 63; *Van Alen v. American Nat. Bank*, 52 N. Y. 1; *Farmers' &c. Bank v. King*, 57 Pa. St. 202; s. c. 98 Am. Dec. 215; *Cook v. Tullis*, 18 Wall. (U. S.) 332; *Schuler v. Laclede Bank*, 27 Fed. Rep. 424; *National Bank v. Insurance Co.*, 104 U. S. 54; *Winters v. Armstrong*, 37 Fed. Rep. 508; *First Nat. Bank v. Armstrong*, 36 Fed. Rep. 59.

collection is actually consummated.<sup>1</sup> Neither is this strict right of the bank curtailed or altered simply because a practice has been allowed to prevail, by which it has allowed the depositor to draw against deposits of paper for collection before the collection has been actually made. This is a mere gratuitous privilege allowed by the bank, which does not grow into a binding legal usage. Thus, it is very common for depositors to deposit checks with their banks, and to draw against them, on the same day, checks of their own, which may be presented for payment before the bank has had an opportunity to collect upon the deposited checks. In such cases banks are frequently wont to honor such checks of their customers upon the confidence that the deposited checks will be duly paid. But this habit of the banks is a pure favor, and if there be no distinct understanding to change the natural effect of such dealing, its long continuance gives no real right whatsoever to the depositor to demand its continuance or its practice in any individual case wherein the bank may, for any arbitrary reason, see fit to withhold that favor. In England, a decision given by Lord Ellenborough went much further even than this. Bills, not yet due, were sent to a country banker to collect. According to the custom of country bankers, these were actually entered in the bankers' own books to the depositor's credit, with the proper discount, and he was thereafter entitled to draw against this credit before the actual collection. 'Upon the subsequent failure of the banker, before the collection, it was held that the title in the bills had not passed to him, and that the depositor should recover them specifically, or their amount, if the bankrupt's assignee had already made the collection.'<sup>1</sup> The Supreme Court of Wisconsin, against the dissent of two able judges,<sup>2</sup> take the view that where a draft is sent to a bank for collection, and the bank fails, after having collected, but before remitting, the money, the money is a trust fund in the hands of the assignee

<sup>1</sup> Morse on Banks & Banking (3d ed. by Nixon, J., in Balbach v. ed.), p. 922, § 583; quoted with approval by Frelinghuysen, 15 Fed. Rep. 675.

<sup>2</sup> Cassidy and Taylor, JJ., dissented.

in insolvency of the bank, to be restored in full, although the bank, when it received the paper for collection, gave credit to the transmitting bank therefor, and allowed the transmitting bank to check against it,<sup>1</sup>—losing sight of the fact that this preference operates to the prejudice of other creditors, equally meritorious.

**§ 7094. Illustrations of This View.**—A mercantile firm of Kansas City desired to remit the proceeds of certain sales to their consignor at Denver, in compliance with his instructions, which were to place the amount to his credit in the Exchange Bank of that city. These merchants had received payment for the property sold, in the form of a *draft*. This draft was deposited in the Mastin Bank, of Kansas City, but not, it seems, in the usual way, by receiving credit on their bank book for it as so much cash; but they deposited it with a special notification to the Mastin Bank that it was to be transmitted to the Exchange Bank of Denver, and there placed to the credit of the consignor of the goods. The cashier of the Mastin Bank accordingly wrote to the Exchange Bank, to the effect that the account of the Exchange Bank with the Mastin Bank was entitled to a credit of the net amount of the proceeds of the sale (the same being something less than the amount of the check), for the use of the consignor of the goods, and a memorandum to the same effect was sent to the consignor by the consignees who had deposited the check. Before this letter reached the Exchange Bank, the Mastin Bank suspended business and made an assignment for the benefit of its creditors. When the letter arrived, notifying the Exchange Bank as above stated, it refused to charge the amount to the Mastin Bank, or to place it on its books to the use of the consignor of the goods, and refused to recognize the consignor as having any claim for such credit, or to pay him the amount of it. The consignees, who had deposited the draft with the Mastin Bank, thereupon brought an action against the assignee, to charge the funds in his hands with the full amount of the draft, and it was held that they were entitled to recover; because the special manner in which the draft had been deposited impressed it with the character of a trust fund, and it never had become *rightfully* mingled with the funds of the Mastin Bank; and if it had been so *wrongfully* mingled,

<sup>1</sup> McLeod v. Evans, 66 Wis. 401; doctrine, see Stoller v. Coates, 88 Mo. s. c. 57 Am. Rep. 287. To the same 514.



the depositors were entitled to payment in full, on the principle that the diversion of the fund had increased the assets which had been assigned,<sup>1</sup>—a conclusion which seems perfectly clear. In another case the maker of a note, which had been originally given to a bank, deposited with the bank, before the note fell due, a sum of money to be used by the bank in paying the note when it should fall due, with the instruction that the money be paid to the holder of the note. Instead of using the money according to the instruction, the bank appropriated it to its own use, failed to pay the note, suspended business, and made an assignment for its creditors. It was held, and on grounds which are perfectly clear, that the depositor of the money could reclaim it in full from the assignee, as a trust fund.<sup>2</sup> In another case, a person transmitted a sum of money to a bank, on the representation of the bank that it could be loaned with the security of a deed of trust upon real estate, for the purpose of its being so loaned, and to be held by the bank only for delivery to the borrowers when they should execute and deliver a note secured by a recorded deed of trust. The bank mingled the money with its general funds, and then failed, and it was held that the depositors could maintain an action against its assignee to impress its general assets in his hands with the entire amount of the deposit, on the theory of its having been received as a trust fund, and not as an ordinary deposit.<sup>3</sup>

§ 7095. **Money Deposited Immediately Before Suspensions.**—It has been held that where a customer of a bank makes a general deposit of money immediately before its suspension, and the bank is *hopelessly insolvent to the knowledge of its president*, the depositor may recover the amount of his deposit in full, and is not obliged to take a distributive share with other creditors. The court proceeded upon the ground that the depositor has a *right of rescission on the ground of fraud*, which he may exercise even after the suspension,—the governing principle, stated by the court, being “that one who

<sup>1</sup> *Stoller v. Coates*, 88 Mo. 514.

<sup>2</sup> *Peak v. Ellicott*, 30 Kan. 156;  
s. c. 46 Am. Rep. 90. The same conclusion was reached on similar facts in *People v. City Bank*, 96 N. Y. 32.

<sup>3</sup> *Harrison v. Smith*, 83 Mo. 210;  
s. c. 53 Am. Rep. 571; overruling *Mills v. Post*, 76 Mo. 426.

has been induced to part with his property by the fraud of another, under guise of a contract, may, upon discovery of the fraud, rescind the contract and reclaim the property, unless it has come to the possession of a *bona fide* holder.”<sup>1</sup> The propriety of this decision is doubtful, because of the extreme difficulty of applying such a rule so as not to work injustice to other creditors. Many other depositors may have made their deposits at a time when the insolvency of the bank was so doubtful, to the knowledge of the president, that he ought not to have received them; and yet, under the operation of the rule, *their money*, or a part of it, will be taken to pay the preferred depositor in full.

§ 7096. **Money Otherwise Obtained by Fraud.**—It is a general principle of equity that where a contract has been procured by fraud, the defrauded party has a right of rescission and reclamation, provided he asserts his right seasonably after discovering the fraud, and before the rights of innocent third parties have supervened on the faith of the validity of the transaction.<sup>2</sup> No doubt it is a part of this doctrine that where money or property is obtained from a person by fraud, he may, on discovering the fraud, elect to rescind the contract and reclaim his money or property in the hands of any one except an innocent purchaser for value, but always with the proviso *that he can find it*. Whether this right of rescission and reclamation can be converted into a *lien*, so that, if the party committing the fraud becomes insolvent and the money or property procured by the fraud has been so mingled with the other property of the party committing the fraud that it cannot be identified, and in this mingled condition passes into the hands of a receiver or assignee for the benefit of creditors, he can enforce the lien, to the extent of its value, against the property in the hands of the receiver or assignee,—presents a different and more difficult question. To allow him

<sup>1</sup> *Cragie v. Hadley*, 99 N. Y. 131; &c. *R. Co. v. Johnston*, 133 U. S. 566, s. c. 52 Am. Rep. 9; St. Louis 576.

<sup>2</sup> *Ante*, § 1438, et seq.

to assert such a lien is tantamount to converting a *right of action for damages* into an *equitable lien*, and this against other creditors, who are equally innocent with himself, and who may have been equally duped in a moral sense, though not in such a legal sense as to give them a right of rescission in equity. When there is not enough in the final distribution for all, the result of allowing such a lien is similar to the result of allowing a right of set-off: it pays the particular creditor, in part out of the money which the insolvent debtor has procured from other creditors, unless in cases where the money or property, in respect of which the lien is asserted, is procured immediately before the suspension. In such a case it has been held that, the money procured by fraud having been mingled with the general funds of the insolvent prior to his suspension, so as to become incapable of identification, the right of the defrauded party to reclamation or to a preferential payment, on the theory of following a trust fund, is gone.<sup>1</sup>

**§ 7097. Distinction where the Customer has No Deposit Account with the Bank.**—A distinction must be admitted, resting on clear grounds, where the person who sends the paper to the bank for collection has *no general deposit account with the bank*. Here, as soon as the money is collected by the bank and comes into its treasury, it is not passed as an addition to the general balance of the depositor of the paper, such as, under ordinary circumstances, may reasonably be supposed to impress it with the character of a general deposit; but the collecting bank clearly stands in the position of any other collecting agent or bailee. The money which it has collected

<sup>1</sup> *Union Nat. Bank v. Goetz*, 138 Ill. 127; *s. c.* 32 Am. St. Rep. 119; 27 N. E. Rep. 907; distinguishing *King v. Hamilton*, 16 Ill. 190; *Clapp v. Emery*, 98 Ill. 523; and *First Nat. Bank v. Schween*, 127 Ill. 573; *s. c.* 11 Am. St. Rep. 174; 23 N. E. Rep. 681; citing and approving the following cases: *Thompson's Appeal*, 22 Pa.

St. 16; *Philadelphia Nat. Bank v. Dowd*, 38 Fed. Rep. 172; *Goodell v. Buck*, 67 Me. 514; *Portland &c. Steamboat Co. v. Locke*, 73 Me. 370; *United States v. Waterborough*, 2 Ware (U. S.), 158; *Englar v. Offutt*, 70 Md. 78; *s. c.* 14 Am. St. Rep. 332; 16 Atl. Rep. 497; *Johnson v. Ames*, 11 Pick. (Mass.) 172.

*does not belong to it*; the performance of the service required of it does not create the mere relation of debtor and creditor between it and the person to whom the service has been rendered, such as arises in the case of an ordinary bank deposit; but the money belongs to such person, and must be restored to him by the receiver in full.<sup>1</sup>

**§ 7098. General Deposits with Banking Company Pass to its Receiver as Assets.**—The relation created between a banker and its customer, when the customer makes general deposits of funds with the bank, against which he checks in favor of his creditors in the ordinary course of his business, — is not that of bailor or bailee, but is that of *debtor and creditor*; the money deposited becomes the property of the bank, and the bank owes the customer so much money, payable when demanded by his check.<sup>2</sup> When, therefore, the bank fails and

<sup>1</sup> *Ryan v. Paine*, 66 Miss. 678. In a case illustrating this distinction, a bank having received from a distant person, not a regular customer, a draft drawn against one of its own customers, received from the drawee his check upon itself in payment of the draft, and delivered the draft to the drawee, but suspended payment before it remitted the money to the holder of the draft. Other creditors attached its assets, and there was a general creditors' suit in which a receiver was appointed, to whom its assets were conveyed. Under the decree therein, certain of its creditors purchased and paid for all of its assets. Afterwards the drawer of the draft, not being a party to the creditors' suit, filed a bill to enforce a trust on the indebtedness of the drawee to the bank, a part of which was represented by the check. It was held that he was entitled to pursue it as a trust fund in equity, and that the creditors receiving the assets were not *bona fide* purchasers of the claim,

which was a mere book account. *Kinney v. Paine*, 68 Miss. 258.

<sup>2</sup> It is not necessary to enlarge upon the well-understood rule in the law of banking, that the simple deposit of money in a bank transfers the ownership of the money to the bank, and creates the relation of debtor and creditor between the bank and the depositor:—*Shipman v. Bank*, 126 N. Y. 318; *s. c.* 22 Am. St. Rep. 821; *Grissom v. Commercial Nat. Bank*, 87 Tenn. 350; *s. c.* 10 Am. St. Rep. 669, and note; *Boettcher v. Colorado Nat. Bank*, 15 Colo. 16; *Atlanta Nat. Bank v. Burke*, 81 Ga. 597; *Spilman v. Payne*, 84 Va. 435; *Fowler v. Bowery & Co. Bank*, 113 N. Y. 450; *s. c.* 10 Am. St. Rep. 479; *Gumbel v. Abrams*, 20 La. An. 568; *s. c.* 96 Am. Dec. 426; *Marine Bank v. Chandler*, 27 Ill. 525; *s. c.* 81 Am. Dec. 249, and note; *Lynch v. First Nat. Bank*, 107 N. Y. 179; *s. c.* 1 Am. St. Rep. 803; *Adams v. Schiffer*, 11 Colo. 15; *s. c.* 7 Am. St. Rep. 202; *Roberts v. Corbin*, 26 Iowa, 315; *s. c.*

## 5 Thomp. Corp. § 7099.] RECEIVERS OF CORPORATIONS.

goes into liquidation, the money thus deposited by the customer, having lost its character of a trust fund and having been mingled with the other deposits and funds of the bank, passes into the hands of its receiver, as general assets of the bank for administration and distribution among its creditors *pro rata*.<sup>1</sup>

§ 7099. What Deposits are Special and hence a Trust Fund. — No better rule can be stated, by which to determine this question, than to say that a deposit is not a general deposit, such as creates the relation of debtor and creditor between the banker and the depositor, but is a special deposit, where the right of property does not change, but where the property is to be held by the banker as a bailee or trustee, and where it is hence impressed with the character of a trust fund, and is payable by his receiver in full in the event of his insolvency, — when there is an *express agreement* to the effect that such is the character of the deposit, or when the circumstances are such that such an understanding of the nature of the transaction may be fairly inferred. In either case, the question whether the title to the deposit is changed from the depositor to the banker, or whether it remains in the depositor, must be determined with reference to the *agreement of the parties*, or, in the absence of an express agreement, to the general custom of bankers and the circumstances of the particular case.<sup>2</sup> The essential ear-mark of the special deposit is that it is something lodged with the banker for care and safe-keeping, to be returned in kind to the depositor, or to be delivered by the banker upon his order to a third person. To illustrate this principle, it has been held that a special deposit is created where a person deposits with a banker a sum of money upon the *promise* of the banker to remit it to a person at a distant place on receiving a certain letter of

96 Am. Dec. 146, and note 157;  
Fogarties v. State Bank, 12 Rich. L.  
(S. C.) 518; s. c. 78 Am. Dec. 468;  
Schmidt v. Barker, 17 La. An. 261;  
s. c. 87 Am. Dec. 527.

<sup>1</sup> Hawes v. Blackwell, 107 N. C.  
196; s. c. 22 Am. St. Rep. 870.

<sup>2</sup> Boettcher v. Colorado Nat. Bank,  
15 Colo. 16.

advice.<sup>1</sup> The most usual case of a special deposit with a banker, such as brings the thing deposited within the right of preference here considered, arises where bonds or other securities are placed by a customer in the hands of his banker for safe-keeping in the vaults of the bank. If in such a case the banker, in violation of the conditions under which he receives the deposit, disposes of it, and mingles the proceeds with his own assets, and afterwards makes an assignment for the benefit of his creditors,—the depositor has a right to be paid in full out of the assets.<sup>2</sup>

**§ 7100. Money Delivered to a Bank to Pay a Note Which It has Transferred.**—It has been held in two cases that where a customer of a bank delivers money to the bank, for the purpose of paying a note of such customer which has been negotiated with the bank, and the note has been rediscounted by the bank to a third person, and the bank, without

<sup>1</sup> *Cutler v. American Exch. Bank*, 113 N. Y. 593. A case in Illinois furnishes an illustration of the text. The agents of one O'Hare deposited with the Drovers' Bank a sum of money to the credit of the Henry Bank, for the use of O'Hare, and received the certificate of the Drovers' Bank, to the effect that the amount had been by it carried to the credit of the Henry Bank for the use of O'Hare. On the same day the Henry Bank failed; but the Drovers' Bank transferred the sum to the Northwestern Bank, without mentioning for what use the funds had been deposited with it. The Northwestern Bank carried the moneys to the account of the Henry Bank, and then applied them on an indebtedness due from the Henry Bank to itself, and refused to account to O'Hare for the moneys. It was held that the Drovers' Bank received and held the moneys as a trust fund for the use of O'Hare, and must account to him for the same. *Drovers' Nat. Bank v. O'Hare*, 119 Ill. 646.

<sup>2</sup> *Bowers v. Evans*, 71 Wis. 133; following *McLeod v. Evans*, 66 Wis. 401; *s. c.* 57 Am. Rep. 287, and *Francis v. Evans*, 69 Wis. 115. This principle was doubtfully applied on the following state of facts: F. intrusted to H., who was a banker, a deed of conveyance of certain land, directing him to collect the purchase-money and then deliver the deed to R., the grantee, and immediately remit the money to F. H., the banker, delivered the deed to R., for a small amount of the purchase-money in cash, and accepted the balance in his own certificates of deposit, previously issued to R. and others. On the same day the banker closed his business, and soon after made an assignment for the benefit of his creditors, without having remitted to F. the purchase-money of the land. It was held (*Taylor and Cassoday, JJ.*, dissenting) that he was guilty of a fraud in receiving the certificates in place of cash; that the assets in the hands of his assignee were subject to an

using the money to take up the note, fails and passes into the hands of a receiver or assignee, — the person delivering the money to the bank, delivers it upon such a trust that he is entitled to have the receiver or assignee repay it to him in full. The theory is that it never became assets of the bank, and never belonged to its general creditors for distribution among them.<sup>1</sup>

**§ 7101. Damages for the Conversion of a Special Deposit.**

It has been held, construing the National Banking Act, that the liabilities to the payment of which the funds of such a bank, in the hands of a receiver, are to be ratably appropriated, embrace a liability accruing from the tort of its officers in the conversion of a *special deposit*; and consequently that an action may be maintained against such a bank, after its insolvency, upon such a cause of action.<sup>2</sup> But the true theory is that a *special deposit* is a *trust fund*, and that the making of it does not create, as between the bank and the depositor, the relation of debtor and creditor, but that it creates the relation of bailor and bailee; and therefore if, at the time of the failure of the bank, the deposit remains in its vaults, the depositor is entitled to have it returned to him in full, and is not bound to take a distributive share, on the footing of being a creditor.<sup>3</sup> But, on the other hand, if the special deposit *has been converted* by the officers of the bank, then his demand against the bank for *damages* for the conversion will put him on the footing of an ordinary creditor, and in respect of that he will get only a distributive share in common with the others.<sup>4</sup>

equitable trust in favor of F. for the whole amount of the purchase-money, although it could not be traced to any specific property; and that he could enforce *full payment* of it in an action against the assignee. Francis v. Evans, 69 Wis. 115. That collaterals deposited with a bank for one debt or class of debts cannot be appropriated to another debt or class

of debts, — see Loyd v. Lynchburgh Nat. Bank, 86 Va. 690.

<sup>1</sup> Peak v. Ellicott, 30 Kan. 156; s. c. 46 Am. Rep. 90; Cavin v. Gleason, 105 N. Y. 256.

<sup>2</sup> Turner v. First Nat. Bank, 26 Iowa, 562.

<sup>3</sup> Ante, § 7099.

<sup>4</sup> Turner v. First Nat. Bank, 26 Iowa, 562. Where the bank was in

**§ 7102. Doctrine that Special Deposits Converted and Mingled with Assets of Corporation do not Give a Preference.**—Opposed to the foregoing is the doctrine, supported by strong reasons, that where a special deposit is made with a bank or other depository, and is wrongfully converted by the depository and mingled with its own funds, and a receiver is thereafter appointed by reason of its insolvency, — the depositor is not entitled to be paid in full, if the assets are not enough to pay all creditors in full, but must take his *pro rata* share with other general creditors. Several reasons have been adduced in the support of this conclusion:—1. The man who trusts his property with a depository for safe-keeping does not repose any more trust or confidence in him than the man who intrusts his money to his safe-keeping to be paid back to him on his check; and the former occupies no better position morally than the latter. 2. Where the depository becomes insolvent and his assets are not enough to satisfy the demands of all his creditors, if one of them is paid in full, in so far as he gets more than what his *pro rata* share would have been, he is paid out of money belonging to the others. 3. His claim against the depository is in the nature of a right of action for *damages for a tort*, which tort consists of the conversion of his special deposit; and, according to the principles of equity, damages springing out of torts do not, in the administration of insolvent estates, stand on a higher footing than simple contract debts. The conclusion from this doctrine is that it is *only where the depositor can trace his property and identify it*, that he has a right to claim it in full on its being a trust fund.<sup>1</sup>

failing circumstances, and some of its friends made an effort to raise a fund to tide it over its difficulties, and did raise, by their joint contributions, a certain fund, and one of them placed a certain sum in the bank as a special deposit, to remain as such until the entire amount of the fund agreed upon should be raised, but the bank failed before it was raised, — it was

held that he was entitled to repayment in full, seemingly on the theory of its being a trust fund. *Kinsela v. Cataract City Bank*, 18 N. J. Eq. 158, 175.

<sup>1</sup> In the opinion of the dissenting judges (Taylor and Cassoday, JJ.), in *Francis v. Evans*, 69 Wis., 115, 123, the doctrine is thus stated: "That rule, as we understand, was never



§ 7103. Doctrine that, in Order to Create a Preference, the Property Converted must be Traced into the Trust Estate. — Much of the confusion which attends this subject, in the administration of insolvent estates, has grown out of the failure of judges to keep in their minds the distinction between the case where the question arises between the trustee and his *cestui que trust*, and the case where the question arises between the *cestui que trust* and other creditors of the trustee. Where the question arises between the original parties to the transaction, then, beyond all question, the bailor, depositor, or *cestui que trust* is not to lose his right to be paid in full because the bailee, deposittee, or trustee may have wrongfully converted the subject of the bailment or trust, to his own use, or wrongfully mingled it with his own money or property so as to render it incapable of identification. The well-settled rule in equity is that, as between the *cestui que trust* and trustee, and as against all parties claiming under the trust otherwise than by purchase for a valuable consideration without notice, all property belonging to the trust, however much it may be changed or altered in its nature or character, and all the fruits of such property, whether in its original or altered state, — continues to be subject to or affected by the trust.<sup>1</sup> “This settled doctrine of equity,” said Andrews, J., “has its basis in the right of property. The owner of personal property, which, by the wrongful act of his agent or trustee, has been changed and converted into

based upon any supposed right of preference of one creditor over another, as sometimes provided by statute; but upon the supposed equitable right of the person whose property has been wrongfully converted, to trace and retake his own property, and, when its identity has been lost by being mixed with other funds, then to retake its equivalent from the property or funds it has so enriched, and to the extent of such enrichment.” In the case supposed, there is not only a loss of identity,

but an entire absence of any mixture or enrichment of any funds or property remaining in the hands of the debtor, as the wrongfully converted property has passed entirely from D. to A., and if followed at all, would have to be followed into the hands of A. The same judges renewed their dissent in *Bowers v. Evans*, 71 Wis. 133, 138, and restated the same ground of dissent.

<sup>1</sup> *Pennell v. Deffell*, 4 De Gex, M. & G. 372, 387, *per* Turner, L. J.

chattels of another description, may elect to treat the property into which the conversion has been made, as his own. Upon such election the title to the substituted property is vested in him as fully as if he had originally authorized the wrongful act, which title he may assert in a legal action to the same extent as he could have asserted title in respect to the original property."<sup>1</sup> The reason of the doctrine has been often restated, in the language of Lord Ellenborough, to be that "the product of, or substitute for, the original thing still follows the nature of the thing itself, so long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail."<sup>2</sup> "Courts," continues Andrews, J., "go very far to protect rights of property as against a wrong-doer. They follow it through whatever changes and transmutations it may undergo in his hands, and, as against him, transfer to the changed and altered product the original title, however much the original property has been increased in value by his labor or expenditure, provided only that the product is still a chattel and is composed of the original materials. But a court of law, as a general rule, deals only with the legal title, and when the legal identity of the property is destroyed, or the property cannot be traced specifically into another thing, it is powerless to give relief except by action for damages against the wrong-doer."<sup>3</sup> But when the question arises as between the *cestui que trust* and other creditors of the trustee, then a totally different class of principles comes into operation. We have already seen how the intervention of the insolvency of a corporation may operate to prevent its shareholders from rescinding their contracts of subscription on the ground that they were induced to make them through the frauds of the agents of the corporation,<sup>4</sup>—showing that the question presents itself in a totally different aspect, when it arises between the defrauded share-

<sup>1</sup> *Cavin v. Gleason*, 105 N. Y. 256, 260.

<sup>2</sup> *Cavin v. Gleason*, 105 N. Y. 256, 261; citing *Silbury v. McCoon*, 3

<sup>3</sup> *Taylor v. Plumer*, 3 Maule & S. 562.

N. Y. 379; *s. c.* 53 Am. Dec. 307.

<sup>4</sup> *Ante*, § 1438, *et seq.*, and especially § 1450.

holder and the *corporation*, from that when it arises between the defrauded shareholder and the *creditors* of the corporation. So, in respect of the question before us, the man who trusts his property to a bank or other corporation for safe-keeping does not repose in it any higher degree of trust or confidence than does the man who deposits his money with it; and therefore the Court of Appeals of New York were justified in the conclusion that "upon an accounting in bankruptcy or insolvency, a trust creditor is not entitled to a preference over general creditors of the insolvent, merely on the ground of the nature of his claim,—that is, that he is a trust creditor, as distinguished from a general creditor." "We know," continued the court, "of no authority for such a contention. The equitable doctrine that, as between creditors, equality is equity, admits, so far as we know, of no exception founded on the greater supposed sacredness of one debt, or that it arose out of a violation of duty, or that its loss involves greater apparent hardship in one case than another, unless it appears, in addition, that there is some specific recognized equity, founded on some agreement, or the relation of the debt to the assigned property, which entitles the claimant, according to equitable principles, to preferential payment."<sup>1</sup>

§ 7104. **The Same Subject Continued.**—This brings us to the obvious conclusion that, where the question arises after insolvency, in a struggle for preferences among creditors, the bailor or *cestui que trust* whose bailment or trust fund has been converted by the bailee or trustee, must, in order to secure a preference, at least, *trace his funds or property into the assets which have come into the hands of the receiver.*<sup>2</sup> To this extent, the burden is upon him. If he fails so to trace his funds or property, and especially if it appears that the bailee or trustee converted it to his own private use, and that it has not come into the funds which has passed into the hands of the receiver,—the bailor or *cestui que trust* must

<sup>1</sup> *Cavin v. Gleason*, 105 N. Y. 256, 262.

<sup>2</sup> *Merchants' &c. Bank v. Austin*, 48 Fed. Rep. 25.

take merely his distributive share, on the footing of the other general creditors. The doctrine was thus expressed by the Court of Appeals of New York in a very clear opinion written by Andrews, J.: "If it appears that trust property, specifically belonging to the trust, is included in the assets, the court, doubtless, may order it to be restored to the trust. So also if it appears that trust property has been wrongfully converted by the trustee, and constitutes, although in a changed form, a part of the assets, it would seem to be equitable, and in accordance with equitable principles, that the things into which the trust property has been changed should, if required, be set apart for the trust, or if separation is impossible, that priority of lien should be adjudged in favor of the trust estate for the value of the trust property, or funds, or proceeds of the trust property, entering into and constituting a part of the assets. This rule simply asserts the right of the true owner to his own property. But it is the general rule, as well in a court of equity as in a court of law, that in order to follow trust funds and subject them to the operation of the trust, they *must be identified*. A court of equity in pursuing the inquiry and in administering relief, is less hampered by technical difficulties than a court of law, and it may be sufficient to entitle a party to equitable preference in the distribution of a fund in insolvency, that it appears that the fund or property of the insolvent remaining for distribution includes the proceeds of the trust estate, although it may be impossible to point out the precise thing in which the trust fund has been invested, or the precise time when the conversion took place. The authorities require at least this degree of distinctness in the proof, before preference can be awarded."<sup>1</sup> Roundly stated, the doctrine is

<sup>1</sup> *Cavin v. Gleason*, 105 N. Y. 256, 262. The court "distinguish" *People v. City Bank*, 96 N. Y. 32. It is submitted that the case cannot be distinguished. The case was that a bank discounted certain notes for its customer; that the customer, desir-

ing to anticipate payment of the notes, gave the bank his checks for the amount of them, less a rebate of interest, which checks the bank received and charged to his account; that the bank thereupon made entries in its books to the effect that the

that, in order to obtain a preference, the bailor or *cestui que trust* must show that the property bailed or delivered in trust, passed into the hands of the receiver, either in its original form, or in the form of other property or money into which it had been changed by the bailee or trustee; and that, if he cannot so trace it and identify it, his quest fails, and he must take his distributive share with the general creditors.<sup>1</sup>

**§ 7105. Illustrations of This Doctrine.**—In a proceeding to compel an assignee for creditors to first pay the claim of petitioners out of the funds in his hands, it appeared that the petitioners, just before the assignment, placed a fund in the hands of the assignor to be invested in a mortgage, and that, instead of doing so, he used the entire fund, except thirty dollars, in paying his personal debts, and that only the thirty dollars came into the hands of the assignee. It was held that the petitioners were entitled to a preference only to that amount because only that amount came into the hands of the

notes were paid; that the depositor, at the time, supposed that the bank held the notes, but that they had in fact previously been sold by it; that, before the notes became due, the bank failed, and its assets went into the hands of a receiver. It was held that an order requiring the receiver to pay the notes out of the funds in his hands was properly granted. The court proceeded upon the sole view that the transaction between the bank and the depositor created a trust in respect of the money represented by the checks, and did not rest in the ordinary relation of debtor and creditor; and that the violation of this trust constituted a fraud from which the bank could derive no profit, and that the receiver occupied no higher position than the bank. It is idle to try to distinguish such a case from the case previously cited; and the courts would deserve a greater measure of respect from the profession if they would candidly overrule their previous decisions, in-

stead of thus vainly attempting to distinguish them. It is worthy of note that in this last case, the court, following its characteristic habit, "distinguished" its previous decision in *People v. Merchants' &c. Bank*, 78 N. Y. 269; s. c. 34 Am. Rep. 532. See further on the subject of *following trust funds*:—*Van Alen v. American Nat. Bank*, 52 N. Y. 1; *Newton v. Porter*, 69 N. Y. 133; s. c. 25 Am. Rep. 152; *Ferris v. Van Vechten*, 73 N. Y. 113; *Frith v. Cortland*, 1 Hem. & M. 417. An exhaustive discussion of the subject is found in *Re Hallett's Estate*, 13 Ch. Div. 696, where it is held that if money held by a person in a fiduciary character, though not as trustee, has been paid by him to his bankers, the person for whom he held the money can follow it, and has a charge on the balance in the banker's hands. The courts seem to have overruled *Ex parte Dale*, 11 Ch. Div. 772.

<sup>1</sup> *Hopkins' Appeal* (Pa.), 9 Atl. Rep. 867.

receiver.<sup>1</sup> Where a draft was sent to a bank for collection, and the drawee was a customer of the bank, and he gave his check upon the bank to take up the draft, and his account in the bank was overdrawn at the time, and the bank accepted his check and adjusted the account, and then remitted its own draft upon its New York depository to the bank sending the check, and soon thereafter passed into the hands of a receiver and its draft was protested,—it was held that the evidence failed to trace the proceeds of the check into the hands of the receiver, or that any money coming from the collection of it went to swell the *corpus* of the estate in his hands.<sup>2</sup>

§ 7106. Evidence to Trace and Identify the Fund.—Many cases lay down the principle that the *cestui que trust* has the right to follow the fund, either in its original or substituted form, into the hands of anyone except a *bona fide* holder for value, “unless the means of ascertainment fail.”<sup>3</sup> But what will be evidence sufficient to identify the fund and warrant its reclamation, will often be a question of difficulty.<sup>4</sup> If a trustee deposits trust funds in a bank, and there is nothing to his personal credit in the bank, then it is conceded that the *cestui que trust* may recover the entire deposit from the bank as a trust fund.<sup>5</sup>

§ 7107. Illustrative Cases.—In the course of dealing between a New York bank and a Texas bank, the New York bank was in the habit of discounting notes for the Texas bank, and forwarding them

<sup>1</sup> *Cavin v. Gleason*, 105 N. Y. 256.

<sup>2</sup> *Merchants' &c. Bank v. Austin*, 48 Fed. Rep. 25.

<sup>3</sup> *Lord Ellenborough*, in *Taylor v. Plumer*, 3 Maule & S. 562; *First Nat. Bank v. Armstrong*, 36 Fed. Rep. 59, 62, *per Jackson, J.*

<sup>4</sup> Where a draft was sent to a bank specially indorsed for collection, and was paid by the drawee by his check, which the collecting bank sent and collected through the clearing-house, and a memorandum was placed with the cash of the collecting bank to indicate that the proceeds of the draft

were the property of the sender, and the bank closed its doors on the next morning, and the receiver, put in charge of its assets, credited the proceeds to the sender of the draft on the books of the bank,—it was held that the fund was not so mingled with the funds of the bank that it could not be traced and identified, and that the sender of the check was entitled to recover it in full. *First Nat. Bank v. Armstrong*, 36 Fed. Rep. 59.

<sup>5</sup> *Overseers v. Bank*, 2 Gratt. (Va.) 544, 549; *s. c.* 44 Am. Dec. 399.

to the latter on maturity, "for collection and return," with the understanding that the proceeds of them should be preserved by the Texas bank as the property of the New York bank, and returned to it as such. It was held that this arrangement created the relation of *trustee* and *cestui que trust*, and not that of *debtor* and *creditor*; that the trust fund was not divested of its character as such, by being placed by the collecting bank in its vaults and there mingled with its other moneys; and that, the collecting bank thereafter becoming insolvent, the trust would attach to whatever money remained in the vaults at the time of the appointment of the receiver, on the principle already stated, that the bank, in paying out, is presumed to pay out its own funds, and not the trust funds.<sup>1</sup> Where a bank account was opened in the name of a depositor as "general agent," but it was known to the officers of the bank that he was the agent of an insurance company, that the business of his agency was his chief business, and that the account was opened to facilitate that business, and was used as a means of accumulating the premiums on policies collected by him for the company, and of making payment to the company by his checks drawn against it, — it was held that the bank was chargeable with notice of the equitable rights of the company, although the agent may have deposited other moneys in the same account, and may have drawn checks against it for his private use. The insurance company might, therefore, by a bill in equity, assert its beneficial ownership in such fund against the bank, in opposition to the claim of the bank of a *banker's lien* upon the fund for a debt due to it by the agent, which he contracted with the bank, for his individual use.<sup>2</sup>

<sup>1</sup> Continental Nat. Bank v. Weems, 69 Tex. 489 s. c. 5 Am. St. Rep. 85.

<sup>2</sup> National Bank v. Insurance Co., 104 U. S. 54. And where an attorney-at-law, having an account with a banker, deposited the following check: "Cashier of the Farmers' Bank at Norfolk, pay to James H. Langhorne, attorney, 2119 dollars, 52 cents, in full of judgment in favor of Overseers of the Poor of Norfolk County against the estate of Mordecai Cooke, deceased, rendered by Norfolk County Court, on 21st instant.

(Signed) M. Cooke"; — and had at the time a small deposit in the bank, and afterwards drew some further small items in excess of his individual balance, which the bank paid, and the attorney then died insolvent, owing the bank a large amount on a note protested on the day of his death, — it was held that the fund could be distinctly traced and followed, and that the Overseers of the Poor were entitled to it, as against the bank. Overseers v. Bank, 2 Gratt. (Va.) 544; s. c. 44 Am. Dec. 399.

§ 7108. **Trustee Presumed to Pay out his Own Funds, and not Those of his Cestui que Trust.**—A leading principle adopted by the courts in modern cases, in tracing and identifying the trust fund, where the trustee has mingled them with his own funds in one general mass, out of which mass he has made payments and disbursements on his own personal account,—is that payments and disbursements made by him, other than to or for the *cestui que trust*, are *conclusively presumed* to have been made out of his own funds; so that the residue, if equal to the amount of the trust fund, will be restored to the *cestui qui trust*, or any part of it, if less than the amount of the trust fund.<sup>1</sup> In order to the proper application of this rule, in the relation now under consideration, it is obviously necessary to show: 1. That the fund went into the treasury of the corporation, or otherwise into its custody; 2. That, at all times since the fund came into the custody of the corporation, it had an amount on hand equal to the amount of the fund,—otherwise the *cestui que trust* can reclaim no more than the *smallest amount* which it may have had on hand at any time since coming into the possession of the fund; and 3. That the mass of moneys with which the fund had been thus mingled actually passed into the hands of the receiver.

§ 7109. **Conclusion: The True Doctrine Suggested.**—From all this discussion the conclusion unquestionably is: 1. That, as between the original parties to the transaction, the bailor or *cestui que trust* may reclaim the specific property, or any other property into which it has been changed or converted, or may have damages for the tortious conversion of it. 2. That where the property has passed out of the hands of the bailee or trustee, he may, in like manner, reclaim it, or the property into which it has been changed, in the hands of

<sup>1</sup> Re Hallett's Estate, 13 Ch. Div. 696; distinguishing Clayton's Case, 1 Mer. 572; and overruling on this point, Pennell v. Deffell, 4 De Gex, M. & G. 372 (Thesiger, L. J., dissent-

ing); Continental Nat. Bank. v. Weems, 69 Tex. 489; s. c. 5 Am. St. Rep. 85; National Bank v. Insurance Co., 104 U. S. 54.



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anyone not a purchaser for value without notice. 3. That a receiver is not a purchaser for value, and therefore if the bailor or *cestui que trust* can trace the property, or the property into which it has been changed, into the hands of a receiver of the bailee or trustee, he may reclaim it in kind, or demand its value in full, to the exclusion of other creditors.

## CHAPTER CLXVIII.

### PREFERRED CLAIMS IN RAILWAY RECEIVERSHIPS.

#### SECTION

- 7114. Priority of claims for labor and materials necessary for keeping the road a going concern.
- 7115. Age and nature of the claims which can be thus preferred.
- 7116. Illustrative decisions.
- 7117. No distinction between unassigned and assigned claims.
- 7118. Whether a diversion of funds necessary to support this rule of priority.
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#### SECTION

- 7120. Not necessary that the payment of such claims should be made a condition precedent to the granting of a receivership.
- 7121. Unsecured debts contracted for the original construction of railroads not preferred.
- 7122. Claims for materials and labor furnished in building a railroad.
- 7123. Claims for unliquidated damages not entitled to preference over prior mortgages.
- 7124. Payment of damages to employés injured in the line of their duty.

§ 7114. **Priority of Claims for Labor and Materials Necessary for Keeping the Road a Going Concern.**—It is a principle of modern date, in the adjustment of claims in these cases, that recent claims for labor and materials which were necessary to keep the railroad a going concern, are a first charge upon its earnings and upon the proceeds accruing from its sale under the decree of foreclosure.<sup>1</sup>

<sup>1</sup> Fosdick v. Schall, 99 U. S. 235; Vilas v. Page, 106 N. Y. 439; s. c. 13 N. E. Rep. 743; McIlhenny v. Binz, 80 Tex. 1; s. c. 26 Am. St. Rep. 705; Union Trust Co. v. Illinois &c. R. Co., 117 U. S. 434; Porter v. Pittsburgh Bessemer Steel Co., 120 U. S. 649; Hand v. Savannah &c. R. Co., 17 S. C. 219; Addison v. Lewis, 75 Va. 701; Burnham v. Bowen, 111 U. S. 776; Douglass v. Cline, 12 Bush

(Ky.), 608; Williamson v. Washington City &c. R. Co., 33 Gratt. (Va.) 624; Skiddy v. Atlantic &c. R. Co., 3 Hughes (U. S.), 320; Atkins v. Petersburg &c. R. Co., 3 Hughes (U. S.), 307; Blair v. St. Louis &c. R. Co., 22 Fed. Rep. 769; Finance Co. v. Charleston &c. R. Co., 52 Fed. Rep. 524; Farmers' Loan & Trust Co. v. Kansas City &c. R. Co., 53 Fed. Rep. 182.

§ 7115. **Age and Nature of the Claims Which can be thus Preferred.** — “There is no fixed rule,” said Caldwell, J., “barring preferential debts contracted more than six months before the appointment of the receiver. There is no ‘six months’ rule.”<sup>1</sup> So, the Supreme Court of Texas have held that claimants having statutory liens against a railroad, for labor performed in its construction, operation, and maintenance, who, before such liens expire, are prevented from enforcing them by the appointment of a receiver, will not be denied the priority to which they are entitled, merely because their claims accrued more than six months before the appointment of the receiver, notwithstanding the court has made a provisional order prescribing six months as the limit of time within which claims must have accrued in order to be entitled to priority.<sup>2</sup> “Various rules,” said Mr. Morris M. Cohn, annotating a Federal case, “are relied upon to sustain the position of the courts, which resolve themselves into an elastic rule, depending upon the breadth of mind of the tribunal determining the matter. The old saying about ‘the Chancellor’s foot’ seems to be highly appropriate in this connection.”<sup>3</sup> The meaning is, that there is *no rule beyond the sense of justice of the judge*, applied to the nature of the claims when viewed

<sup>1</sup> Farmers’ Loan & Trust Co. v. Kansas City R. Co., 53 Fed. Rep. 182, 187. In Blair v. St. Louis & C. R. Co., 22 Fed. Rep. 471, Mr. Circuit Judge Brewer said that “there is no arbitrary time prescribed.” “Six months,” said he, “is the longest time I have noticed as yet given. Ordinarily, I think, that is ample. Perhaps, in some large concerns, with extensive lines of road and a complicated business, a longer time might be necessary.” *Ibid.* 474. It should be stated that this decision was rendered in the Circuit Court of the United States for the Eastern District of Missouri in which court there had been, in the year 1876, some railway

foreclosures, in which the court had, by analogy to the period of the Missouri statute in regard of *mechanics’ liens* against railroads, fixed the period of six months as the limit within which such claims should be allowed; and the writer of this work, who, as master in chancery of the court, had the duty of auditing the claims, was obliged, to his regret, to exclude, under this rule, *one* claim which did not fall within it. It was, perhaps, from the tradition of the rulings in these cases that the idea arose that there was a so-called six months’ limit.

<sup>2</sup> McIlhenny v. Binz, 80 Tex. 1; s. c. 26 Am. St. Rep. 705.

<sup>3</sup> 53 Fed. Rep. 194.

with reference to the facts in each particular case, and with reference to the precedents relating to the subject.

§ 7116. **Illustrative Decisions.**—In one case, priority was given to a claim for materials furnished *three years* before the appointment of the receiver, for which a note had been given *sixteen months* before the receiver was appointed.<sup>1</sup> In another case, priority was given to a claim for *coal* supplied and used in operating the railroad *eleven months* before the appointment of the receiver.<sup>2</sup> In another case, the railroad company, being unable to pay its employés, had obtained a loan from certain bondholders of an amount necessary to liquidate such debts, and had given notes therefor. This was done in order to prevent an impending strike, and upon the condition that the amount loaned should be applied to the payment of the wages then due, and that the notes given the lenders of the money should be paid out of the first net income of the road. A receiver was appointed *twenty-two months* thereafter, and it was held that the net income of the road in the hands of the receiver should be applied towards the repayment of the loan.<sup>3</sup> In a case in Virginia, claims for services rendered and materials furnished in the years 1874 and 1875 received such a preference, although the receiver was not appointed until June, 1876.<sup>4</sup> In another case in the same court, unassigned claims for labor performed during the twelve months preceding the receiver's appointment were allowed and ordered to be paid out of the net income of the road in his hands.<sup>5</sup> In a case in Kentucky, the company had defaulted in the payment of interest on its bonded debt more than *eight months* prior to the appointment of a receiver, and the wages of employés, earned after the default, were ordered to be paid out of the net income of the receivership, though no special equities appeared.<sup>6</sup> An ordinary illustration of the sort of claims which may thus be preferred is found in a decision to the effect that the court may provide that the receiver shall pay the arrears due for operating expenses for a period in the past *not exceeding ninety days*, and pay indebtedness, not exceeding \$10,000, to other connecting

<sup>1</sup> Hale v. Frost, 99 U. S. 389.

<sup>2</sup> Burnham v. Bowen, 111 U. S. 776.

<sup>4</sup> Williamson v. Washington City &c. R. Co., 33 Gratt. (Va.) 624.

<sup>3</sup> Atkins v. Petersburg R. Co., 3 Hughes (U. S.), 307.

<sup>5</sup> Skeddy v. Railroad Co., 3 Hughes (U. S.), 320.

<sup>6</sup> Douglass v. Cline, 12 Bush (Ky.), 608.

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lines, for materials and repairs and for ticket and freight balances, a part of which had been incurred more than *ninety days* before the appointment of the receiver.<sup>1</sup>

**§ 7117. No Distinction between Unassigned and Assigned Claims.**—In respect of such priorities, there is no legal distinction between claims which remain in the hands of the original parties furnishing the labor or materials, and claims which they have *assigned* to others.<sup>2</sup> For instance, where an

<sup>1</sup> *Miltenberger v. Logansport R. Co.*, 106 U. S. 286. Another court has held that such receivers may be authorized to issue *certificates* in payment of claims for materials and supplies furnished the company not more than *five months* before the road was placed in their hands. *Farmers' &c. Bank v. Philadelphia &c. R. Co.*, 14 Phila. (Pa.) 456. The Supreme Court of Texas have included within the list of claims entitled to priority over existing mortgages, under the head of "useful improvements" within the doctrine of *Fosdick v. Schall*, 99 U. S. 235, not only necessary repairs, but also such changes in, and additions to, structures already completed as may be deemed advantageous to the road, in a financial point of view, and such as prudent management would demand,—such as debts created in substituting an iron and stone bridge for one built of wood, or the expense incurred in changing the gauge of a railroad from a narrow gauge to a standard gauge, when the exigencies of the traffic and other circumstances demanded the change, in order to prevent an utter failure of the enterprise and to keep up the road as a going concern. *McIlhenny v. Binz*, 80 Tex. 1; *s. c.* 26 Am. St. Rep. 705, 722. In a case which does not deserve to be mentioned in terms

of respect, where receivers of a railway system had been appointed on a bill in equity filed by the railway company against its own creditors, its equity being that it could not pay its just debts and hold its system together, receivers' certificates were ordered and issued to the extent of \$2,200,000 to take up certain promissory notes of the railroad company (plaintiff in the suit) indorsed by "persons of high financial standing,"—understood to have been the principal stockholders in the railroad company,—and secured by certain collaterals, including bonds, stocks, rolling stock, engines, and real estate. The debts for which these obligations were given were more than two years old. Bondholders whose liens were displaced did not consent to the order. After a foreclosure sale had taken place, the bondholders, secured by underlying mortgages, raised objections to this and other orders giving preferences superior to their liens, which objections were overruled on the ground of coming too late: *Central Trust Co. v. Wabash &c. R. Co.*, 30 Fed. Rep. 332. For a fuller description of these rulings, see *Farmers' Loan & Trust Co. v. Kansas City &c. Co.*, 53 Fed. Rep. 182, 187.

<sup>2</sup> *Union Trust Co. v. Walker*, 107 U. S. 596; *McIlhenny v. Binz*, 80 Tex. 1; *s. c.* 26 Am. St. Rep. 705; *Burnham*

arrangement is made with a railroad company, whereby a sufficient amount of the wages of its laborers is to be retained by the company to pay their board, the claims of the *boarding-house-keepers* for such amounts are to be treated as claims originally due the laborers and duly assigned to the boarding-house-keepers, and the assignment of such claims for such purpose, does not destroy their right of priority.<sup>1</sup> Where, in such a case, a number of these debts, due for wages, had become the property of one person, and the railroad company gave the assignee a *promissory note* for the aggregate amount, this merely changed the *evidence* of the indebtedness, but did not change the character of the debts, and the holder of the note was entitled to the same priority which attached to the original debts.<sup>2</sup>

**§ 7118. Whether a Diversion of Funds Necessary to Support This Rule of Priority.**—In the earliest case in which the Supreme Court of the United States departed from its previous holding and from the previous legal conceptions on this question,<sup>3</sup> it laid down two propositions, in this way: 1. "When a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property, pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income during the receivership, of outstanding debts for labor, supplies, equipment, or permanent improvement of the mortgaged property, as may, under the circumstances of the particular case, appear to be reasonable." 2. "If no such order is made when the receiver is appointed, and it appears in the progress of the cause that bonded interest has been paid, additional

*v. Bowen*, 111 U.S. 776. The Supreme Court of Texas have referred to an analogous holding of theirs, to the effect that where a vendor sells land upon the vendee executing a note for the purchase-money, *payable to a third party*, the payee has a lien upon the land for the payment of the note.

*Pinchain v. Collard*, 13 Tex. 333. Compare *ante*, § 3143.

<sup>1</sup> *McIlhenny v. Binz*, 80 Tex. 1; *s. c.* 26 Am. St. Rep. 705, 727.

<sup>2</sup> *Ibid.*

<sup>3</sup> As shown in *Galveston Railroad Co. v. Cowdrey*, 11 Wall. (U. S.) 459.

equipment provided, or lasting and valuable improvements made, out of earnings which ought, in equity, to have been employed to keep down debts for labor, supplies, and the like, it is within the power of the court to use the income of the receivership to discharge obligations which, *but for the diversion of funds*, would have been paid in the ordinary course of business.”<sup>1</sup> In a subsequent case, the court went a step further, and held “that the net earnings of the road, while in possession of the court and operated by its receiver, are not necessarily and exclusively the property of the mortgagees, but are subject to the disposal of the Chancellor in the payment of claims which have superior equities, if such shall be found to exist.” And the court held that the claims of certain parties, who had furnished supplies to the road after default in the payment of interest under the mortgage, were entitled to be paid in full, before any part of the income should be applied to the payment of the mortgage creditors,—and this, although there had been *no diversion* of the current funds such as described in the preceding case, but the current income had been merely applied to the payment of antecedent current debts.<sup>2</sup> In a still later case, the court likewise placed the principle on a basis which did not necessarily depend on the theory of a diversion of income. Mr. Chief Justice Waite, quoting from the first case above cited, said: “The income out of which the mortgagee is to be paid, is the *net income* obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements”; and that, “every railroad mortgagee, in accepting his security, impliedly agrees that the current debts, made in the ordinary course of business, shall be paid from the current receipts, before he has any claim on the income.” And he made the following clear statement of the governing principle: “Such being the case, when a court of chancery, in enforcing the rights of mortgage creditors, takes possession of a mort-

<sup>1</sup> Fosdick v. Schall, 99 U. S. 235, adopted by the Court of Appeals of Virginia in Williamson v. Washington City &c. R. Co., 33 Gratt. (Va.) 624.

<sup>2</sup> Hale v. Frost, 99 U. S. 389.

gaged railroad, and thus deprives the company of the power of receiving any further earnings, it ought to do what the company would have been bound to do if it had remained in possession,—that is to say, pay, out of what it receives from earnings, all the debts which in equity and good conscience, considering the character of the business, are chargeable upon such earnings. In other words, what may properly be termed the *debts of the income* should be paid from the income, before it is applied, in any way, to the use of the mortgagees. The business of a railroad should be treated, by a court of equity, under such circumstances, as a ‘going concern,’ not to be embarrassed by any unnecessary interference with the relations of those who are engaged in or affected by it.” And the court accordingly ordered the payment of a claim for coal supplied in operating the railroad more than eleven months before the appointment of the receiver; but the court found that there had been a diversion of income, such as first above described, in applying the current receipts to the payment of fixed charges on the structure of the road.<sup>1</sup> In other cases the court advanced further, and held that where the income should prove insufficient, such claims might be charged upon the *corpus* of the property, and receiver’s certificates be issued creating such a charge, and giving it precedence over all existing mortgages,<sup>2</sup>—a conclusion which seems entirely consistent with the theory of diversion of income. But, on the whole, perhaps the decisions justify the explicit declaration made by Mr. Circuit Judge Caldwell, that a *diversion of the income* of the road by its directors prior to the appointment of a receiver is *not at all necessary* to give priority to the class of claims under consideration.<sup>3</sup>

<sup>1</sup> Burnham v. Bowen, 111 U. S. 776, 780, 781.

<sup>2</sup> Miltenberger v. Logansport R. Co., 106 U. S. 286, 311, 312; Union Trust Co. v. Illinois Midland R. Co., 117 U. S. 434, 457, 463; Thomas v. Peoria &c. R. Co., 36 Fed. Rep. 808.

<sup>3</sup> Farmers’ Loan & Trust Co. v. Kansas City &c. R. Co., 53 Fed. Rep. 182, 189. See the discussion of the question in McIlhenny v. Binz, 80 Tex. 1; s. c. 26 Am. St. Rep. 705.



§ 7119. Such Claims may be Charged on the Corpus of the Property if the Income is Insufficient. — It seems to have been supposed, at one time, that such claims were chargeable only upon the *income* of the road in the hands of the receiver; and some of the early decisions of the Supreme Court of the United States have rested the propriety of giving priority to such claims chiefly upon the theory that there had been a *diversion of the income* to permanent improvements, by the directors, prior to the appointment of the receiver, whereas the income ought to have been first employed in the payment of claims of this class;<sup>1</sup> and hence, that the court, in giving priority to such claims, was in effect merely restoring the diverted income and giving it to those to whom it should have been paid in the first instance.<sup>2</sup> As just seen,<sup>3</sup> the court finally advanced to the conclusion that, in the case where the income should prove insufficient, the claims might be made a charge upon the *corpus* of the property,<sup>4</sup> — a theory which rested on the conception that the current income, which should have been applied to the payment of operating expenses, had been *diverted* to the improvement or preservation of the *corpus* of the property. Indeed, it was admitted, in the earliest case on this subject, that “while ordinarily this power is confined to the appropriation of the income of the receivership and the proceeds of moneyed assets that have been taken from the company, cases may arise where equity will require the use of the proceeds of the sale of the mortgaged property in the same way.”<sup>5</sup> And Mr. Justice Harlan, at circuit, held that such a case arises where, before the appointment of a receiver, or in the administration of the cause, the income, applicable to the payment of old debts for current expenses, is taken and used “to make permanent improvements in the fixed property, or

<sup>1</sup> *Ante*, § 7118.

<sup>2</sup> *Fosdick v. Schall*, 99 U. S. 235, Co., 106 U. S. 286, 311, 312; *Union Trust Co. v. Illinois Midland R. Co.*, 117 U. S. 434, 457, 463.

<sup>3</sup> *Ante*, § 7118.

<sup>4</sup> *Miltenberger v. Logansport R.* 254.

<sup>5</sup> *Fosdick v. Schall*, 99 U. S. 235,

to buy additional equipment.”<sup>1</sup> So that, as stated by Mr. Circuit Judge Caldwell, “It is an error to suppose that such debts can only be given priority where there has been a diversion of the income of the road; nor is it true that they can only be paid out of the earnings of the road, and cannot be made a charge on the *corpus* of the property. A diversion of the income is not essential to give them priority, and they may be made a charge on the *corpus* of the estate if the earnings are not sufficient to pay them.”<sup>2</sup> And the rule is that if the earnings of the road in the hands of the receivers are insufficient to pay the operating expenses and the public taxes, and if, under these circumstances, the receiver employs a part of the earnings in the permanent improvement of the road, the sums so employed will be regarded, under the operation of this principle, as having been *employed for the benefit of the bondholders*; and consequently they must, if necessary, make good the *diversion* in favor of laborers and material-men having the species of preferred claims above stated. And they can make it good only in one of two ways: 1. Either by the issue of receivers’ certificates which become a first charge upon future earnings; or, 2. By making it a first charge upon the proceeds of the sale under the decree of foreclosure.<sup>3</sup> The first charges it upon *current income*; the last, upon the *corpus* of the property. At the same time, the circumstances under which it will be proper to make such claims a charge upon the *corpus* of the estate do not seem to be fixed with any degree of precision. It was said: “It cannot be affirmed that no items which accrued before the appointment of a receiver can be allowed in any case. Many circumstances may exist which may make it necessary and indispensable to the business of the road and the preservation of the property, for the receiver to pay pre-existing debts of certain classes out of the earnings of the receivership, or even the *corpus* of the property, under

<sup>1</sup> Thomas v. Peoria &c. R. Co., 36 Fed. Rep. 808, 818; citing Fosdick v. Schall, *supra*, and many other cases.

<sup>2</sup> Farmers’ Loan & Trust Co. v. Kansas City &c. R. Co., 53 Fed. Rep. 182, 189.

<sup>3</sup> Finance Co. v. Charleston &c. R. Co., 52 Fed. Rep. 524; McIlhenny v. Binz, 80 Tex. 1; s. c. 26 Am. St. Rep. 705.

the order of the court, with a priority of lien. Yet the discretion to do so should be exercised with very great care. The payment of such debts stands, *prima facie*, on a different basis from the payment of claims arising under the receivership, while it may be brought within the principle of the latter by special circumstances.”<sup>1</sup>

**§ 7120. Not Necessary that the Payment of Such Claims should be Made a Condition Precedent to the Granting of a Receivership.**—While it is better for the court, when applied to by the trustee in the mortgage to appoint a receiver, to require the trustee to consent of record, as a condition of the appointment, that such claims shall be paid in priority to the mortgage, yet it does not at all follow that it is necessary for such consent to be exacted and given, in order to enable the court to make such claims a prior charge, both upon the earnings and *corpus* of the property, and to issue receiver’s certificates accordingly. The reason is, that the *jurisdiction* so to do does not rest upon the *consent* of the mortgage creditors, through their trustee or otherwise, but rests upon the principle of equity that he who seeks equity must do equity; and it becomes a condition precedent to the granting of the relief prayed for by the bill, namely, the foreclosure of the mortgage.<sup>2</sup>

**§ 7121. Unsecured Debts Contracted for the Original Construction of Railroads not Preferred.**—The *general rule* is, that an *unsecured debt*, contracted for the original construction of a railroad, is not entitled to priority over subsequent mortgages; and it seems that the recent doctrine of the Supreme

<sup>1</sup> *Miltenberger v. Logansport R. Co.*, 106 U. S. 286, 311; again quoted in *Union Trust Co. v. Illinois Midland R. Co.*, 117 U. S. 434, 457.

<sup>2</sup> That such consent is not necessary, see *Fosdick v. Schall*, 99 U. S. 235; *Central Trust Co. v. St. Louis*

*&c. R. Co.*, 41 Fed. Rep. 551; *Blair v. St. Louis &c. R. Co.*, 22 Fed. Rep. 471; *Farmers’ Loan & Trust Co. v. Kansas City &c. R. Co.*, 53 Fed. Rep. 182, 189. As to granting receiverships *on condition*, see *ante*, §§ 6824, 6825.

Court of the United States<sup>1</sup> does not extend so far as to give priority to claims of this kind.<sup>2</sup>

§ 7122. **Claims for Materials and Labor Furnished in Building a Railroad.**—Whether claims for materials furnished and labor expended in *building* a railroad ought to have preference over a prior *mortgage* covering *after-acquired property*, furnishes a nice question for judicial casuistry, and a question on which a good deal may be fairly said on both sides. If the mortgage was duly recorded within the State and county within which the materials were furnished or the labor done, then, upon general principles relating to mortgages of after-acquired property, the mortgage would have priority of lien; because the persons furnishing the labor or materials would have notice of the mortgage, and would know that, under the principles of equity, the lien of it had attached to the property of the railroad upon which their labor and materials would be expended, and that they, as against the bondholders under the mortgage, would be remitted to the position of general creditors, contracting and acting upon the faith of the solvency of the corporation merely. On the other hand, the rule or principle of public policy which underlies all the existing statutes which give *liens to mechanics, laborers, and material-men*, demands that a lien shall be given to one who furnishes labor or materials for a permanent structure, and thereby completes the structure, in preference to the prior mortgagee, who does no more than lend money to the person or corporation which is to become the owner of the structure, without any regard to the use to which such corporation shall put the money.<sup>3</sup>

§ 7123. **Claims for Unliquidated Damages not Entitled to Preference over Prior Mortgages.**—It may be stated in

<sup>1</sup> In *Fosdick v. Schall*, 99 U. S. 235.

<sup>2</sup> *Wood v. Guarantee & Co.*, 128 U. S. 416; *Cowdrey v. Galveston R. Co.*, 93 U. S. 352. But compare *Farmers' Loan & Trust Co. v. Kansas*

*City & C. R. Co.*, 53 Fed. Rep. 182; *ante*, § 6260.

<sup>3</sup> See the observation of Mr. Justice Gaines in *McIlhenny v. Binz*, 80 Tex. 1; *s. c.* 26 Am. St. Rep. 705, 723.

general, and on grounds that will appear obvious without argument, that claims against a corporation *for unliquidated damages*, whether springing out of breaches of its contracts or out of *torts simpliciter*, arising before the appointment of a receiver, will not be a charge upon the funds in his hands, or upon the proceeds accruing from a foreclosure sale of the property of the corporation;<sup>1</sup> since it would be against the crudest conception of the obligation of a contract embraced in a mortgage, to hold that it could be impaired, even to the extent of being rendered valueless, by the subsequent torts of the mortgagor. Some reasons may exist requiring a modification of this principle in the case of receivers of railroads. The operation of a railroad can only be carried on by the concurrent action of a large number of agents and servants, and damages will, in the ordinary course of human experience, be inflicted to a considerable extent through their negligence, upon the owners of adjacent property, and upon passengers and goods in the course of transit over its line. It is not, therefore, an unjust conclusion that, when the bondholders under a railway corporation apply, through their trustee, for the extraordinary aid of a court of equity in the form of a receiver, pending a proceeding to foreclose their mortgage, the court ought to impose upon them, as a condition precedent to the appointment of a receiver, the requirement that the receiver should pay, out of the income which should come into his hands, not only the arrearages due by the company for the necessary operation of its road, but those damages which have arisen in its ordinary operation, and which have not been satisfied. We have elsewhere set out an order embracing such a provision made by a judge possessing a very high sense of equity.<sup>2</sup>

<sup>1</sup> Central Trust Co. v. Wabash, St. Louis &c. R. Co., 32 Fed. Rep. 566; *ante*, § 6260.

<sup>2</sup> *Ante*, § 6825. The writer remembers a painful case where, under the strict rule above stated, he felt bound to report, as a master in chancery,

against the payment of damages claimed by a number of poor farmers for the destruction of their stacks of hay and grain by a fire negligently communicated from a locomotive of a railroad company only *five days* before it went into the hands of a re-

§ 7124. **Payment of Damages to Employés Injured in the Line of their Duty.** — Although there may be difficulty in justifying, on strict legal theories, the *payment of damages out of trust funds*, — yet where a receiver has been placed in charge of such a property at the request of the bondholders under a mortgage, to operate it for their benefit pending their suit to foreclose the mortgage and reorganize the company in case they become the purchasers at the foreclosure sale, it is a conclusion, justified on grounds of public policy, that the trust fund in the hands of the receiver, — that is to say, the current earnings, and, if necessary, the proceeds of the foreclosure sale, — should be charged with the damages accruing to employés from negligence, where the circumstances are such that they would have had a right of action against the corporation had it been in possession of its property; and, as we shall see hereafter,<sup>1</sup> the universal rule is, that such damages are payable by the receiver. But where the circumstances are such that the injured employé could not have maintained an action for damages against the corporation had it been in possession, will the receiver be justified in paying him *wages* during the period of his recovery, or in other ways expending money for his relief? It has been held, by an enlightened and humane judge, that it is just and good policy, for the receiver in such a case to pay wages to the injured employé during the period necessarily required for his recovery, where his own carelessness did not contribute to the injury.<sup>2</sup>

ceiver. The learned judge, who made the order above referred to, presided in that case, and possibly the recollection of that and other similar hardships encountered in his judicial experience, induced him to in-

sert in the order the clause referred to.

<sup>1</sup> *Post*, § 7160.

<sup>2</sup> *Missouri Pac. R. Co. v. Texas &c. R. Co.*, 33 Fed. Rep. 701, Pardee, J.

## CHAPTER CLXIX.

### ACTIONS AGAINST THE RECEIVER.

#### SECTION

- 7128. Leave to bring actions against the receiver.
- 7129. Appealing from orders granting such leave.
- 7130. Circumstances under which such leave granted or denied.
- 7131. Effect of the act of Congress dispensing with the necessity of leave to sue receiver.
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#### SECTION

- 7137. Suing the receiver instead of intervening.
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- 7139. When receiver and corporation cannot be made parties.
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- 7142. Liens of judgments recovered against the receiver after discharge.
- 7143. Proceedings to condemn land in the hands of receivers.
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#### § 7128. Leave to Bring Actions against the Receiver.—

One of the objects of appointing a receiver is to bring the entire administration of the property under the superintendence of one court, to the end that justice may be evenly balanced among all the contending claimants. It is entirely inconsistent with this object to allow any party, who thinks he has a cause of action affecting the property, to bring an independent action against the receiver. This would withdraw from the court appointing the receiver that plenary jurisdiction over the subject of the trust which is necessary to its administration, and would scatter the jurisdiction among different courts. It would, moreover, result in disturbing the posses-

sion of the receiver. It would have the further effect that it might never be possible to wind up the trust, because actions might be brought in other jurisdictions and delayed interminably. If such actions were permitted to be brought without leave of the court appointing the receiver, the court would thus effectually lose control of the administration, and one of the principal objects in taking charge of it by the court's officer would be defeated. The rule of equity therefore is,—and it may be assumed that this rule obtains in most jurisdictions unless changed by statute,—that no action can be prosecuted against a receiver without first obtaining the *consent of the court appointing the receiver*, which consent must, under most remedial systems, be *averred and proved*. The doctrine on this subject does not pertain specially to receivers of corporations, but pertains to the law of receivers generally; and the author, therefore, contents himself with referring, for a general statement of it, to the text of a work of high authority, and with citing the cases there referred to.<sup>1</sup> The rule applies to all actions, whether *ex contractu* or *ex delicto*, and it applies equally to actions where, according to the course of the common law, either party would be entitled to a *jury trial*; and it is no deprivation of the constitutional right of jury trial to deny such leave in actions sounding in damages.<sup>2</sup> The Su-

<sup>1</sup> High on Receivers (2d ed.), § 254; citing the following authorities: Taylor v. Baldwin, 14 Abb. Pr. (N. Y.) 166; Wray v. Hazlett, 6 Phila. (Pa.) 155; De Groot v. Jay, 30 Barb. (N. Y.) 483; s. c. 9 Abb. Pr. (N. Y.) 364; Miller v. Loeb, 64 Barb. (N. Y.) 454; Randfield v. Randfield, 3 De Gex, F. & J. 766; reversing s. c. 1 Drury & Sm. 310; Keen v. Breckenridge, 96 Ind. 69; Melendy v. Barbour, 78 Va. 544; Barton v. Barbour, 104 U. S. 126; affirming s. c. 3 McArthur (D. C.), 212; Searle v. Choat, 25 Ch. Div. 723; De Graffenried v. Brunswick & Co. R. Co., 57 Ga. 22; Thompson v. Scott, 4 Dill. (U. S.) 508; s. c. 3 Cent. L. J. 737; Kennedy v. Indianapolis & Co. R. Co.,

3 Fed. Rep. 97; s. c. 2 Flipp. (U. S.) 704; Meredith Village Sav. Bank v. Simpson, 22 Kan. 414. See also Evelyn v. Lewis, 3 Hare, 472; Re Perrisse, 8 Ir. Eq. 111; Parr v. Bell, 9 Ir. Eq. 55; Tink v. Rundle, 10 Beav. 318; Payne v. Baxter, 2 Tenn. Ch. 517. See *contra*, Kinney v. Crocker, 18 Wis. 74; Paige v. Smith, 99 Mass. 395; St. Joseph & Co. R. Co. v. Smith, 19 Kan. 225; Meeker v. Sprague, 5 Wash. 242; s. c. 31 Pac. Rep. 628.

<sup>2</sup> Barton v. Barbour, 104 U. S. 126; affirming s. c. 3 McArthur (D. C.), 212, which is the leading Federal case on the subject. This case is characterized by an earnest dissenting opinion by Mr. Justice Miller, in which



preme Courts of Wisconsin and of Kansas have qualified the doctrine by holding that, while a party desiring to bring an action against a receiver may very properly apply for leave so to do from the court whose officer he is, yet the failure to obtain such relief is no bar to the *jurisdiction* of a court of law.<sup>1</sup> Notwithstanding these decisions, Mr. High regards the weight of authority as supporting the conclusion that leave to sue the receiver is *jurisdictional* in its nature, and that the omission to obtain such leave is fatal to maintaining the action;<sup>2</sup> and this is the doctrine of the Supreme Court of the United States.<sup>3</sup> An exception to this rule exists in Indiana, under peculiar statutes of that State;<sup>4</sup> and an act of Congress dispenses with such license in the case of Federal court receivers.<sup>5</sup>

**§ 7129. Appealing from Orders Granting Such Leave.**—According to the general rules of equity procedure, such orders are interlocutory merely, and hence not appealable. But in one jurisdiction, an appeal lies from such an order, and the motion to dismiss such an appeal has been denied, and, upon consideration of the merits, the order affirmed.<sup>6</sup> The *rule for the decision of such an appeal*, is that such an application, in the absence of statute, is addressed to the *sound discretion* of the court, whose officer the receiver is, and that there is no presumption that the court will not do as full and exact justice to all the claimants before it in the original suit as would be done by their prosecuting independent actions.<sup>7</sup> This is tan-

he described the abuses which had attended railway receiverships in his judicial circuit. Mr. Justice Miller cited, as supporting his view, the following cases: *Angel v. Smith*, 9 Ves. Jr. 335; *Hills v. Parker*, 111 Mass. 508; *s. c.* 15 Am. Rep. 63; *Chautauque County Bank v. Risley*, 19 N. Y. 369; *s. c.* 75 Am. Dec. 347; *Camp v. Barney*, 4 Hun (N. Y.), 373; *Sprague v. Smith*, 29 Vt. 421; *s. c.* 70 Am. Dec. 424.

<sup>1</sup> *Kinney v. Crocker*, 18 Wis. 74.

To the same effect see *St. Joseph & C. R. Co. v. Smith*, 19 Kan. 225.

<sup>2</sup> *High on Receivers* (2d ed.), § 254 *a*; citing *Meredith Village Sav. Bank v. Simpson*, 22 Kan. 414.

<sup>3</sup> *Barton v. Barbour*, 104 U. S. 126.

<sup>4</sup> See *Ohio & C. R. Co. v. Fitch*, 20 Ind. 498; *McKinney v. Ohio & C. R. Co.*, 22 Ind. 99; *Louisville & C. R. Co. v. Cauble*, 46 Ind. 277.

<sup>5</sup> *Post*, § 7131.

<sup>6</sup> *Meeker v. Sprague*, 5 Wash. 242; *s. c.* 31 Pac. Rep. 628.

<sup>7</sup> *Ibid.*

tamount to holding that the denial of such leave will not be reversed in any case on appeal, except where the circumstances are so extraordinary or peculiar as to make it clear that there was an *abuse of discretion* in denying it.

§ 7130. **Circumstances under Which Such Leave Granted or Denied.**—Where, in an action against a corporation, a receiver is appointed, and all persons holding claims against the corporation are brought into court, and notified to appear and wage their claims, an application by a claimant so appearing, for leave to bring an independent action against the receiver to foreclose certain mortgages upon the corporate property, will be denied; since the rights of such claimant can be more properly adjudicated in the original action.<sup>1</sup> But where the claim consists of a strictly *legal* cause of action for *damages* resulting from a *tort*, for instance from the *negligence* of the employés of the receiver in discharging their duties, — then, according to an opinion of the Court of Errors and Appeals of New Jersey, in which the subject was ably and carefully considered by Chief Justice Beasley, the claimant has *the legal right to a trial by jury*, and consequently to prosecute his claim in the form of an action at law against the receiver. Such an action, it is further held, cannot be brought without the permission of the Chancellor, but such permission cannot be refused unless the claim is manifestly *unfounded and vexatious*.<sup>2</sup>

<sup>1</sup> Meeker v. Sprague, 5 Wash. 242; s. c. 31 Pac. Rep. 628.

<sup>2</sup> Palys v. Jewett, 32 N. J. Eq. 302. The case was an appeal from the Vice-Chancellor, of a case where one who had sustained damages, as he alleged, through the negligence of the employés of a railway receiver, in the management of a train of cars, intervened *pro interesse suo*, claiming damages, and the Vice-Chancellor decided against him on the merits. While the court held that the Vice-Chancellor ought to have allowed him to bring a separate action at law against the receiver, yet as he had

not appealed from the order refusing leave to bring such action, the court, though not without some misgivings, concluded to re-examine the cause on the merits, — which it did, reversing the decision of the Vice-Chancellor, and remanding the cause with instructions. The court considered the principles upon which the power of the Chancellor ought to be exercised in granting and refusing leave to bring a separate action. It is difficult to reconcile the expressions, in this part of the opinion of the court, with the conclusion that leave is necessary at all. The court holds that the con-

Aside from these decisions, the rule upon which courts of equity unquestionably act, is that, where the complaint is made against a receiver for an injury sustained by reason of *negligence* in the exercise of his official duties, the court, whose officer he is, may either itself take cognizance of the complaint and administer justice between the parties upon an *intervening petition pro interesse suo*, filed by the party aggrieved, or may allow such party to bring his action at law for the injury.<sup>1</sup> And the same practice would obtain in the case of a claim founded on any other *tort simpliciter*, committed by the receiver or those under his power or control. On the other hand, where leave has not been obtained, separate actions against a receiver may be *enjoined*.<sup>2</sup>

**§ 7131. Effect of the Act of Congress Dispensing with the Necessity of Leave to Sue Receiver.** — An act of Congress

stitutional right of trial by jury is, in such cases, as in other cases, an *absolute right*. The court also concludes that the supposition that a court of chancery "can entertain an action for tort to the person, becomes unreasonable in the extreme." *Ibid.* 317. The opinion seems to be inconsistent with itself in this, that while it holds that a trial by jury is an absolute constitutional right, it yet concedes that, before a party can get this right, he must apply to the Chancellor and satisfy the Chancellor that his claim is not unfounded and vexatious. The only meaning which can reconcile this concession with the rest of the opinion is, that he must exhibit to the Chancellor evidence sufficient to make out a *prima facie* case, such as would entitle him to go to a jury, if he were suing in a court of law; for this is the only limitation which courts put upon the right of trial by jury in actions at law sounding in damages. In all such cases, the judge must see as a preliminary question, sometimes called a question

of law, but really a question of fact, — that there is *some evidence* upon which a jury may not unreasonably, or at least not violently, conclude that the plaintiff has the right to recover; and if the judge sees no such evidence, he should withdraw the case from the jury, and compel the plaintiff to take a nonsuit. 2 Thomp. Trials, § 2242, *et seq.* The meaning of this decision must be that the Chancellor may exercise the same authority in disposing of the preliminary question, upon the motion for leave to bring an action at law against his receiver, so far as to see that the plaintiff will be able to present evidence in such an action which will entitle him to go to a jury. Otherwise, the refusal of leave to bring the action is no deprivation of the right of trial by jury.

<sup>1</sup> Parker v. Browning, 8 Paige (N. Y.), 388; s. c. 35 Am. Dec. 717; Murphy v. Holbrook, 20 Ohio St. 137; s. c. 5 Am. Rep. 633.

<sup>2</sup> Attorney-General v. North American Life Ins. Co., 6 Abb. N. Cas. (N. Y.) 293.

passed on the 3d of March, 1887,—provoked by the abuses of Federal court railway receiverships,—dispenses with the necessity of obtaining leave of the court before bringing an action against a receiver, in the following language: “That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice.”<sup>1</sup> The plain meaning of the statute is, that it gives to any party, who thinks he has a cause of action against a receiver appointed by a court of the United States, the untrammelled right to bring an action against such receiver in any court having jurisdiction, State or Federal. Such claimant can prosecute his claim to judgment, and there his remedy in the court in which he brings the action stops. He cannot have *execution* upon the judgment against any property in the hands of a receiver, because that would disturb the possession of the receiver; but the manner in which the judgment shall be paid, and the adjustment of the equities subsisting between him, as a judgment creditor, and other claimants against the funds in the hands of the receiver, are exclusively for the determination of the court whose officer the receiver is.<sup>2</sup> But the manner in which the judgment shall be paid does not affect the *jurisdiction* of the court in which the action is brought, conclusively to establish, by judgment, the existence and extent of a demand against the funds in the hands of a receiver.<sup>3</sup> A cause of action arising out of personal injuries received through the *negligence* of the servants of the receiver of a railway, constitutes an “act or

<sup>1</sup> Act Cong. March 3, 1887, ch. 373, 433; now published in 1 Supp. to Rev. § 2; 24 U. S. Stats. at Large; as corrected and re-enrolled by Act Cong. Stats. U. S. 611, 613.  
<sup>2</sup> Dillingham v. Russell, 73 Tex. 47; Aug. 13, 1888; 25 U. S. Stat. at Large, s. c. 15 Am. St. Rep. 753.  
<sup>3</sup> *Ibid.*

## 5 Thomp. Corp. § 7132.] RECEIVERS OF CORPORATIONS.

transaction" of the receiver, within the meaning of this statute; and it is not necessary to obtain leave of the court appointing the receiver in order to maintain an action against him in a State court for such cause.<sup>1</sup>

§ 7132. **Further of This Statute.** — It is to be observed that the statute provides that "such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice." "This clause of the act," said Caldwell, J., "establishes no new rule, but is merely declaratory of the previously existing law. The receiver holds the property for the benefit of all persons having any interest in or lien upon it. The road is a unit. Broken into parts, or deprived of its rolling stock, its value would be greatly impaired. Suits, therefore, which seek to deprive the receiver of the possession of the property, and all process the execution of which would have that effect, are subject to the control of the court appointing the receiver, so far as may be necessary to the ends of justice. The marshaling of the assets, and the orderly distribution of the fund or property according to the rights and equities of the several parties in interest, is not to be interfered with by the judgment or process of the State court. The judgment of the State court is conclusive as to the amount of the debt, but the time and mode of its payment must be controlled by the court appointing the receiver."<sup>2</sup> It has been observed, in further comment on the above statute, that the receiver of a Federal court, when sued in a State court, should have the right to *appeal* to the proper appellate court of the State, for the purpose of correcting any errors of the court in which he is sued. This language was not intended, of course, to be admonitory to the State courts; because such right of appeal may undoubtedly be exercised by

<sup>1</sup> *Fordyce v. Withers* (Tex. App.), 20 S. W. Rep. 766. To the same effect are *Texas Pac. R. Co. v. Johnson*, 76 Tex. 421; *s. c.* 18 Am. St. Rep. 60; *Texas Pac. R. Co. v. Griffin*, 76 Tex.

441; *Brown v. Gay*, 76 Tex. 444; *Dillingham v. Russell*, 73 Tex. 47; *s. c.* 15 Am. St. Rep. 753.

<sup>2</sup> *Central Trust Co. v. St. Louis &c. R. Co.*, 41 Fed. Rep. 551, 555.

the receiver in every case where an individual defendant, if sued on like demand, could exercise it. It was intended by the court as a rule for the guidance of its own receivers; and the learned judge added: "Appeals should not be taken for delay, but that justice may be done. When the receiver, in good faith, takes an appeal, he should not be required *by this court* to execute a *supersedeas* bond. The receiver is an officer of the court. His possession of the property is the possession of the court. The property of the railroad stands as security for all the obligations of the court incurred in its operation. The receiver, no more than the judge of the court, should be required to become personally bound as a condition of his appealing, in good faith, from the judgment of a State court rendered against him in his official capacity. The court will not part with the possession of the property until the obligations incurred by the receiver are paid, or proper provision is made to secure their payment."<sup>1</sup> The court accordingly sustained an objection to a clause in an order of the court appointing a receiver, which required him, when sued, to execute a *supersedeas* bond in case he should appeal. Moreover, the effect of the act of Congress is to abrogate all discretionary power of the Federal court with reference to the bringing of actions against its receiver, but on the contrary it becomes the duty of the court fairly to give effect to the statute. When, therefore, its receivers remove themselves and their principal offices into another State, the court will direct that *service of process* made upon the clerk or station agent of its receiver, at any station or depot of the railroad in the county where the process is issued, shall be deemed a good and valid service.<sup>2</sup> The court concluded that such service would be good under the act of Congress and under the statutes of Arkansas; but the object of the service was to remove all doubt upon the question, so far as concerned the manner in which the Federal court would subsequently treat judgments recovered in the State courts upon such service:

<sup>1</sup> Central Trust Co. v. St. Louis & c. R. Co., 41 Fed. Rep. 551, 555.

<sup>2</sup> Central Trust Co. v. St. Louis & c. R. Co., 40 Fed. Rep. 426, *per* Caldwell, J.

meaning that the court would hold them to be valid judgments, and order them to be paid in due course of administration.<sup>1</sup>

§ 7133. **The Same Subject Continued.**—The necessary effect of this statute is to give the right, in all cases, to bring actions in the State courts against receivers appointed by courts of the United States, without first obtaining leave from the court appointing the receiver, and to give to the judgment obtained in such actions against the receiver the same final and conclusive effect which attaches to a judgment obtained against any other suitor, — assuming, of course, that the State court has jurisdiction of the parties and the subject-matter. It is open to the receiver to correct the errors of the State court in such an action, by an *appeal* to the supreme or other appellate court of the State, but he cannot have them corrected in the Federal court whose officer the receiver is. Such a court will not qualify its order, requiring its receiver to pay judgments recovered in the State court, by adding a *proviso* to the effect that, when it is shown that the judgment is for a grossly excessive amount, the Federal court will reduce it to a just and reasonable sum. “This court,” said Caldwell, J., “will not entertain the suggestion that its receiver will not obtain justice in the State courts. . . . This court is not invested with appellate or supervisory jurisdiction over the State courts, and cannot annul, vacate, or modify their judgments.”<sup>2</sup> It is also perceived that the statute uses the lan-

<sup>1</sup> The form of the order in the particular case was as follows: “It appearing to the court that S. W. Fordyce, and A. H. Swanson, the receivers in this cause, have established their office, and have their official domicile as such receivers, in St. Louis, Missouri, and that they cannot be personally served with process issued against them by the courts in the State, because they are not found in this State, — it is therefore ordered that the service of a copy of any sum-

mons or writ, heretofore or hereafter issued against said receivers in this State, upon the clerk or station agent of said receivers at any station or depot of said railroad in the county where the same was or may be issued, shall be deemed and considered as a good and valid service of such summons or writ on said receivers.” *Central Trust Co. v. St. Louis & C. R. Co.*, 40 Fed. Rep. 426, 428.

<sup>2</sup> *Central Trust Co. v. St. Louis & C. R. Co.*, 41 Fed. Rep. 551, 555; citing

guage, "may be sued in respect of any act or transaction of *his* in carrying on the business connected with such property," etc. It was not intended, by the use of the word "his," to limit the right to sue without leave of the court, to cases where the cause of action arises from the conduct of the receiver himself or his agents. On the contrary, with respect to his liability, the receiver stands substantially in the place of the corporation; and he is therefore suable, under the statute, without leave of the court, upon a cause of action arising from the theoretical tort of his predecessor in the office. "His position is somewhat analogous to that of a corporation sole, with respect to which it is held by the authorities that actions will lie by and against the actual incumbents of such corporations for causes of actions accruing under their predecessors in office.<sup>1</sup> If actions were brought against the receivership generally, or against the corporation by name, 'in the hands of,' or 'in the possession of,' a receiver, without stating the name of the individual, it would more accurately represent the character or *status* of the defendant. So long as the property of the corporation remains in the custody of the court and is administered through the agency of a receiver, such receivership is continuous and uninterrupted until the court relinquishes its hold upon the property, though its *personnel* may be subject to repeated changes.<sup>2</sup> Actions against the receiver are in law actions against the receivership, or the funds in the hands of the receiver, and his contracts, misfeasances, negligences, and liabilities are official and not personal, and judgments against him as receiver are payable only from the funds in his hands."<sup>3</sup> It is also held that the question whether the person holding the office of receiver under a Federal court can be held responsible for the acts of his predecessor in the same office, is *not a Federal question*, but a *question of general law*.<sup>4</sup>

Randall v. Howard, 2 Black (U. S.), 585; Nogue v. Clapp, 101 U. S. 551.

<sup>1</sup> Citing Polk v. Plummer, 2 Humph. (Tenn.) 500; s. c. 37 Am. Dec. 566; Jansen v. Ostrander, 1 Cow. (N. Y.) 670.

<sup>2</sup> Compare *ante*, §§ 6942, 6943.

<sup>3</sup> McNulta v. Lochridge, 141 U. S. 327, 331, 332.

<sup>4</sup> *Ibid.*



§ 7134. **Removal to Federal Court of Actions Brought against Receiver in State Court.**—Actions brought against receivers of insolvent *national banks* present matters of dispute arising under the laws of the United States. Such actions are hence *removable* to a court of the United States, under the act of Congress relating to the removal of causes from the State courts to the Federal courts.<sup>1</sup> But this question must now be considered with reference to the effect of the act of Congress of 1888, already set out.<sup>2</sup> Prior to this statute, it was held by Mr. Justice Bradley, at circuit, that such a receiver, when sued for not surrendering property alleged to belong to the plaintiff, enjoyed no exclusive privilege of litigating in the courts of the United States, and could not remove the action into such a court.<sup>3</sup> An action against a national bank and a receiver of its assets, appointed by the Comptroller of the Currency, to secure an application of a part of the funds in the hands of the receiver in satisfaction of the plaintiff's claim, is one in which the *bank* is only a *nominal*, and the *receiver* is the *real, party*, and in which the defense of the receiver must depend on an interpretation of the laws of the United States. Accordingly, it is held that the Circuit Court of the United States has *jurisdiction* of such an action, and that it is removable from a State court to that court.<sup>4</sup>

§ 7135. **Revivor against Receiver of Actions Commenced against Corporation.**—The appointment of a receiver *pendente lite*, of property after an action has been commenced to foreclose a mortgage thereon, does not operate against the prosecution of the action in any way, either in *bar* or in *abatement*, and a plea that sets up such an appointment by way of defense is *frivolous*. At most, such an appointment can only render the suit defective, such as may make it irregular for

<sup>1</sup> Act of Congress, March 3, 1875; Supp. to Rev. Stat. U. S. 174, § 2; *Davies v. Marine Nat. Bank*, 24 Fed. Rep. 194.

<sup>2</sup> *Ante*, § 7131.

<sup>3</sup> *Bird v. Cockrem*, 2 Woods (U. S.), 32; s. c. 1 Nat. Bank. Cas. 284.

<sup>4</sup> *Grant v. Spokane Nat. Bank*, 47 Fed. Rep. 673.

the complainant to proceed until the receiver is brought before the court by a supplemental bill in the nature of revivor.<sup>1</sup> The proper course of procedure in such a case is said to be for the defendant to apply for an order that the complainant bring the receiver before the court, by a *supplemental bill* in the nature of a bill of *revivor*, within a time to be fixed, or that the bill be dismissed, and that in the mean time all proceedings be *stayed*.<sup>2</sup>

**§ 7136. When Receiver not Properly Joined with the Corporation.**—It has been held that a receiver of a bank cannot be joined as a party defendant, in an action against the bank upon a mere moneyed demand, where no relief is prayed and no cause of action is shown against the receiver in his trust capacity. The court said: "The mere fact that A. is the assignee or the receiver of B., whether these be natural or artificial persons, will not justify a creditor of B., in bringing A. as a party into every suit against B., or where the rights and the remedies of the plaintiff, so far as appears, end with B., and the assignee or receiver is not to be affected by the suit, nor to be adjudged or compelled to do anything for the relief of the plaintiff."<sup>3</sup> It would seem, from the doctrine of this case, that the receiver is joined as a defendant, in actions commenced against the corporation, only where the action is in its nature *possessory*, so that the effect of the judgment itself will be the restoration of the property claimed by the plaintiff which is held by the receiver. But the foregoing doctrine can have no application to the case where the effect of the appointment of a receiver is to work a *dissolution* of the corporation, or where the corporation has been *dissolved* prior to the appointment.<sup>4</sup>

<sup>1</sup> *Wilson v. Wilson*, 1 Barb. Ch. (N. Y.) 592. Even if the appointment of a receiver constituted a valid defense, which it did not, yet it was pointed out that it could not have been pleaded in bar to the suit generally, but should have been pleaded in bar of the *further continuance of the suit* merely, by analogy to the form

of pleading in similar cases at law. *Le Bret v. Papillon*, 4 East, 502,—referring to the plea *puis darrein continuance*.

<sup>2</sup> *Wilson v. Wilson*, 1 Barb. Ch. (N. Y.) 592.

<sup>3</sup> *Arnold v. Suffolk Bank*, 27 Barb. (N. Y.) 424, 426.

<sup>4</sup> See *ante*, § 6893, *et seq.*

§ 7137. **Suing the Receiver Instead of Intervening.**—It has been held that where a receiver appointed on the dissolution of a corporation advertised for claims, and made personal service of notice to present claims upon the plaintiff in a pending action against the corporation, but the latter presented no claim, he could not, after the receiver had duly distributed the assets, reserving only sufficient to meet the expenses, by making the receiver a party to his action, cast on the latter the costs of the litigation.<sup>1</sup>

§ 7138. **Reviving against Receiver Actions Commenced against Corporation, and Restraining Receiver from Pleading Statute of Limitations.**—Regularly, as we have seen, if an action is commenced against a corporation, and thereafter all its property and franchises pass into the hands of a receiver, it will be necessary, in order to make the action effective, and probably in order to its further prosecution, that the receiver should be made a party defendant; but, as this is tantamount to bringing an action against a receiver appointed by a court of equity, ordinarily the *consent* of the court is necessary to the *joining of the receiver as a party*. Where such action was brought in the Supreme Court of New Jersey, the ordinary court of common-law jurisdiction in that State, against a railroad company, and afterwards a receiver of its properties was appointed by the Court of Chancery, and the Court of Chancery allowed the plaintiff to amend his summons and declaration by substituting the receiver as defendant, but with the *proviso* “that the Chancellor of this State shall on application of the said plaintiff to him, grant permission and consent to such amendment and continuance of said suit against said receiver aforesaid”; and the action at law was instituted in the Supreme Court against the company in time to avoid the bar of the *statute of limitations*, but the bar of the statute had attached before the receiver had been properly impleaded as a defendant under the order allowing

<sup>1</sup> *Owen v. Kellogg*, 56 Hun (N. Y.), 455; s. c. 31 N. Y. St. Rep. 600; 10 N. Y. Supp. 75.

the amendment,—the Vice-Chancellor held that, as the receiver was his own officer, he would restrain him from setting up the defense of the statute of limitations in the action at law, although it was pending in another court.<sup>1</sup>

**§ 7139. When Receiver and Corporation cannot be Made Parties.**—Where, after action brought by a creditor of a corporation against a trustee to reach the proceeds of land alleged to have been obtained by him from the corporation in fraud of its creditors, a receiver of the corporation is appointed in the people's action for dissolution, and, under authority of the court, the receiver brings an action to set aside the transfer of the land by the corporation to its trustee, the court will not thereafter permit the corporation and its receiver to be brought in as parties defendant in the prior action, and thus compel the receiver to submit his rights as receiver to judgment in an action which may be in conflict with the suit he has instituted under order of court.<sup>2</sup>

**§ 7140. Indemnity for Expenses of Litigation against the Receiver.**—In a case brought in the Supreme Court of New York, to dissolve a corporation as insolvent, temporary receivers were appointed; and a general injunction issued against interference with the corporate property. The holders and guarantors of a corporate note applied for and procured, against the receiver's opposition, a modification of the injunction, so as to permit them to sell property of the corporation held as collateral to the note. It was held that the special term had power, upon motion, to ascertain, by a reference, whether the holders and guarantors, or either of them, had a valid claim against the receiver's estate for counsel fees and other expenses incident to such litigation with the receiver, and if they had, to fix the amount. The remedy was not deemed limited to an action against the receiver.<sup>3</sup>

<sup>1</sup> Lehigh Coal & Nav. Co. v. Central R. Co., 42 N. J. Eq. 591.

<sup>2</sup> Colorado Nat. Bank v. Scott, 19 Abb. N. Cas. (N. Y.) 348.

<sup>3</sup> People v. Remington, 19 Abb. N. Cas. (N. Y.) 350. The claimants' right to indemnity did not rest upon, nor was controlled by, the sections

§ 7141. **Receiver Entitled to Any Defenses Which the Corporation could Make.** — According to a view taken by the Supreme Court of New Jersey, the receiver in charge of a railroad, while not strictly the agent of the company, is the *representative of the company* in the custody of its property, in such a sense that, when an action is brought against him for damages alleged to have been inflicted upon the plaintiff through the management of the property while in his custody, he is entitled to set up any defense against the action which would have been available to the corporation if the supposed damages had been inflicted by it while in the possession of its property,—for instance, *a statute of limitations* requiring suits for negligence to be brought against railroad companies within two years. The court reasoned that, as the object of the action is not to charge the receiver in his personal capacity, but to charge with damages the property in his possession, it is, in substance and effect, an action against the railroad company. “A judgment in this action,” said Beasley, C. J., “would constitute an equitable claim upon the property of the corporation, and would not subject the receiver to any personal responsibility. It is the person whose property will be applied to the payment of the judgment who is the real defendant.”<sup>1</sup>

§ 7142. **Liens of Judgments Recovered against the Receiver after Discharge.** — A statute of Iowa creates a lien for personal injuries sustained by the employes of railway companies from the time when such claims are reduced to judgment.<sup>2</sup> If an action is brought in that State, for such a cause, against a receiver while in custody of the property of

of the New York Code of Civil Procedure, regulating the allowance of costs. *Ibid.*

<sup>1</sup> Bartlett v. Keim, 50 N. J. L. 260; s. c. 13 Atl. 7; 11 Cent. Rep. 361.

<sup>2</sup> Iowa Code 1873, § 1309; Burlington & C. R. Co. v. Verry, 48 Iowa, 458. The statute reads as follows: “A judgment against any railway cor-

poration, for any injury to any person or property, shall be a lien, within the county where recovered, on the property of such corporation, and such lien shall be prior and superior to the lien of any mortgage or trust deed executed since the fourth day of July, 1862.”

a railroad company, but, before the action has progressed to judgment, the railroad property is *sold* at a foreclosure sale, and the purchasers organize a *new company* to receive and operate it,—the judgment thereafter recovered against the receiver will not become a lien *upon the railroad property* in their hands, so as to follow the property into the hands of a purchaser at foreclosure sale. If it can be said to be a lien upon anything, it will at most be a lien upon the *earnings* of the property in his hands.<sup>1</sup> For like reasons, it has been held, where an employé of a railway company commenced an action against it for a personal injury, and afterwards it was sold, under a decree of foreclosure, to a committee of bondholders, who assigned their purchase to a *new corporation*, after which date the plaintiff recovered judgment in his action, but against the old corporation,—that the judgment was not a lien upon the property in the hands of the new corporation.<sup>2</sup> The reason was perfectly obvious: the statute only gave a lien upon the property of the corporation against which the judgment was rendered, and not upon the property of another corporation which might receive its property by purchase.

**§ 7143. Proceedings to Condemn Land in the Hands of Receivers.**—It has been held that where a proceeding is instituted to condemn land in the hands of a receiver, it properly takes the form of an *intervening petition* presented to the court, whose officer the receiver is, and that the court has power to *assess the damages* without the intervention of a *jury*.<sup>3</sup> It has been held by a Federal court, having in its custody, by its receiver, the property of a street railway company, that the court would extend its protection so far as to *restrain* another railway company from proceeding to condemn, or to subject to its use, a portion of the right of way of such street railway company, and would do this the

<sup>1</sup> *White v. Keokuk & C. R. Co.*, 52 Iowa, 97, 102. Compare the Texas doctrine. <sup>2</sup> *Burlington & C. R. Co. v. Verry*, 48 Iowa, 458.

<sup>3</sup> *Pacific Railway Co. v. Wade*, 91 Cal. 449; s. c. 25 Am. St. Rep. 201.

more readily, when such condemnation or use was attempted to be had without any legal proceedings being taken for that purpose.<sup>1</sup> Notwithstanding this decision, it is submitted that, since the act of Congress allowing parties to bring actions against receivers appointed by Federal courts,<sup>2</sup> it is not competent for such a court to enjoin the regular statutory action commenced in a State court by one corporation to condemn a portion of the land, right of way, or franchises of the corporation whose assets are in the hands of its receiver, but that all questions as to the right of condemnation would be determinable in such condemnation proceeding, and not by the court holding the custody of the property by its receiver.

§ 7144. Condemning Land in the Hands of Receivers.—

When property is held by a receiver, which is subject to condemnation under the right of *eminent domain*, the proper course is for the court, whose officer the receiver is, to assess the damages, upon an application made for that purpose, in the nature of an *intervening petition*;<sup>3</sup> though the court may direct an *action* to be brought against the receiver for that purpose, especially where it is desirable to have the damages assessed by a *jury*.<sup>4</sup>

<sup>1</sup> Fidelity Trust &c. Co. v. Mobile Street R. Co., 53 Fed. Rep. 687, *per* Toulmin, J.

<sup>2</sup> *Ante*, § 7131.

<sup>3</sup> Pacific R. Co. v. Wade, 91 Cal. 449; *s. c.* 25 Am. St. Rep. 201.

<sup>4</sup> *Ibid.*

## CHAPTER CLXX.

### LIABILITY AND REMEDIES FOR TORTS OF RECEIVER.

#### SECTION

- 7148. Corporation not liable for torts or crimes of receiver.
- 7149. Exceptions to this rule.
- 7150. A case illustrating two of these exceptions.
- 7151. The true theory suggested.
- 7152. Exception in case of penalties for non-compliance with statutory police regulations.
- 7153. Exception where the receiver has been appointed on the petition of the corporation itself.
- 7154. Statutory exception in Indiana.
- 7155. General rule that receiver not liable personally.
- 7156. Personally liable for *ultra vires* torts.

#### SECTION

- 7157. Trustees in possession personally liable.
- 7158. Receiver not liable on contracts made officially.
- 7159. Liable for damages resulting in death.
- 7160. Liable in his official capacity for damages for torts.
- 7161. Application of the statute of limitations to actions against receiver for damages.
- 7162. When proceeds by action and when by intervening petition or motion.
- 7163. When discharge of receiver bars action against him.
- 7164. Reviving action against railroad company after discharge of receiver.

§ 7148. **Corporation not Liable for Torts or Crimes of Receiver.**—When it is considered that regularly the corporation is the *defendant*, and often the *only defendant* in the action by which it is dispossessed of its property by a receiver,<sup>1</sup> it must follow that the receiver cannot be regarded in any sense as the *agent or representative of the corporation*, and that the corporation cannot be answerable on any theory for the torts or crimes committed by him in the management of its property. Its property has been wrested from it and put in his hands in a proceeding taken against it *in invitum* by its mortgagee or other creditors, or by the Attorney-General, Bank Commissioner, or other officer representing the State; and it would

<sup>1</sup> *Ante*, §§ 6214, 6874.



overturn all notions of justice to make it answerable for the manner in which its property is used, or for the negligence, torts, or crimes of the person by whom the property is wrested from its own custody. Therefore, a railroad company, whose road, with all its appurtenances, has passed into the exclusive possession, use, and control of a receiver, who has power to employ, control, and dismiss all the agents, servants, and employés engaged in operating the road,—is not liable for an injury resulting from the *negligence* of such agents or servants.<sup>1</sup> Moreover, where the corporation is in the hands of a receiver, who has full possession of its property and the entire charge of its affairs, the corporation cannot be prosecuted for *crimes and misdemeanors* committed by the agents or servants of the receiver in managing the property. For instance, the corporation is not liable to *indictment* for an *obstruction of a highway* by such servants or agents.<sup>2</sup>

§ 7149. **Exceptions to This Rule.**—Exceptions to this rule have been declared in three cases: 1. Where the railroad company, whether the original company or a reorganized corporation, receives the property from the receiver under an agreement by which it *assumes all the liabilities* incurred by

<sup>1</sup> Ohio &c. R. Co. v. Davis, 23 Ind. 553; s. c. 85 Am. Dec. 477; Bell v. Indianapolis &c. R. Co., 53 Ind. 57; White v. Keokuk &c. R. Co., 52 Iowa, 97, 102; Metz v. Buffalo &c. R. Co., 58 N. Y. 61; s. c. 17 Am. Rep. 201 (*assignee* in bankruptcy); Davis v. Duncan, 19 Fed. Rep. 477; Heath v. Missouri &c. R. Co., 83 Mo. 617; Texas &c. R. Co. v. Collins, 84 Tex. 121; s. c. 19 S. W. Rep. 365; Texas &c. R. Co. v. Bledsoe (Tex. App.), 20 S. W. Rep. 1135. The governing principle may be illustrated by a case where a railway corporation was thrown into involuntary bankruptcy, and the road was operated by *special receiver*, who was afterwards made *assignee*. The property

and franchises of the corporation were sold to the holders of its bonds. Before the sale was confirmed, and while the assignee was operating the road, the plaintiff's intestate was negligently killed. In an action against the incorporation, it was held that it was not liable for damages for the death. Metz v. Buffalo &c. R. Co., 58 N. Y. 61; s. c. 17 Am. Rep. 201. Compare Com. v. Central Passenger Ry., 52 Pa. St. 506; Wellsborough &c. Plank Road v. Griffin, 57 Pa. St. 417; Rogers v. Wheeler, 43 N. Y. 598.

<sup>2</sup> State v. Wabash &c. R. Co., 115 Ind. 466; s. c. 1 L. R. A. 179; 35 Am. & Eng. Rail. Cas. 1; 17 N. E. Rep. 909; 15 West. Rep. 449; 4 Rail. & Corp. L. J. 417.

the receiver in operating the property;<sup>1</sup> or where the court, in its final decree, has *reserved its jurisdiction* to enforce, as liens upon the property, all liabilities incurred by the receiver.<sup>2</sup> 2. Where the *current earnings* of the road, which have come into the hands of the receiver during his receivership, have been used in *betterment of the property*, and have therefore been *diverted* to the benefit of the bondholders on whose application the receiver was appointed.<sup>3</sup> Under the operation of the second exception, a judgment rendered against a receiver, while in possession and control of the railroad, establishes the right of the plaintiff to have the sum thereby adjudged in his favor paid out of the property turned over by the receiver at the close of his trust, provided it appear that the net earnings of the road, while in the hands of the receiver, have been expended in making improvements of which the railway company receiving the property back from the receiver has had the benefit.<sup>4</sup> And a *second action* may be maintained against the corporation on the judgment recovered against the receiver.<sup>5</sup> 3. In the case of an action to recover a *penalty* denounced by a statute in the nature of a police regulation.<sup>6</sup>

§ 7150. A Case Illustrating Two of These Exceptions. — In a leading case in Texas in which the first two of these exceptions were declared, a syllabus written by a very competent reporter, now occupying a distinguished diplomatic position abroad, furnishes a much clearer statement of the ground on which the court proceeded than does the opinion itself. With slight verbal alterations, it is as follows: "A receiver was appointed in April, 1878, by a court of competent jurisdiction, on the application of bond-holding creditors of a railway company, and was invested with exclusive authority

<sup>1</sup> Ryan v. Hays, 62 Tex. 42, 52.

<sup>2</sup> Farmers' &c. Co. v. Central Railroad, 7 Fed. Rep. 537.

<sup>3</sup> *Ibid.*; Texas Pac. R. Co. v. Johnson, 76 Tex. 421; s. c. 18 Am. St. Rep. 60; International &c. R. Co. v. Ormond, 62 Tex. 274; Texas Pac. R. Co. v. Griffin, 76 Tex. 441; Texas Pac. R. Co. v. Brick, 83 Tex. 526; s. c. 29 Am. St. Rep. 675; Texas Pac. R. Co.

v. Comstock, 83 Tex. 537; Boggs v. Brown, 82 Tex. 41; Texas Pac. R. Co. v. Overheiser, 76 Tex. 437; Texas Pac. R. Co. v. Geiger, 79 Tex. 13; Texas Pac. R. Co. v. Miller, 79 Tex. 78; s. c. 23 Am. St. Rep. 308.

<sup>4</sup> Texas Pac. R. Co. v. Griffin, 76 Tex. 441.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Post*, § 7152.

to manage and carry on the business of the road, as a common carrier, subject to the supervision of the court, and for that purpose he was invested by its order with all the rights and franchises of the corporation. The property was afterward sold, on October 13, 1879, and purchased by the bondholders, for whose benefit the receiver had been appointed, and the sale had been ordered. The sale was approved by the court, and a deed was executed to the purchasers. The purchasers thereupon conveyed the property to the original railway company for a less sum than the amount bid by them, taking a mortgage to secure payment. After the reconveyance to the original company, its board of directors passed a resolution accepting from the receiver the property and all the money in his hands, and assuming all debts and liabilities against him as receiver, and providing for executing to him an indemnifying bond. The receiver was finally discharged from his trust in December, 1879. On the 15th of October, 1879, suit was brought against the receiver, and against the railway company, to recover damages for injuries inflicted on the plaintiff through the negligence of its servants, at a time when the road was under the exclusive management and control of the receiver, but it was not claimed that he was responsible otherwise than officially, as receiver. It was held: 1. The receiver was not liable to plaintiff, after all the property, once in his control as receiver, had been turned over to the purchasers, and after he had received his discharge from the court. 2. With the discharge of such receiver from his trust, and the surrender of all property in his hands as receiver, his liability, being an official one, ceased, except in cases where he was personally at fault. 3. It is technically true that the relation of master and servant does not exist between a railway company and a receiver, when the company's property is placed in his possession by a competent court, and he is required by its order to discharge, with the property of the company, the duty of a common carrier. 4. While this is true, the profits or income of the property, while in the hands of the receiver, are responsible for the satisfaction of claims for injuries resulting from the negligence of the receiver or of his employés. 5. The question whether, when a receiver is appointed on the application of mortgage creditors, they can be required to yield from the proceeds of the sale of the mortgaged property a sum sufficient to pay for freight lost, or for damages or injuries done passengers through the negligence of the receiver or

his employés, was not considered. 6. If the company was not responsible for damages sustained by plaintiff, through the negligence of the servants of the receiver, further than its current receipts while in his hands, it follows that the company would incur no obligation to pay such damages, from the mere fact that they purchased the property from those who bought it at the receiver's sale. 7. A valid claim for damages against the receiver was entitled to satisfaction out of the current receipts applied to satisfy mortgage creditors, or to the improvement of the railway property; and the court appointing the receiver would have had authority to apply such portion of the proceeds of the mortgage sale as would equal such applied current receipts or the value of such improvements, to satisfy such claim for damages. 8. The resolution of the directors, providing for an indemnifying bond to the receiver, inured to the benefit of anyone contemplated by it, having a just debt or claim against the receiver as such, or personally. 9. A claim for damages caused by injuries inflicted by the servants of a receiver, while he is operating a railroad, is entitled to payment out of the current receipts of the road; and if they are invested in betterments of the road, then such claim is entitled to satisfaction out of proceeds of sale of the road to satisfy a mortgage, to the extent of the value of such betterments.<sup>1</sup>

§ 7151. **The True Theory Suggested.**—Much of the reasoning in the opinion of this case is dreamy and untenable; but the conclusion seems clearly sound. The courts have not as yet been able to grasp the real principle upon which they will soon plant themselves in these cases. That principle is analogous to the principle that, where a *municipal corporation* is reorganized or re-created, under an act of the legislature, by the granting of a new charter, or otherwise, the new or reorganized corporation remains liable for the debts and torts of its predecessor. The real reason plainly is, that the corporation is the *trustee* of a trust fund; that it is not the artificial *person* that is liable, for no liability to respond in damages can attach to an artificial person except as against its property; that it is therefore the *trust fund* which is liable; that, through the change which has taken place by the creation of the new

<sup>1</sup> Ryan v. Hays, 62 Tex. 42.

corporation to succeed the old one, there has been nothing more than a change of the trustees holding the same trust fund and administering it for the same trust purposes; and that the fund accordingly continues to be liable, although the action is necessarily prosecuted against the new trustee,—that is to say, against the new corporation. This reasoning will precisely fit the case where a railroad is taken out of the hands of its custodians and put in the hands of a receiver, on the application of its mortgage creditors. The receiver becomes the new custodian of a property which was before, in a sense, a trust property in the hands of the corporation. In the management of this trust property, negligences are committed by his servants, for which, under the settled principles of law, the receiver is liable—not personally except where he has been guilty of personal fault,—but out of the trust funds in his hands. The liability is then essentially a *liability of the fund*, and *not of the custodian*. When, therefore, the fund is transferred to a new trustee, whether it be to a new and reorganized corporation created by the purchasers at a mortgage sale for the purpose of receiving and operating the property, or whether it be the original corporation, its former owner, to whom it is redelivered under a new arrangement,—it is the case of a trust property, to which a liability has attached, passing into the hands of a new trustee. The trust property continues liable; but from the very nature of the case, any action brought to charge it must, if the receiver has been discharged prior to the bringing of the action, be brought against the corporation which is its custodian,—that is to say, against the new trustee. If, on the other hand, the action has been commenced prior to the discharge of the receiver, it abates as to him upon his discharge; because the nature of the action is an action to charge the trust property in the hands of a trustee, and it can only be prosecuted against him who is the trustee; and upon the happening of that event it must be revived against the corporation into whose hands it has passed,—that is, against the new trustee. Until the courts plainly see and state, as the reason for their conclusion, that the lia-

bility attaches to the *thing*, and that the governing principle is essentially the principle on which the courts of *admiralty* proceed, then they will flounder about, as the judges have done in many cases, and their reasoning will "give abundant sport to after days."

§ 7152. **Exception in Case of Penalties for Non-compliance with Statutory Police Regulations.**—If a statute imposes upon a man a duty, under a penalty, it will be no answer to recover the penalty that the defendant is insolvent; and so if a statute imposes upon a corporation a duty in the nature of a police regulation, under a penalty, and an action is brought to recover the penalty, it will obviously be no answer to the action to say that the defendant has become insolvent, and that its property has been taken out of its possession and placed in the hands of a temporary receiver, to be held and operated during a litigation conducted against it by its creditors. So long as the corporation retains possession of its franchises, it stands under the duty of complying with the statute, and an action thereunder may be prosecuted against it for the penalty denounced for its non-compliance, no matter who has possession of its property; and it seems that the mere fact that it has been dispossessed of its property so completely as to disable it from complying with the requirements of the statute, makes no difference,—at least, that is the conception of one court. In the cases referred to, the statute required *railroad companies* to *fence their road*, so as to keep stock from getting on their tracks, and provided that, in case they should neglect or refuse so to do, any land-owner might build the fence and might then have an action for double the value of the fence, against the corporation or party occupying or using its road. It was held that the fact that the road and other property of the corporation had been wrested from its possession by a court of the United States and placed in the hands of a receiver *pendente lite*, was no defense to an action brought by a land-owner against the corporation to recover double the value of building such a fence. The court was not able to see that the corporation had been *disabled* from building the fence by a

*vis major*, and that any attempt on its part to build it would have been an interference with the possession of the receiver, and a *contempt* of the court whose officer he was; but it rested its conclusion upon the proposition that the action of the court of the United States could not dispense with or set aside the police regulations of the States.<sup>1</sup> The court reasoned that the *injunction* made by the court on appointing the receiver, prohibiting the company from interfering with its property or disturbing the possession of the receiver, would not operate to prevent it from building a fence along its right of way, as required by the statute.<sup>2</sup>

**§ 7153. Exception where the Receiver has been Appointed on the Petition of the Corporation Itself.** — To the foregoing rule another exception must be added, and that arises in cases where a receiver has been appointed on the petition of the corporation itself. The writer knows of but two cases where this was ever done, and one of these was suppressed by a writ of prohibition.<sup>3</sup> It is hoped that decisions so anomalous and indefensible will never be drawn into a precedent. While it is true that a receiver appointed by a court is the officer of the court, and responsible only to the court, and consequently that the doctrine of *respondeat superior* cannot in a strict sense apply to the *moving party* in the litigation at whose instigation the receiver has been appointed, because such a party cannot give orders to him or discharge him for disobedience, — yet to any person who takes a practical view, enlightened by experience, of the real nature of railway receiverships, the propriety of holding the moving corporation liable for the acts of the receiver in such a case will be perfectly obvious.

<sup>1</sup> *Ohio &c. R. Co. v. Russell*, 115 Ill. 52.

<sup>2</sup> *Ibid.* There seems to be no soundness in this decision. The mere inability, through insolvency, of the corporation to build the fence, would obviously be no answer to the action; but the court was clearly wrong in supposing that it could enter upon its

right of way for the purpose of building the fence after having been dispossessed of it by the receiver; or that it retained any power to do anything touching its property after its entire property had been vested in the custody and control of the receiver.

<sup>3</sup> *Ante*, § 6843.

Such was the view of the Supreme Court of Texas in a case where the court was evidently of opinion that the proceeding was collusive, and that the real moving party in procuring the appointment of the receiver was the railway company or its managers.<sup>1</sup> "If," said the court, "it should be made to appear, as is contended was the appointment of the receiver whose acts are in question, that an appointment was collusive, and in effect made at request of and for the benefit of the company, for the purpose of placing for a time its property beyond the reach of some classes of its creditors, then it might with some propriety be held that the receiver was but the servant or agent of the company, for whose acts it would be as fully responsible as though he was appointed by its stockholders or directory."<sup>2</sup>

§ 7154. **Statutory Exception in Indiana.** — An Indiana statute enacts "that *lessees, assignees, receivers, and other persons running or controlling any railroad, in the corporate name of such company, shall be liable, jointly or severally with such company, for stock killed or injured by the locomotives,*" etc.<sup>3</sup> The statute proceeds to designate the tribunals before which the action against such lessees, etc., may be brought, and to provide for the *garnishment* of funds in the hands of receivers, and for a payment of certain proportions of the judgment into the clerk's office, etc.<sup>4</sup> Questions have arisen in that State as to how far property in the hands of a *receiver appointed by a Federal court* is affected by this act, the solution of which involves an extended discussion of the principles underlying the Federal and State jurisdictions. In an early case, it was held that the plaintiff might recover a judgment against a railroad company and sell its railroad property, subject, of course, to the possession of the receiver. But if he elected to sue the receiver, he might pursue

<sup>1</sup> In point of fact, the receiver had been general solicitor of the railway system of which the particular road formed a part, and, when discharged as a receiver, became the president of the particular road. He was, from first to last, subject to the slight interferences and deflections of a Federal court, which seems to have permitted

itself to be handled like putty, — the agent of the principal owner and manipulator of the railway system.

<sup>2</sup> Texas Pac. R. Co. v. Johnson, 76 Tex. 421, 430; s. c. 18 Am. St. Rep. 60.

<sup>3</sup> 1 Stat. Ind. 1876, p. 751, § 1.

<sup>4</sup> See the case of Ohio & C. R. Co. v. Fitch, 20 Ind. 498, 500, where the whole statute is set out at length.



one of two courses: 1. He might apply to the Federal court for leave to sue the receiver; or 2. He might apply to the Federal court for an order upon the receiver to pay the judgment.<sup>1</sup> And it has been held that the company is liable, although the road and property were in the hands of a receiver appointed by a Federal court;<sup>2</sup> and that service upon a conductor, in accordance with the statute, was good, though the conductor was employed and controlled by such receiver.<sup>3</sup> How far the complications between Federal and State jurisdictions, arising out of such actions, are helped out by the recent Federal statute dispensing with the necessity of obtaining leave of court before bringing actions against receivers,<sup>4</sup> is a question not easy of solution.

### § 7155. General Rule that Receiver not Liable Personally.

From the foregoing statement it follows that the receiver is not liable personally for damages inflicted by his agents, employés, or servants in the operation of the property in his hands, except where he is personally guilty of some positive wrong;<sup>5</sup> but in his stead the trust fund is liable. The person receiving the injury must regularly intervene *pro interesse suo*, and establish his demand upon a reference to a master, and have it allowed by the court and *paid out of the fund*, if it turns out to be a meritorious demand. This is known by the writer to be the practice in such cases in the courts of the United States.

§ 7156. Personally Liable for Ultra Vires Torts. — But this rule is not, and in the nature of things cannot be, of universal application. If, for instance, the receiver commits a *tort outside of the scope of the authority conferred upon him*, he is, on elementary principles of law, personally answerable in damages.<sup>6</sup> When, therefore, a demand against him does not in-

<sup>1</sup> Ohio &c. R. Co. v. Fitch, *supra*.

<sup>2</sup> McKinney v. Ohio &c. R. Co., 22 Ind. 99; Louisville &c. R. Co. v. Cauble, 46 Ind. 277; Indianapolis &c. R. Co. v. Ray, 51 Ind. 269.

<sup>3</sup> Louisville &c. R. Co. v. Cauble, *supra*.

<sup>4</sup> *Ante*, § 7131.

<sup>5</sup> Murphy v. Holbrook, 20 Ohio St. 137; s. c. 5 Am. Rep. 633. In Ohio this conclusion has been regarded as flowing from the terms of a statute, but it is equally the rule in the absence of statute.

<sup>6</sup> Bank of Montreal v. Thayer, 7 Fed. Rep. 622.

volve the administration of the trust committed to him, but arises from his having taken unlawful possession of property not included in the trust, an action will lie against him *personally* as for a *trespass*; and it has been held that it will lie, even though he took possession of the property under an order of the court.<sup>1</sup> It seems, however, that the order of the court ought to protect him, and that the remedy of the claimants ought to be an intervening petition in the court.<sup>2</sup> So, if he undertakes to go *out of the jurisdiction* of the court whose receiver he is, and to lease and operate a railroad in another jurisdiction, although it may be an arm or branch, commercially, of the road of which he is receiver, he will be answerable before the courts of such other jurisdiction for the negligence or other torts of his agents or servants in operating the road.<sup>3</sup> In such a case it was said that "the receiver might be protected from an action at law in respect to the property *in the possession of the court*, or in his hands as its receiver, or from the consequences of an *accident* occurring in its management; but as to other property, the management of which is *voluntarily assumed*, over which the court had no control, he stands in his natural person, and responsible for its careful and proper management to all those whose relations to it are such that they may suffer from his neglect of duty. A contrary doctrine would leave the injured party remediless."<sup>4</sup>

§ 7157. **Trustees in Possession Personally Liable.**—In like manner, it was held in Massachusetts, that if a mortgage of a railroad has been executed to *trustees*, for the benefit of

<sup>1</sup> Curran v. Craig, 22 Fed. Rep. 101.

<sup>2</sup> Ante, § 6935.

<sup>3</sup> Kain v. Smith, 80 N. Y. 458; reversing s. c. 11 Hun (N. Y.), 552; distinguishing Cardot v. Barney, 63 N. Y. 281; s. c. 20 Am. Rep. 533.

<sup>4</sup> Kain v. Smith, 80 N. Y. 458, 472. This is not strictly correct. The injured party might be remediless in a

legal sense, but not in an actual sense. He would be put to the inconvenience of going into a foreign jurisdiction for his remedy and submitting his rights to a foreign tribunal, which, it may be assumed, would be regarded by the courts of any one of the American States as contrary to the public policy of that State.

## 5 Thomp. Corp. § 7159.] RECEIVERS OF CORPORATIONS.

bondholders; and the trustees, after entering into possession, *lease* the railroads to others, but, under verbal agreement, continue to operate the road through the lessees, and to receive the earnings and pay the expenses; and if they select, contract with, and discharge the persons employed on the road, and exercise all the powers usually exercised by railroad corporations over their own roads, — *such trustees thereby make themselves personally responsible* for injuries sustained by reason of the negligence of the persons so employed, and they must secure their indemnity out of the trust property in their hands.<sup>1</sup> This holding must be regarded as strictly in accordance with the principles of the common law. We have seen that the corporation is not in such a case responsible.<sup>2</sup> From the nature of the case, no other principal could be responsible; and when the trustees under a mortgage assume to take possession of the mortgaged property and operate it *as proprietors*, they must, as towards their employés and the general public, shoulder the ordinary responsibilities of proprietors.

**§ 7158. Receiver not Liable on Contracts Made Officially.** Where the receiver contracts with third parties strictly in his official capacity, he does not make himself personally liable on those contracts, although they may prove ineffective to charge the fund in his hands, by reason of their being in excess of his power.<sup>3</sup> The theory is, that a party contracting with the receiver occupies the position of a party contracting with a *known agent*, or with a corporation: he must take notice at his peril, of the extent of the power of the party with whom he is contracting; and he ought not, in general, to be allowed to charge the receiver personally on the contract, because neither party intends such a result.<sup>4</sup>

**§ 7159. Liable for Damages Resulting in Death.** — It was held in Texas that a receiver is not “a proprietor, owner,

<sup>1</sup> *Ballou v. Farnum*, 9 Allen (Mass.), 47.

<sup>2</sup> *Ante*, §§ 5355, 5884, 6293.

<sup>3</sup> *Livingston v. Pettigrew*, 7 Lans.

(N. Y.) 505; recognized in *Ellis v. Little*, 27 Kan. 707, 720; *s. c.* 41 Am. Rep. 434.

<sup>4</sup> Compare *ante*, § 4887, 5973.

charterer, or hirer," within the meaning of a statute,<sup>1</sup> giving a right of action for injuries resulting in death, caused by the negligence of a proprietor, owner, charterer, or hirer of a railroad, etc., or by the negligence of his servants or agents;<sup>2</sup> but the legislature intervened and amended the law so as to abrogate a rule of construction so palpably inexcusable, and conferred the right of action.<sup>3</sup> The rule of public policy which makes receivers of railroads answerable for the damages committed in the operation of the properties in their hands, out of funds in their custody, to precisely the same extent, and under the same circumstances as the corporation, if in custody of the property, would be answerable, — requires that they should be answerable for damages resulting in death, whenever the corporation would have been so answerable; and other courts have so held whenever the question has been presented to them.<sup>4</sup>

**§ 7160. Liable in his Official Capacity for Damages for Torts.**—The receiver of a railway property, appointed by a court of equity to operate it, pending a suit to foreclose a mortgage, or pending any other litigation, — or it may be assumed under any other circumstances, — takes the place of the company in such a sense that, on grounds of public policy, he is liable in his official or representative capacity to pay *damages* incurred through *negligence* or otherwise in operating the property, whenever, under the same circumstances, the corporation would be liable if itself in charge of the prop-

<sup>1</sup> Rev. Stat. Tex., art. 2899.

<sup>2</sup> *Turner v. Cross*, 83 Tex. 218; *s. c.* 18 S. W. Rep. 578; *Bonner v. Thomas* (Tex. Civ. App.), 20 S. W. Rep. 722; *Yoakum v. Selph*, 83 Tex. 607; *s. c.* 19 S. W. Rep. 145; *Texas & C. R. Co. v. Thedens* (Tex. Civ. App.), 21 S. W. Rep. 132; *Texas & C. R. Co. v. Collins*, 84 Tex. 121; *Texas & C. R. Co. v. Bledsoe* (Tex. Civ. App.), 20 S. W. Rep. 1135.

<sup>3</sup> Laws Tex., 22d. Leg., Sp. Sess. 1892, p. 5.

<sup>4</sup> *Murphy v. Holbrook*, 20 Ohio St. 137, 149; *s. c.* 5 Am. Rep. 633; *Little v. Dusenberry*, 46 N. J. L. 614; *s. c.* 50 Am. Rep. 445; *Lamphear v. Buckingham*, 33 Conn. 237; *Lyman v. Central Vermont R. Co.*, 59 Vt. 167 (case of receiver operating railroad as *lessee*); *Erwin v. Davenport*, 9 Heisk. (Tenn.) 45.

erty.<sup>1</sup> This principle is well settled, and, with the exception of his liability for statutory damages for injuries resulting in death,<sup>2</sup> is not questioned anywhere. At the same time, it is very difficult to sustain it on artificial or technical reasoning. It really involves the proposition that *damages* are properly payable out of a trust fund, by reason of the torts of those in charge of the property, which constitutes the basis of the fund. It rests on a principle of public policy and necessity; since otherwise, whenever a railroad is operated by a receiver, torts might be committed at will, and the persons injured would have no remedy except civil and criminal proceedings against the insolvent employés of the receiver who were personally guilty. The doctrine sustains a close analogy to the rule of admiralty which in such cases makes the *thing*,—that is to say the *ship*,—responsible for the damages. With this idea in view, it has been said that the proceeding against the receiver for the torts of his employés is in the nature of a proceeding *in rem*, and renders the property in his hands, as such, liable to make compensation.<sup>3</sup>

§ 7161. **Application of the Statute of Limitations to Actions against Receiver for Damages.**—Where a receiver succeeds to the franchises and properties of a railway company, under an order of a court of equity, pending a suit to foreclose a mortgage thereon, and continues to operate the property as the railway company might have done, and causes of action arise against him in his official capacity for damages inflicted upon third persons or upon employés, by negligence or otherwise, while so operating the property,—the *statute of limitations* applicable to such actions is the same as that which would have been applicable in cases of an action for a like cause against the railway company.<sup>4</sup> And

<sup>1</sup> Winbourn's Case, 30 Fed. Rep. 167; Pope's Case, 30 Fed. Rep. 169; Central Trust Co. v. Sloan, 65 Iowa, 655; s. c. 22 N. W. Rep. 916; Sloan v. Central Iowa R. Co., 62 Iowa, 728; s. c. N. W. Rep. 331; Murphy v. Hol-

brook, 20 Ohio St. 137; s. c. 5 Am. Rep. 633.

<sup>2</sup> *Ante*, § 7159.

<sup>3</sup> Davis v. Duncan, 19 Fed. Rep. 477.

<sup>4</sup> Texas &c. R. Co. v. Comstock, 83 Tex. 537.

where an action is brought against the receiver within the period of limitation, and the receiver is *discharged* pending the action, an *amendment* reviving it against the corporation which has received the property back from the receiver, is not an amendment setting up a *new cause of action*, or operating as the commencement of a new action against a different party, but is to be treated, for the purpose of saving the bar of the statute, as a continuation of the original action.<sup>1</sup>

§ 7162. **When Proceeds by Action and when by Intervening Petition or Motion.**—It is not intended to consider in detail the circumstances under which leave to bring independent actions against the receiver has been granted and refused. But it is sufficient to say that an application to a court of equity, which has regularly acquired jurisdiction of the subject-matter and all the interested parties in a suit in which a receiver of an insolvent corporation has been duly appointed, for leave to bring an independent suit in equity against the receiver to foreclose mortgages on the corporate property, is addressed to the *sound discretion* of the court, which is not abused by denying such leave.<sup>2</sup> On the other hand, where there are conflicting claims among the parties already before the court, to the fund in the hands of its receiver, it seems that the court may, in the exercise of its discretion, *direct a separate action* for the purpose of determining their respective rights, instead of determining them *on motion*,<sup>3</sup> which, under the modern codes of procedure, takes the place of an intervening petition. This is somewhat anal-

<sup>1</sup> Texas &c. R. Co. v. Comstock, 83 Tex. 537.

<sup>2</sup> Meeker v. Sprague, 5 Wash. 242; s. c. 31 Pac. Rep. 628. It is also held in this case that an order denying an application for leave to sue a receiver is a *final order*, from which an appeal will lie. *Ibid.* That it is *discretionary* with the court appointing the receiver either to grant or deny an application for leave to bring

a separate action against the receiver, or to join him as a party in a separate action already brought,—see Merchants' Nat. Bank v. Landauer, 68 Wis. 44; s. c. *sub. nom.* Davis v. Michelbacher, 31 N. W. Rep. 160, where the doctrine is explained by Lyon, J.

<sup>3</sup> Woodruff v. Erie R. Co., 93 N. Y. 609; reversing s. c. 25 Hun (N. Y.), 246.

ogous to the power of a Chancellor to direct a *feigned issue*, or to take the opinion of a jury upon an issue which depends upon conflicting evidence, for the purpose of *enlightening his conscience*,—that is to say, shifting his responsibility.<sup>1</sup> It has been held, in the same State, that where a receiver, appointed in an action against the corporation, fraudulently obtains an order of sale of a debt due the corporation, an *equitable action*, at the suit of the creditors at whose instance the receiver was appointed, will lie to vacate the order, and set aside a sale made in pursuance of it. In such a case the creditor is not limited to a motion in the action wherein the receiver was appointed.<sup>2</sup>

**§ 7163. When Discharge of Receiver Bars Action against Him.**—It has been held that the discharge of a receiver has the effect of *abating* any action pending against him, brought to charge him *virtute officii*, that is, brought to charge the *fund* in his custody,—as, for instance, an action

<sup>1</sup> The circumstances under which a party may proceed by *motion*, instead of bringing a new action, are stated by Mr. Abbott, with applicatory New York citations, in his “New Practice,”—1 Abb. New Pract., p. 109, § 12. It is there stated (page 110) that in cases of moment and difficulty, the court may, in its discretion, refuse relief on motion, and leave the applicant to bring an action for the same relief. *McLean v. Tompkins*, 18 Abb. Pr. (N. Y.) 24; *New York Elevated R. Co. v. Manhattan R. Co.*, 63 How. Pr. (N. Y.) 14. And the learned author, in further explanation of his text, states the holdings in the following cases: *National Bank v. Dun*, 29 Hun (N. Y.), 529, 531; *People v. Erie R. Co.*, 54 How. Pr. (N. Y.) 59 (where a motion to compel a receiver to comply with the terms of a lease was denied because “very grave, and important facts” were “in dis-

pute,” and because “it is better that rights should be settled in an action than on motion”); *Phillips v. Wicks*, 38 N. Y. Super. 74; *Rhodes v. Dutcher*, 6 Hun (N. Y.), 453; *Marvin v. Marvin*, 1 Abb. Pr. N. Cas. (N. Y.) 372; *Swift v. Prouty*, 64 N. Y. 545; affirming *s. c.* 6 Hun (N. Y.), 94.

<sup>2</sup> *Hackley v. Draper*, 60 N. Y. 88; distinguishing *Libby v. Rosekrans*, 55 Barb. (N. Y.) 202, 219, 220; and pointing out that the authorities cited to sustain the view taken in that case, that the only remedy was by motion, were all cases of *foreclosure sales*, where it had been held that there was a full, adequate, and complete remedy by motion to the court,—as to which see *Brown v. Frost*, 10 Paige (N. Y.), 243; *American Ins. Co. v. Oakley*, 9 Paige (N. Y.), 259; *McCotter v. Jay*, 30 N. Y. 80; *Gould v. Mortimer*, 26 How. Pr. (N. Y.) 167.

to recover *damages* for personal injuries by reason of an assault committed upon the plaintiff by the servants of the receivers of a railway.<sup>1</sup> If the receiver was appointed by a court of the United States, a *statute of the State* in which the action is brought, providing that the discharge of the receiver shall not abate any pending suit, or a cause of action accruing against him as such receiver, will not take the case out of this principle; because it is not competent for the legislature of a State to enact a statute prescribing the effect of the decrees of courts of the United States discharging the receivers appointed by them.<sup>2</sup> An order of the court which has appointed the receiver, requiring him to turn over the property of which he has had possession to the purchaser at the foreclosure sale which has taken place, and the compliance with such order by the receiver, whereby he ceases to have any voice in the management of the property,—does not operate to abate actions against him, within the principle just stated, but an order *expressly discharging* him must be shown.<sup>3</sup> Where he is sued as receiver for the loss of property committed to his custody as a carrier, he is of course entitled to make the defense that before the loss happened he had been discharged as receiver.<sup>4</sup>

§ 7164. **Reviving Action against Railroad Company after Discharge of Receiver.**—In Texas the principle was declared and acted upon, in a case where the appointment of the receiver was probably collusive, and where he was the mere stake-holder of the railroad company,<sup>5</sup>—that where an action had been brought against him for injuries received while he was operating the road, and he had been *discharged* as re-

<sup>1</sup> *Fordyce v. Beecher* (Tex. Civ. App.), 21 S. W. Rep. 179.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *Corser v. Russell*, 44 Hun (N. Y.), 630, *mem.*; s. c. 20 Abb. N. Cas. (N. Y.) 316; 9 N. Y. St. Rep. 56.

<sup>5</sup> In point of fact, he was, prior to

his appointment as receiver, the general solicitor of the railway system of which the particular road formed a part, and was, after its reorganization, the president of the road. He was from first to last simply the *alter ego* of the principal shareholder of the railroad company.



**5** Thomp. Corp. § 7164.] RECEIVERS OF CORPORATIONS.

ceiver pending the action; the proper practice was to *revive* the action against the railroad company by an amendment substituting it as the party defendant;<sup>1</sup> but in order to make the railroad company liable in such a case, the facts upon which its liability arises to pay damages or losses sustained by the plaintiff while its road was in the hands of the receiver, must be averred and proved.<sup>2</sup>

<sup>1</sup> Brown v. Gay, 76 Tex. 444; Texas Pac. R. Co. v. Johnson, 76 Tex. 421; <sup>2</sup> Texas &c. R. Co. v. Adams, 78 Tex. 372; s. c. 22 Am. St. Rep. 56. s. c. 18 Am. St. Rep. 60.

## CHAPTER CLXXI.

### RECEIVERS' CERTIFICATES.

#### SECTION

- 7168. Issuing receivers' certificates and making them a prior lien.
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#### SECTION

- 7179. Form of such receiver's certificate of debenture.
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**§ 7168. Issuing Receivers' Certificates and Making Them a Prior Lien.** — We have already had occasion to consider the principle which has obtained in the courts of the United States and in those of some of the States, that recent debts which have accrued in the necessary operation of a railroad become a charge upon the *income* in the hands of the receiver when appointed, and also upon the *corpus* of the estate, and consequently upon the proceeds of the sale of foreclosure, taking precedence of all existing liens and incum-

brances.<sup>1</sup> Where the income derived from the operation of the property is insufficient to liquidate these prior debts, it is the practice of the courts to authorize the receiver to issue *certificates of indebtedness*, negotiable in form, which certificates are generally expressed upon their face to be a *first charge upon the income and property*. These certificates thus acquire a quality superior even to the first mortgage bonds of a solvent railroad company, especially in view of the fact that the good faith of the court, in dealing with the public, is pledged to their redemption,<sup>2</sup> so that the purchasers of them may rightfully conclude that the court will not relinquish its grasp of the property until they are paid or secured. In this way, needy material-men, mechanics, and other railway employés are enabled to receive payment for their past services without the delay which would take place if such certificates were not issued. The reason which justifies the issuing of such certificates for such purposes has been nowhere better expressed than in the conception that a railway on land is like a ship at sea; that it must go on, so to speak; that public rights inhere in it, of such a nature that its operations cannot be suffered to stop; and consequently that the taker of its mortgage securities must be understood as taking them in view of this fact, and as thereby assenting to the power of the mortgagor to employ, even in a period of insolvency, the current funds to pay the current expenses.<sup>3</sup> In many cases the public nature of the property and the public necessity may be such as to require an increase of the floating indebtedness chargeable against it while in the hands of a receiver; and the issuing of receivers' certificates to represent the debts necessarily incurred by the receiver, under the orders of the court, general or special, in the administration of the property, rests upon a different footing from the issuing of such certificates to take up the indebtedness which accrued in the management of the property prior to the appointment of the receiver. That footing appeals to the well-known principle in the law of trusts, that a trustee is not bound to relinquish

<sup>1</sup> *Ante*, § 7114, *et seq.*<sup>2</sup> *Ante*, §§ 6942, 6943.<sup>3</sup> *Ante*, § 7118.

the trust fund or property in his hands until he has been reimbursed in respect of his necessary and proper outlays made in the administration of the trust. Nor is it at all necessary that the instrument creating the trust should specially provide for such reimbursement: he is entitled to it on the general principles of equity. And if the trust fund has become rightfully exhausted in his hands before he has been thus reimbursed, he may claim reimbursement from the *cestui que trust*.<sup>1</sup>

<sup>1</sup> *Rensselaer &c. R. Co. v. Miller*, 47 Vt. 146, 152; reaffirmed in *Langdon v. Vermont Cent. R. Co.*, 54 Vt. 593, 600; *Vermont &c. R. Co. v. Vermont Cent. R. Co.*, 50 Vt. 500, 580. Whether the power of a court of equity, when it takes possession of the property at the suit of a mortgagee for the purpose of preserving it until his mortgage can be foreclosed and the equities of intervening claimants adjusted, to create new obligations and to charge them on the property, and to give them priority to existing liens, can be defended on principle, is, to say the least, doubtful. Mr. High says: "The power to thus create a new lien or mortgage upon the property, and to give it priority over existing mortgages, marks the extreme limit which courts of equity have thus far attained in the exercise of their extraordinary jurisdiction. It can hardly be questioned that the exercise of such a power impairs the obligation of the mortgage contract, and frequently results in the diversion of a large portion of the mortgage security. A power so dangerous, because so limitless, cannot be sustained upon any just principles of legal reasoning." High on Receivers (2d ed.), § 398 c. At the same time, the jurisdiction must be regarded as well settled, at least in reference to receivers of rail-

roads, and so far as the courts of the United States are concerned. In what is sometimes cited as the leading Federal case on this question, it was said by Mr. Justice Bradley: "The power of a court of equity to appoint managing receivers of such property as a railroad, when taken under its charge as a trust fund for the payment of incumbrances, and to authorize such receivers to raise money necessary for the preservation and management of the property, and make the same chargeable as a lien thereon for its repayment, cannot, at this day, be seriously disputed. It is a part of that jurisdiction, always exercised by the court, by which it is its duty to protect and preserve the trust funds in its hands. It is, undoubtedly, a power to be exercised with great caution; and, if possible, with the consent or acquiescence of the parties interested in the fund." *Wallace v. Loomis*, 97 U. S. 146, 162. Cases affirming the existence of this power in the case of receiverships of railroads are: *Meyer v. Johnston*, 53 Ala. 237; *Hoover v. Montclair &c. R. Co.*, 29 N. J. Eq. 4; *Taylor v. Philadelphia &c. R. Co.*, 7 Fed. Rep. 377; *Stanton v. Alabama &c. R. Co.*, 2 Woods (U. S.), 506; *Kneeland v. American Loan &c. Co.*, 136 U. S. 89; *Burnham v. Bowen*, 111 U. S. 776; and many others. For

**§ 7169. Circumstances Which Justify the Exercise of the Power.** — The circumstances which justify the exercise of the power are substantially those which justify the exercise of the power of appointing the receiver in the first instance, and thereby displacing the possession of the ordinary custodians of the property. These circumstances have already been considered;<sup>1</sup> but we may, in this connection, quote the expressions of an authoritative writer: "The object sought by the appointment of a receiver," says Mr. Kerr, "may be generally described to be to *provide for the safety of property* pending the litigation which is to decide the right of litigant parties."<sup>2</sup> Again: "The duty of the court, upon a motion for a receiver, is merely to *protect the property* in the mean time for the benefit of those persons to whom the court, at the hearing of the cause, when it will have before it all evidence and materials for a determination, shall think it properly belongs."<sup>3</sup> The power of creating an indebtedness, chargeable as a first lien upon the property, must, it should seem, if it can be justified at all, be coextensive with the power to lay hold of the property by means of a receiver, for the purpose of preserving it *pendente lite* for the benefit of all parties having liens upon it or interests in it. Upon this ground, it is not difficult to justify the exercise of the power, in so far as absolutely necessary to raise money for the purpose of preserving the *status* of the property itself or preventing it from falling into decay;<sup>4</sup> and accordingly, we find in what may be regarded as a leading case in the American State courts, — perhaps the leading case upon the subject, — the exercise of the power justified on this ground. In an opinion of the Supreme Court of Alabama, where the subject is canvassed with great thoughtfulness and ability, by Mr. Justice Manning, and where the arguments pro

an argument in favor of the power, founded on the public nature of railroad property, see the opinion of Mr. Justice Manning in *Meyer v. Johnston*, 53 Ala. 237, 347. For a vigorous counter-argument, see the dissenting opinion of Mr. Justice Walker in *Humphreys v. Allen*, 101 Ill. 490.

<sup>1</sup> *Ante*, § 6823, *et seq.*

<sup>2</sup> Kerr on Receivers, p. 6.

<sup>3</sup> *Ibid.*, p. 6. See also *Blakeney v. Dunfaur*, 15 Beav. 42; also *Meyer v. Johnston*, 53 Ala. 237, 335, where the above note is quoted.

<sup>4</sup> *Ante*, § 6826, *et seq.*

and con are carefully balanced, the court concludes that it does not follow, from all the objections considered against the exercise of the power, that a Chancellor, who takes property in litigation, by his receivers and managers, under the charge of the court, is incompetent to raise money, when necessary for the expense of *its custody and preservation*, by issuing certificates of indebtedness, that shall constitute first liens.<sup>1</sup>

**§ 7170. Circumstances under Which Such Certificates have been Ordered.**—In the leading case in the State courts on this subject, the substance of the decision was that the court of chancery of Alabama had the power, after proper notice to and hearing of interested parties, to authorize the issue of negotiable certificates of indebtedness, making them a first lien and displacing other liens to that extent, on the property of a railroad which the court was operating through its receiver, whenever it should be necessary to raise money for the economical management and conservation of the property. But, according to the view of the court, the mere fact that the fruits of the expenditures made by the

<sup>1</sup> *Meyer v. Johnston*, 53 Ala. 237, 346. The writer takes occasion here to state that, in reviewing a paper published in the *Columbia Law Times* on the subject of Receivers' Certificates (26 Am. Law Rev. 450, 452), when referring to this case, he was led into an inadvertency which does great injustice to the court, by stating that the decision was "rendered in what are known as 'carpet-bag times.'" When that note was written the author did not have the report open before him, and his recollection of the date of the decision was that it was earlier than the year 1875, which was its actual date. The members of the court were then Hon. Robert C. Bickell, Chief Justice, author of a digest of the Alabama reports and a judge of great probity and reputation; Hon. Thomas J.

Judge, who died the year following; Hon. Amos R. Manning, the author of the opinion in the case referred to; and Hon. George W. Stone, who recently died, after nearly fifty years of judicial service. It is believed that the decisions of none of the State courts are entitled to take higher rank than are those of this court; and that in none of the numerous decisions upon this subject has it been dealt with in a more searching and discriminating manner, with a wider range of judicial vision, and a better judicial balance, than is displayed in the opinion of Mr. Justice Manning in the case above cited. See the same case for a statement of the course to be pursued by objectors *where the order to issue the certificates is made without notice to creditors and other parties*: *Meyer v. Johnston*, 53 Ala. 237, 350.

railroad company are about to be lost by the failure of its enterprise, cannot justify the making of such an order, in the absence of the consent of the lienholders whose liens it will displace, and courts of equity cannot exercise such a power.<sup>1</sup> A further examination of the decisions where this power has been exercised will make it appear that in nearly all of them there were circumstances of *consent*, *negligence*, *laches*, and the like. Thus, in a leading Federal case on the subject, all the parties consented to the appointment of a receiver, and in the order appointing him he was empowered to raise money by issuing certificates which should be a first lien upon the property; and the objecting bondholder did not make his objection until a considerable lapse of time after the order had been made; and it was held that he was concluded by the consent of the trustees in the mortgage under which his bonds had been issued, in conformity with the principle already stated,<sup>2</sup> which consent bound him by representation, and further that he was *estopped by his laches* from claiming the right to have the order rescinded.<sup>3</sup> In a later case, the power to issue such certificates was not directly considered; but the rearrangement and reorganization of an insolvent railroad company, effected at a public meeting of all its bondholders, concurred in by the trustee under the mortgages, was upheld by the court, Mr. Chief Justice Waite saying that this was more desirable than the issuing of receiver's certificates.<sup>4</sup> In another case, often cited in support of the power to issue such certificates, the court upheld the issuing of them to a limited amount for the purpose of paying a small indebtedness due connecting lines, and of building six miles of railroad and a bridge,—basing its decision on the ground that the objecting bondholders were represented by the trustee in

<sup>1</sup> Meyer v. Johnston, 53 Ala. 237, 332, *et seq.* It should be added that, while the learned judge who wrote the opinion seemed to regard such certificates as *negotiable* instruments, such is not the character ascribed to

them by the weight of judicial authority: *Post*, § 7183.

<sup>2</sup> *Ante*, §§ 6126, 6209, 6223.

<sup>3</sup> Wallace v. Loomis, 97 U. S. 146, 162.

<sup>4</sup> Shaw v. Railroad Co., 100 U. S. 605.

the deed of trust under which their bonds were issued, and were *estopped by their delay*.<sup>1</sup> In a later case, the same court in an opinion given by Mr. Justice Blatchford, struggling for some ground upon which to uphold the issuing of such certificates under the circumstances before them, which seemed to create a strong necessity therefor, seized upon the idea of *public policy*, and laid stress upon the frequent argument that a railroad is a matter of public concern, and that the court holding it in its grasp by means of its receiver is bound, as a duty to the public, to keep it in operation; but finally declaring that the power of the court to order the issue of such certificates does not depend upon consent or prior notice, but that circumstances may exist which will be judicially equivalent to prior notice.<sup>2</sup> A decision of Mr. Justice Bradley at circuit, which is often quoted in support of this power, rested upon the *consent of the trustees* of the mortgage bondholders, — the order providing that “the certificates shall not be issued until countersigned by the majority of the trustees for the first mortgage bondholders, without which countersigning they shall not be entitled to the lien and priority aforesaid.”<sup>3</sup> In another case in the Circuit Court of the United States, Mr. Circuit Judge Dillon being upon the bench, rested the issue of such certificates upon the necessity of raising money to complete the road in order to *save an impending forfeiture* of a valuable land grant.<sup>4</sup>

**§ 7171. To Make Repairs and Prevent Dilapidation.**—The propriety of issuing such certificates has also been rested upon the obligation of the trustee, both to those interested in the subject of the trust, and to the general public, to preserve the trust estate from dilapidation, — in other words, to keep the road in operation and in repair. “There can be no doubt,” said Chancellor Zabriskie, “as to the duty of the court under the circumstances. Every consideration is in

<sup>1</sup> *Miltenberger v. Logansport &c. R. Co.*, 106 U. S. 286.

<sup>2</sup> *Union Trust Co. v. Illinois Midland R. Co.*, 117 U. S. 434.

<sup>3</sup> *Stanton v. Alabama &c. R. Co.*, 2 Woods (U. S.), 506.

<sup>4</sup> *Kennedy v. St. Paul &c. R. Co.*, 2 Dill. (U. S.) 448.



favor of making the repairs. The value of the trust estate depends in a very great measure upon them. If they be not made, the operation of the road must necessarily cease. The injury to the value of the trust estate which would be occasioned thereby would obviously be great, to say nothing of the inconvenience to the public. It is incumbent on the court to see to it that the receiver keeps up the property by making any necessary repairs, and to that end it may provide the means by pledge of the property, if necessary.<sup>1</sup> Especially is it the duty of the court to make the repairs in this case, where the legislature has imposed upon it the obligation of operating the road for the public convenience."<sup>2</sup>

§ 7172. **To Purchase Rolling Stock.** — It has been held that the court may, under circumstances requiring such action, authorize the receiver to *purchase*, if necessary, *rolling stock on credit*, and to make the debt thereby created "a first lien on the mortgaged premises and all the proceeds which may come into" the hands of the court.<sup>3</sup>

§ 7173. **Cases Denying Power to Issue Such Certificates.** Authoritative courts are not wanting which deny the existence of the power of a court of equity thus to displace the liens of prior mortgages, and to impair the obligations of the contracts

<sup>1</sup> Citing *Morison v. Morison*, 7 De Gex, M. & G. 214; *Stanton v. Alabama &c. R. Co.*, 2 Woods (U. S.), 506; *Bright v. North*, 2 Phillips Ch. 216; *Jerome v. McCarter*, 94 U. S. 734.

\* *Hoover v. Montclair &c. R. Co.*, 29 N. J. Eq. 4. The statute referred to provides that whenever any incorporated company in this State shall become insolvent, and the property of such company shall have passed into the hands of a receiver by order of the Chancellor, in accordance with the statute in such cases made and provided, the receiver shall be empowered to operate the road for

the use of the public, subject at all times to the order of the Chancellor. N. J. Act Feb. 11, 1874; N. J. Rev., p. 196.

<sup>3</sup> *Vilas v. Page*, 106 N. Y. 439; s. c. 13 N. E. Rep. 743. The order was effective when *filed*, although, by a mistake of the clerk, was not entered on the *record*. *Ibid.* Power of the court appointing receiver under an agreement among the secured and general creditors whereby certain income bonds were to be issued payable in thirty years, etc.: *Lehigh Coal & Nav. Co. v. Central R. Co.*, 34 N. J. Eq. 88.

subsisting therein. A decision of the Court of Appeals of New York is to the effect that receiver's certificates, issued under the order of the court appointing the receiver, to pay claims accruing prior to the receivership, cannot be made a lien, cutting under a mortgage existing at the time of the issue of such certificates, where the mortgagee is not a *party* to the suit; nor even as against the lien of the mortgagee on whose application a receiver has been appointed.<sup>1</sup> In one case the same court had to deal with the question in respect of receiver's certificates issued under the order of a court exercising chancery powers, for the purpose of completing a hotel which had been projected by a corporation organized for the purpose of building and running it. The order of the court was *ex parte*, and authorized the receiver to borrow \$100,000 on receiver's certificates, and declared them to be a first lien on the property. Notwithstanding the order, it was held that the lien of the certificates could not prevail over that of the existing mortgage.<sup>2</sup>

§ 7174. Statutes Creating This Power. — In a learned opinion on this subject, it is stated by Mr. Circuit Judge Caldwell that some of the States have enacted statutes providing that the liens of mechanics, laborers, and material-men, upon railroad property, shall be preferred to mortgages upon such property executed by their owners.<sup>3</sup> In one of the States where the power to issue receiver's certificates was upheld on the general principles of equity,<sup>4</sup> the legislature in the same year enacted the following statute: "That whenever any incorporated railroad company in this State shall become insolvent and the property of such company shall have passed into the hands of a receiver by order of the Chancellor, in accordance with the act to which this is a supplement, the receiver shall, and he is hereby empowered to, operate said railroad for the

<sup>1</sup> Metropolitan Trust Co. v. Towanda &c. R. Co., 103 N. Y. 245.

<sup>2</sup> Raht v. Attrill, 106 N. Y. 423; s. c. 60 Am. Rep. 456.

<sup>3</sup> Farmers' Loan & Trust Co. v.

Kansas City &c. R. Co., 53 Fed. Rep. 182, 191.

<sup>4</sup> Hoover v. Montclair &c. R. Co., 29 N. J. Eq. 4.

**5 Thomp. Corp. § 7176.] RECEIVERS OF CORPORATIONS.**

use of the public, subject at all times to the order of the Chancellor; and all expenses incident to the operation of said railroad shall be a first lien on the receipts, to be paid before any other incumbrance whatsoever.”<sup>1</sup>

**§ 7175. Issuing Such Certificates at Usurious Rates: Selling Them at Less than Par.** — Where such certificates are ordered to be issued by the judge of a State court, his order obviously will be erroneous if it is so framed as to proceed in violation of the statute of the State prohibiting the taking of usurious interest. Thus, in a case where the Chancellor, by his order, provided that the certificates should bear interest at the rate of *eight per cent per annum*, and that they might be sold at a *discount of ten per cent*, or for ninety cents on the dollar, — it was held that the order was erroneous, the highest rate of interest allowed by the law of the State being eight per cent per annum; because the order was regarded as tantamount to an order authorizing the receiver to borrow money at an usurious rate of interest.<sup>2</sup> The court stated that the receiver might not have been able to raise the money otherwise than by paying such usurious interest; and, “might it not have been better then,” said the court, “to let an impecunious railroad, which creditors were suing to have sold, remain in the hands of the company operating it until the decree disposing of it should be passed by the court; especially since, in the language of Cairns, L. J., ‘it is obvious there can be no real and correlative responsibility for the consequences of any imperfect management.’”<sup>3</sup>

**§ 7176. Power to Authorize Sale of Such Certificates at a Discount.** — But it is believed not to be the practice of the Federal courts to take into consideration the State laws in regard to usury when making such orders. Indeed, in the opinion just cited, the Supreme Court of Alabama commented upon an imperfect manuscript opinion of Mr. District Judge Longyear, sitting in the Circuit Court of the United States for the

<sup>1</sup> N. J. Stats. 1877, p. 196, § 106.

<sup>2</sup> Meyer v. Johnston, 53 Ala. 237, 351.

<sup>3</sup> Ibid. 352.

Eastern District of Michigan, in a case<sup>1</sup> in which, a receiver having been appointed to take charge of the property, — presumably in a proceeding to foreclose a first mortgage thereon, — the court, after notice to the parties and the hearing of counsel, made an order reciting that, it being made to appear to the court “that it is for the best interest of all concerned in said ship canal and said property, real and personal, that the said canal should be finished and made ready for use as speedily as practicable, and that it is necessary and expedient that said receiver should issue certificates of indebtedness for the purpose of said speedy construction,” — therefore the receiver was authorized to issue such certificates, payable on July 1, 1873 (about a year after the making of the order), bearing interest at the rate of ten per cent per annum, to the amount of \$500,000, and constituting a first lien on the canal and property in the custody of the receiver, which lien should have a priority over any debt previously created, and authorizing the receiver, moreover, to execute and deliver a mortgage deed of trust of the property, franchises, and rights of the company, to a trustee to secure payment of the certificates. The order further provided that in case the certificates should not be paid at maturity, the receiver should, upon application to the court and upon its order, deliver over all the property and effects embraced by the said deed, to the trustee named therein, to be by him sold to pay the certificates. The receiver was also authorized to sell them at a discount not exceeding twenty-five per cent, or to borrow money by a hypothecation of them. Commenting on this extraordinary order, the Alabama court say: “The court, by its conveyance to the trustee, put the property even out of its own control, and appears to have disposed of it as if invested itself with a sort of seigniorial title that enabled it to supersede the existing rights of others therein, and to have exercised legislative power by authorizing the borrowing of money without regard to usury laws.”<sup>2</sup> The Supreme Court of the United States

<sup>1</sup> *Southerland v. Lake Superior &c.*  
R. Co., MS.

<sup>2</sup> *Meyer v. Johnston*, 53 Ala. 237,  
338, 339.

has rendered a decision, which seems to be in substantial conformity with the theory of the Alabama court, in a case where a receiver was appointed by the Circuit Court of the United States sitting in Alabama, in a proceeding to foreclose a mortgage upon the property of a railway company. The court authorized the receiver to borrow money and to issue certificates of indebtedness, to be a lien upon the property and take precedence of the mortgage debt, and to part with them at a rate not less than ninety cents on the dollar. The receiver borrowed money on the hypothecation of some of these certificates. The property was decreed to be sold subject to liens established on references which were then pending. It was held that the hypothecated certificates were not liens to the extent of their face, but that the decree, directing the debts secured by them to be paid in them at the rate of ninety cents on the dollar, would be upheld to the extent of making the money actually advanced upon them a first lien upon the property.<sup>1</sup>

**§ 7177. Circumstances under Which It has been Held Improper to Issue Such Certificates.**—A very experienced, upright, and conservative Federal judge, while admitting,—as under the decisions of the Supreme Court of the United States he was bound to do,—that the power to issue such certificates *may be* exercised, said: “This court has uniformly refused to arm its receivers with such a dangerous power. When the road cannot be kept running without its exercise, except to a very limited extent, the safe and sound practice is to discharge the receiver, stop running the road, and speed the foreclosure.”<sup>2</sup> In so holding, he cited a manuscript decision of his,<sup>3</sup> where application was made to his court to authorize a receiver to issue certificates which were to be a first lien upon the property, for the purpose of building sixty miles of road, in order to earn a large and valuable land grant,

<sup>1</sup> Swann v. Clark, 110 U. S. 602.

<sup>2</sup> Credit Co. v. Arkansas Cent. R. Co., 15 Fed. Rep. 46, *per* Mr. District (now Circuit) Judge Caldwell.

<sup>3</sup> Paine v. Little Rock &c. R. Co., April Term, 1874, United States Circuit Court, East. Dist. Ark.

which would lapse in a short time unless the road was completed. A majority in value of the first mortgage bondholders concurred in the application; and a closely analogous decision of the Circuit Judge of that judicial circuit was pressed upon the court.<sup>1</sup> But he refused the order, upon the ground "that it was no part of the duty of a court of chancery to build railroads, and that the assent of all the parties interested in the property could not make it such."<sup>2</sup> "And there is no difference," continued he, "so far as relates to this question; between building a railroad and making extensive and general repairs and betterments, the cost of which sometimes approximates the cost of original construction. In the case referred to of the Fort Smith railroad, the proceedings to foreclose were speeded and a decree rendered to meet the exigencies of the case, which the Supreme Court approved and said 'was a much more desirable plan' than to issue receiver's certificates."<sup>3</sup>

**§ 7178. Issuing Them to Prevent a Valuable Land Grant to the Railroad Company from Lapsing.**—To prevent a valuable land grant in favor of a railroad company from lapsing, a receiver was appointed at the instance of bondholders of the company, whose principal security was such lands, and the receiver was empowered to borrow money, not to exceed five million dollars, to complete the unfinished portions of the road, and to issue his debentures for that purpose, payable five years after date, which were made a first lien upon the property of the company.<sup>4</sup> In a subsequent report of the same case, the same learned and eminent judge conceded the principle that a court of chancery, in the progress of a foreclosure suit against a railroad company, ought not to enter upon the work of building or completing a railroad, unless there is an irresistible necessity to do so, in order to prevent

<sup>1</sup> The decision referred to was *Kennedy v. St. Paul &c. R. Co.*, 2 Dill. (U. S.) 448; *s. c.* 5 Dill. (U. S.) 519.

<sup>2</sup> The decision is thus stated in *Credit Co. v. Arkansas &c. R. Co.*, 15 Fed. Rep. 46, 50.

<sup>3</sup> *Ibid.*; citing *Shaw v. Railroad Co.*, 100 U. S. 605, 612.

<sup>4</sup> *Kennedy v. St. Paul &c. R. Co.*, 2 Dill. (U. S.) 448, Dillon, Circuit Judge.

a great and certain sacrifice of the rights and securities of the parties in interest.<sup>1</sup> The syllabus of the second report, written by the learned judge who made the order, states the substance of a second application of the same kind, and the ruling of the court thereon as follows, and the order made is set out in a note to the opinion:—“Under the extraordinary circumstances of this cause, the trustees and four-fifths of the bondholders consenting, and none opposing, the court, in order to prevent the forfeiture of the franchises of the company and the loss of a valuable land grant, authorized the receiver to construct the unfinished portions or links of the road, out of moneys to be furnished by bondholders; but the court refused to issue debentures, as a means of credit, in advance of actual construction, or to permit the receiver to incur, for construction purposes, any indebtedness beyond the amount of money furnished by the bondholders. When the road should be fully completed, the order provided for the payment of the actual cost thereof by debentures, which should be a lien upon the property to the extent indicated. Under this order, one hundred and twenty-five miles of railway were built, and the lines of the company’s road completed, and the forfeiture prevented, and debentures were then issued for the cost of construction, and were afterwards paid out of the proceeds of the sale of the property under the decree.”<sup>2</sup>

**§ 7179. Form of Such Receiver’s Certificate of Debenture.**—In a very noted case, where the receiver, appointed in a suit in equity to foreclose a mortgage upon property of an uncompleted railroad, was authorized to borrow money for the purpose of completing the road so as to prevent forfeiture of a valuable land grant,<sup>3</sup> the form of the debentures prescribed in the order of the court was as follows:—

“\$ .....

ST. PAUL, MINNESOTA, }  
..... 1873, }

“Five years after date, unless sooner paid, for value received, I promise to pay to ....., or his assigns, the sum

<sup>1</sup> Kennedy v. St. Paul &c. R. Co.,  
5 Dill. (U. S.) 519.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ante*, § 7178.

of ..... dollars in gold, with interest thereon at the rate of ten per centum per annum, payable in gold semi-annually on the first days of July and January of each year, at the City of New York.

"This obligation is issued under and by virtue of certain provisions of an order of the Circuit Court of the United States for the District of Minnesota, dated on the ..... day of ...., 1873, a copy of which is indorsed hereon, and is part of the loan thereby authorized to be made by me as receiver of the St. Paul & Pacific Railroad Company, amounting, in all, to the sum of \$5,000,000.

"The said loan, or so much thereof as may be required to complete the construction of the St. Paul & Pacific Railroad, and shall be borrowed by me for that purpose under the authority aforesaid, is made and constituted, as provided in the order of the court, a *first lien* upon all the property of every nature and description of the said railroad company; and the earnings of said railroad, after deducting the operating expenses and the expenses of the receivership, are pledged for the payment of the principal and interest of this obligation, according to the tenor thereof.

"Failure to pay interest for six months will make principal due at option of holder.

"....., Receiver."<sup>1</sup>

**§ 7180. Conclusiveness of the Order Issuing Such Certificates upon the Purchaser at Foreclosure Sale.** — Where the receiver has been ordered to issue such certificates, and the decree of foreclosure recites that the sale is to be made subject to the liens thereby created, this will, of course, be *conclusive* upon the purchaser, and he will take the property subject to that burden. When, therefore, the purchaser of a railroad, at a sale under a decree of foreclosure of the first mortgage, which recited that the sale should be made subject to liens established or to be established, on references before had or then pending, to a master, with the right to bondholders to appear and oppose, as prior and superior liens to the liens of the bonds issued under the mortgage, — it was held that the purchaser could not dispute the validity of the liens thus established, even on the ground of *fraud* alleged to have been

<sup>1</sup> Kennedy v. St. Paul &c. R. Co., 2 Dill. (U. S.) 448, 456.



**5 Thomp. Corp. § 7182.] RECEIVERS OF CORPORATIONS.**

discovered after the confirmation of the master's report fixing the amount of the liens.<sup>1</sup>

**§ 7181. Bondholders must Make their Objections Before the Certificates have Passed into the Hands of Bona Fide Purchasers.** — According to a decision of the Supreme Court of Illinois, rendered against a strong dissenting opinion,<sup>2</sup> if the holder of railroad bonds secured by a mortgage on the property, having notice of the appointment of the receiver and the order of court directing the receiver to issue certificates of indebtedness, on which to raise money to discharge a mortgage on the personal property of the company, and to pay taxes, current expenses, etc., which order makes the certificates a first lien on all the property of the company, — desires to question the power of the court to make the order, he must do so *before the certificates are issued* and sold to *bona fide* purchasers, or paid out to creditors of the company. After their issue and sale, it will be too late for him, or purchasers from him with notice of the facts, to raise the question whether the subject-matter to which the certificates were applied was within the scope of the power of the court.<sup>3</sup> But this principle has no application to cases where the certificates have been issued for purposes or in a manner not warranted by the order of the court.<sup>4</sup>

**§ 7182. Such Order can only be Made on Hearing and Notice.** — Where such an order was made on the *ex parte* application of the receiver to the court, the Supreme Court, in reversing the order, said that orders of that class can only be made upon motion, after proper investigation and hearing; and, having the whole record before them, the court was able to say that the early sale of the road was practicable and desirable, which, if made, would obviate any necessity for the order in question.<sup>5</sup>

<sup>1</sup> *Swann v. Wright*, 110 U. S. 590.

<sup>2</sup> Mr. Justice Walker dissented at length, opposing the jurisdiction to issue receiver's certificates.

<sup>3</sup> *Humphreys v. Allen*, 101 Ill. 490.

<sup>4</sup> *Bank of Montreal v. Chicago*, 48 Iowa, 518; *post*, § 7186.

<sup>5</sup> *Ex parte Mitchell*, 12 S. C. 83.

**§ 7183. Such Certificates not Negotiable Instruments.—**

Such certificates are *not negotiable instruments* under the law merchant, so as to be good in the hands of a *bona fide* holder for value, without reference to any vice or infirmity attending their original issue;<sup>1</sup> but, on the other hand, they are good, under the principles of equity, for the amount of money actually paid for or advanced upon them to the receiver, in accordance with the terms of the order of court under which they were issued,<sup>2</sup> and, it seems, for no more.<sup>3</sup> The reason is quite plain. They are issued by an officer of a court of justice, under an order of the court and in the exercise of extraordinary power, and they show this fact upon their face. This fact itself charges any person to whom they are offered with notice of the terms of the order under which they are issued. Another reason is that such certificates, when analyzed, will be found to be wanting in most of the essentials of negotiable paper, although they are, in terms, payable to "order" or "bearer." In the first place, they are not payable *unconditionally*; but whether they are payable in full or only *pro rata* out of the fund upon which they are a charge, depends upon the sufficiency of the fund. Again, there is no personal liability upon anyone for their payment, but only the fund in the control of the court is bound for that purpose, and that only when it is equitable to charge it with the money evidenced thereby; but, in general, their payment can only be coerced by application to the court having control of the trust, for an order upon its acting officer.<sup>4</sup> A still more cogent reason is that the issuing of such certificates, and making them a first charge upon the property, has the effect of displacing prior

<sup>1</sup> *Stanton v. Alabama &c. R. Co.*, 2 Woods (U. S.), 506; *Union Trust Co. v. Chicago &c. R. Co.*, 7 Fed. Rep. 513; *Bank of Montreal v. Chicago &c. R. Co.*, 48 Iowa, 518; *Turner v. Peoria &c. R. Co.*, 95 Ill. 134; *s. c.* 35 Am. Rep. 144; *Newbold v. Peoria &c. R. Co.*, 5 Ill. App. 367; *Kneeland v. Luce*, 141 U. S. 491; *Union Trust Co.*

*v. Illinois Midland R. Co.*, 117 U. S. 461; *Miltnerberger v. Logansport &c. R. Co.*, 106 U. S. 286; *McCurdy v. Bowes*, 88 Ind. 583.

<sup>2</sup> *Stanton v. Alabama &c. R. Co.*, 2 Woods (U. S.), 506.

<sup>3</sup> *Swann v. Clark*, 110 U. S. 602.

<sup>4</sup> *Turner v. Peoria &c. R. Co.*, 95 Ill. 134; *s. c.* 35 Am. Rep. 144.

liens and in many cases without the consent of the prior lien-holders, and to that extent, of impairing the obligation of the contract subsisting between them and the railroad company. Now, if the receiver can issue them in a manner not sanctioned by the order, or for purposes not sanctioned, or without the trust fund in his hands getting any benefit from the sale of them, then it will follow that the court will be put in the position of charging, as a first lien upon the property, a species of fraudulent debenture, and the security of the prior lien-holders will be, to that extent, diminished, without the property receiving any benefit to counteract the diminution, directly or indirectly.

**§ 7184. Non-liability of Indorser of Such Certificates.**—Such being the nature of receiver's certificates, it follows that one to whom they are made payable and who transfers them by indorsement in the usual way in which commercial paper is transferred, does not, by his indorsement, make himself liable to make good the whole or any part of the face value of such certificates, not paid by the receiver or otherwise, out of the fund or property upon which they are a charge. He is not liable as an *indorser* of commercial paper, because the certificate is not such paper; he is not liable as *guarantor*, because the mere indorsement of non-negotiable paper, for the purpose of selling or transferring it, does not amount to a contract of guaranty, and a parol contract of guaranty is within the statute of frauds. Nor does such an indorsement imply a *warranty* that the certificate will be paid. The most that the assignor of such a certificate, under any theory, can be held impliedly to warrant is that the instrument is genuine, that the receiver had the power to issue it, that the title of the assignor is good, and that he transfers it in good faith. Beyond this, the decisions relating to the transfer of other non-negotiable *choses in action* show that there is no implied warranty.<sup>1</sup>

<sup>1</sup> *McCurdy v. Bowes*, 88 Ind. 583. The court referred to some analogous authorities supporting their conclusions thus: "The assignor of an ac-

count does not warrant the solvency of the debtor: *Shirts v. Irons*, 37 Ind. 59; *French v. Turner*, 15 Ind. 59. Nor does the assignor of a judg-

§ 7185. **Other Consequences of This Doctrine.**—When, therefore, receiver's certificates were issued to a person to whom the receiver was not indebted, and who advanced nothing thereon which went to the benefit of the trust estate, and the original taker thereafter pledged them to secure his own personal debt, and afterwards defaulted in the payment of such debt, and their holders filed an intervening petition, asking for an order of court directing the receiver to pay them,—it was held that the order was properly refused.<sup>1</sup> So, where the court made an order directing its receiver to issue such certificates to a stated amount, in such sums as he should deem expedient, and the receiver issued a certificate for \$2,500, payable to one B. or his order, which in its recitals complied with the order of the court, and the object of so issuing it was to enable B. to negotiate it for the benefit of the trust in the hands of the receiver, and B. sold it and never turned over the proceeds to the receiver, and it came into the hands of a banker, by purchase at forty cents on the dollar, and he filed an intervening petition for an order on the receiver to pay it,—it was held that an order would not be granted, and the petition was dismissed. The court proceeded upon the view that the receiver had no power, under the order under which he acted, to *appoint an agent* to negotiate certificates, and for that purpose to issue certificates payable in form to such agent.<sup>2</sup> So, where the order did authorize the receiver to issue certificates in payment of material when the material should be furnished, but he nevertheless issued such certificate for material upon the mere contract of the party to whom they were issued to deliver the material, which contract was never carried out, so that the trust fund got no benefit from their issue,—it was held that

ment: *Reid v. Ross*, 15 Ind. 265. In the assignment of a certificate of location under a land warrant, there is no warranty: *Johnson v. Houghton*, 19 Ind. 259. The discussion by Mr. Daniels, in his work on *Negotiable Instruments* (3d ed., §§ 729, 730), proves that there is no warranty of solvency or ability to pay, in

such an assignment as the one before us."

<sup>1</sup> *Turner v. Peoria &c. R. Co.*, 95 Ill. 134; *s. c.* 35 Am. Rep. 144.

<sup>2</sup> *Union Trust Co. v. Chicago &c. R. Co.*, 7 Fed. Rep. 513. This decision was rendered by Mr. District Judge Brown, since and now justice of the Supreme Court of the United States.

the certificates were void, even in the hands of a *bona fide* holder for value.<sup>1</sup>

**§ 7186. Personal Liability of the Receiver to Bona Fide Purchasers of Fraudulent Certificates.** — If a receiver issues *fraudulent certificates*, — that is, if he issues certificates without an order of court authorizing him so to do, or if he knowingly and fraudulently issues certificates of a character not warranted by the order of the court, — and those certificates are afterwards negotiated, by the payee named therein, to a *bona fide* purchaser for value, who takes them on the faith of the recitals which appear on their face, and afterwards the certificates are repudiated, and it is judicially ascertained that they are not a valid charge upon the fund or property, — such *bona fide* purchaser may maintain an action against the receiver for *damages for the deceit*. The fact that no deceit may have been practiced against the original taker makes no difference; since “in the very nature of the case the defendant must have intended that his representations would, or might be, acted upon by any person or persons purchasing the certificates in the open market. He was placing paper upon the market where it was likely to be bought and sold.”<sup>2</sup> The right of a *bona fide* sub-purchaser to maintain an action against the original party perpetrating the deceit, rests upon the principle already considered in regard to the liability of directors and promoters.<sup>3</sup>

**§ 7187. Such Certificates do not Displace the Liens of Those Who are not Parties.** — Although it is a general principle that a receiver is the representative of all the general or unsecured creditors of the debtor whose property has been placed in his hands, yet he is in no sense the representative of lienholders who are not made parties to the suit. It fol-

<sup>1</sup> Bank of Montreal *v.* Chicago &c. R. Co., 48 Iowa, 518.

<sup>2</sup> Bank of Montreal *v.* Thayer, 7 Fed. Rep. 622. The certificates in this case were those which were ad-

judged to be unauthorized and void in Bank of Montreal *v.* Chicago &c. R. Co., 48 Iowa, 518.

<sup>3</sup> *Ante*, § 1460, *et seq.*; §§ 4144, 4145; § 1503, *et seq.*

holds that an order of court authorizing the receiver of a railroad property to issue receiver's certificates which shall constitute a first lien upon the property, is not valid as against a prior lienholder, not a party to the suit, and cannot be set up in defense to an action brought by him to enforce his lien. It is not necessary to enlarge upon the reasons of this conclusion, further than to state that it would be contrary to the most fundamental principles of justice, and would deprive a person of the right to establish a lien without giving him a day in court.<sup>1</sup>

<sup>1</sup> Snow v. Winslow, 54 Iowa, 200; Seevers, J., dissented on the ground that, when the receiver was appointed, the plaintiff was not a lienholder, but had only an inchoate lien, —that is, the right of a mechanic to establish a lien.

## CHAPTER CLXXII.

### REMOVING AND DISCHARGING THE RECEIVER.

SECTION	SECTION
7192. Vacating order appointing receiver, by writ of prohibition.	7196. Validity of conditions in order discharging receiver.
7193. Revocation of the appointment and dismissal from the office.	7197. Effect of order limiting time for presenting claims when receiver discharged.
7194. Removing the receiver.	7198. Compensation of the receiver.
7195. Appeal from order of removal.	7199. Counsel fees.

**§ 7192. Vacating Order Appointing Receiver, by Writ of Prohibition.**—Where the court proceeds wholly *without jurisdiction* to make an order appointing a receiver, a court possessing a superintending power over the former court may stay the order and in effect vacate the receivership, by means of a writ of *prohibition*.<sup>1</sup> It was so held where, in a proceeding by the Attorney-General, the corporation had been dissolved for becoming a member of a *trust* to create a *monopoly* in a manufactured article, and the court, on motion of the Attorney-General, no creditor or stockholder petitioning thereto, assumed jurisdiction to appoint a receiver, which jurisdiction, in the opinion of the Supreme Court, had not been conferred by statute and did not exist under the principles of equity.<sup>2</sup>

**§ 7193. Revocation of the Appointment and Dismissal from the Office.**—A motion to dismiss the receiver and to vacate the injunction restraining the directors and officers of the corporation from acting, addresses itself to the *sound discretion* of the court, in the same sense as does an application to appoint a receiver. It has been held, on the one

<sup>1</sup> State *v. Ross*, 122 Mo. 435; *s. c.* 25 S. W. Rep. 947; *ante*, § 6843.

<sup>2</sup> *Havemeyer v. Superior Court*, 84 Cal. 327; *s. c.* 18 Am. St. Rep. 192.

hand, that one who claims a right to certain back dividends of stock and bonds, but who has *slept for years* with full knowledge of his right, has no standing in court to oppose such a motion; and, on the other hand, that such a motion will not be granted in opposition to a State which has preferred a claim for back taxes, where it appears that the State would lose all remedy if the motion were granted.<sup>1</sup> The fact that, since the receiver was appointed, there has been a *corporate election*, conducted under an order of court in another action, under which a new board has been elected, does not *ipso facto* vacate the order appointing the receiver and deprive him of authority to act;<sup>2</sup> although the new election might furnish ground for the removal of the receiver, on a proper application to the court which had appointed him.<sup>3</sup> Speaking generally, the effect of discharging the receiver ends the control of the court over the property, unless such control is reserved in the order making the discharge; and it has even been held, though upon grounds which are possibly untenable, that the court cannot, after discharging its receiver, retain its control over the property, by asserting, in the order of discharge, a reservation of its right again to assume control.<sup>4</sup>

**§ 7194. Removing the Receiver.**—No doubt a court of equity possesses the power, in the exercise of a mere discretion, to remove a receiver whom it has appointed, and to sub-

<sup>1</sup> *Hazard v. Credit Mobilier*, 6 Rail. & Corp. L. J. 77; *s. c.* 38 Fed. Rep. 195.

<sup>2</sup> *Keokuk Northern Line Packet Co. v. Davidson*, 13 Mo. App. 561.

<sup>3</sup> *Ibid.*, *per* Bakewell, J. In the case of a proceeding instituted by the Attorney-General of New York, under a statute of that State (New York Laws 1869, ch. 902), against a life insurance company, when the company has been declared insolvent, and its affairs put into the hands of a receiver, and an actuary has reported, showing that the company is

not able to go on with its business, — then “its assets must be turned into money, its liabilities paid, and its affairs closed up, and the court cannot order the receiver to call for premiums, or to keep up the business of the company; nor can it discharge him and restore the assets to the corporation.” *Attorney-General v. Atlantic Mut. Life Ins. Co.*, 77 N. Y. 336.

<sup>4</sup> *Texas Pacific R. Co. v. Johnson*, 76 Tex. 421; *s. c.* 18 Am. St. Rep. 60; 13 S. W. Rep. 463.



stitute another in his place.<sup>1</sup> No duration to the tenure of the office of such an officer having been fixed by law, the case falls within the general principle that public officers, the duration of whose offices is not fixed by law, hold them during the *pleasure* of the appointing power.<sup>2</sup> A receiver will not be removed on the petition of a single creditor, who exhibits no serious grounds for his removal, and where all the other creditors appear to be satisfied with his administration.<sup>3</sup>

§ 7195. **Appeal from Order of Removal.**—In Mississippi, an *appeal does not lie* from an order removing a receiver, such an order not being an interlocutory order whereby the “possession of property is changed,” within the meaning of a statute granting appeals.<sup>4</sup>

§ 7196. **Validity of Conditions in Order Discharging Receiver.**—As the court can impose equitable conditions upon bondholders when they petitioned for a receiver,<sup>5</sup> so, before the court relinquishes its grasp of the property held by its receiver, it may impose equitable conditions upon the party to whom the relinquishment is made. This party is, in almost every case, a *new corporation* organized by the bondholders, who have purchased, through a trustee, the property of the old corporation at the foreclosure sale, and have organized a

<sup>1</sup> First Nat. Bank v. Barnum Wire &c. Works, 60 Mich. 487; Siney v. New York &c. Stage Co., 28 How. Pr. (N. Y.) 481; s. c. 18 Abb. Pr. (N. Y.) 435; High on Receivers (2d ed.), § 820, *et seq.*

<sup>2</sup> People v. Comptroller, 20 Wend. (N. Y.) 594, 598. But it was held that the forty-first section of the act to incorporate the State Bank of Ohio, which authorized the Treasurer, the Secretary of State, and the Auditor, or a majority of them, to appoint a receiver or receivers of a banking company, organized under the statute, upon its becoming insolvent, — *did not empower them to remove from office a receiver so appointed.* The court pro-

ceeded upon the substantial view that the power conferred by the statute upon the officers was to *appoint* the receiver, and that the statute gave them no *superintending* power over him. He made no reports to them, nor did his duties depend in the least degree upon any discretion to be exercised by them; but he was a mere statutory trustee, amenable only to the laws. State v. Claypool, 13 Ohio St. 14.

<sup>3</sup> First Nat. Bank v. Barnum Wire &c. Works, 60 Mich. 487.

<sup>4</sup> Hanon v. Weil, 69 Miss. 476; referring to Code Miss. 1880, § 2311.

<sup>5</sup> *Ante*, §§ 6824, 6825.

new corporation to operate the same. The most common of these conditions is that any expenses incurred by the receiver in managing and operating the property, which have not been liquidated by the income which has come into his hands and by the actual cash paid by the purchaser at the foreclosure sale, shall be a charge upon the property which passes into the hands of the reorganized corporation, or upon its income, or both. Touching this subject, it has been held that where such a receiver is discharged, and the sale of the property to a newly organized corporation is confirmed, with a provision in the order of confirmation that the new company shall pay all the debts of the receiver and all claims and liabilities pending in the foreclosure case and unliquidated, — the new company cannot be permitted, after accepting the property, to question the validity of the order.<sup>1</sup> In order to secure the enforcement of such an order, it is held to be a proper exercise of the chancery powers of the court, while surrendering the trust property to the purchaser, to *retain jurisdiction of the original case*, thereby retaining the authority to enforce the payment of its debts and liabilities incurred by the receiver in the operation of the property.<sup>2</sup> When, therefore, such a receiver was discharged while a suit was pending against him to recover damages for injuries occasioned by the negligence of his servants in running a train, and the property was sold by order of the court and passed into the hands of a new corporation, but the sale was made subject to the receiver's indebtedness, — it was held that the judgment obtained by the plaintiff in his action against the receiver could be enforced against the property in the hands of the new corporation.<sup>3</sup>

**§ 7197. Effect of Order Limiting Time for Presenting Claims when Receiver Discharged.** — It is the practice, especially in cases of railway receiverships, for the court, in framing the order discharging the receiver, to *fix a time* within which

<sup>1</sup> Farmers' Loan & Trust Co. v. Iowa Cent. R. Co., 17 Fed. Rep. 758, McCrary, J.

<sup>2</sup> *Ibid.*

<sup>3</sup> Schmid v. New York &c. R. Co., 32 Hun (N. Y.), 335.

claims for damages, and other claims against the receiver, must be presented, and prescribing that, if not so presented, they will be *barred*. It is perceived that this is in effect an assumption of the power, on the part of the court, to enact *short statutes of limitation* applicable to all claims against its own receiver, of whatsoever character, without reference to the residence, the *status*, or the situation of the claimants. No exception is made in favor of non-residents, minors, or insane persons; and the period of limitation is generally drawn down to two or three months, as was the case in one noted instance which we are about to state. Such orders *can only bind the court making them*: they cannot operate in the slightest degree to abridge the jurisdiction of any other tribunal to deal with such claims, except in cases where the *consent* of the tribunal appointing the receiver may be necessary to the bringing of actions against him to charge him in respect of matters growing out of his receivership. The act of Congress of March 3, 1887,<sup>1</sup> has done away with the necessity of obtaining such consent in order to bring actions in the State tribunals against the receivers of properties appointed by courts of the United States. Since the intervention of this statute, such an order, made by a court of the United States, in discharging such a receiver, has no validity whatever, in so far as it is sought to apply it so as to restrain the jurisdiction of another court to maintain an action, either against the receiver or against the railroad company into whose hands the property has passed from the hands of the receiver. The reason is obvious at a glance. Judicial courts possess no legislative power, and a court of the United States cannot make an order which shall operate to restrain the jurisdiction of a court of one of the States. When, therefore, in the case of a railway receivership, which was undoubtedly collusive, and in which the receiver was the mere stake-holder of the manipulator who was the substantial proprietor of the corporation, the complacent court which had appointed the receiver made an order, on his application, fixing the limitation of *three months*

<sup>1</sup> *Ante*, § 7131.

after the discharge of the receiver, within which all claims against him must be presented and prosecuted *by intervention*, otherwise such claims should be barred, and should not be a charge on the property of the company into whose hands it had been delivered by the receiver, — it was held that this order did not operate to prevent one, who had been damaged through the operation of the property in the hands of the receiver, from maintaining an action against the company into whose hands he had delivered it, to recover such damages.<sup>1</sup>

<sup>1</sup> *Texas Pacific R. Co. v. Johnson*, 76 Tex. 421, 428; *Texas Pacific R. Co. v. Griffin*, 76 Tex. 441; *Brown v. Gay*, 76 Tex. 444; *Fordyce v. Withers* (Tex. App.), 20 S. W. Rep. 766. The peculiar nature of this receivership justifies the writer in transcribing a portion of the opinion of the court, written by Mr. Chief Justice Stayton: "It is contended, however, that that court had power to require all persons, who had claims with which the property once in the custody of the court was charged, to present their claims by intervention for adjudication in that court. Whence that power we know not. Courts may make erroneous rulings which will bind parties to a litigation in which they were made, but they have no power to make laws which will bind strangers to the litigation. Had the receivership not been closed, such an order, in so far as it might be sought to bind appellee through it, would be inoperative and in conflict with the act of Congress passed March 3, 1887, which permits persons having claims against receivers to sue upon and establish them in any court having jurisdiction, without leave previously given by the court appointing the receiver. The order relied upon, if given effect, would annul the act of Congress. It is contended further, that not only

was it necessary for appellee to establish his claim through intervention, but that such intervention should have been made within the time prescribed by the order, or the claim be forever barred and no longer remain a charge on the property. It is generally understood that in our form of government, none other than that to which the power to make laws is given have such power. Within what time a claim shall be established, or action brought to establish it, must be determined by the law-making power, except in those cases in which, from long lapse of time, courts of equity have felt authorized to refuse to enforce them. The court, in the order referred to, undertook to establish arbitrarily a fixed period, which might arise within as short a time as three months after a cause of action arose, within which it would be barred. The court had no rightful power to make such an order. Looking to the record, it seems to us that no better scheme could have been devised than seems to have been pursued in the cause in which the receiver was appointed and receivership conducted, to enable a railway corporation and its creditors secured by mortgage to operate it for a series of years, and build up a fine property for their mutual benefit, at the expense of those who were largely en-

§ 7198. **Compensation of the Receiver.**—It does not seem that this question is germane to the present work, and therefore it will be disposed of very briefly. In the case of a *statutory receiver*, the governing statute must be referred to as determining the compensation of the receiver, in any particular case where a controversy arises.<sup>1</sup> Where there is no such governing statute, the amount of his compensation rests in the *sound discretion* of the court whose officer he is.<sup>2</sup> Where the receivership proceeds in a court of the United States, the compensation will sometimes be fixed by *analogy* to the statute of the State relating to the compensation of receivers or of sheriffs in like cases, though the court will not be bound to follow the statute where the result would be *unreasonable*.<sup>3</sup>

titled to the earnings. The receivership was established and conducted in a State other than that in which the property was situated. How jurisdiction was acquired, we are not informed. The proceedings might as well have been in Mexico, Oregon, California, or Florida, as in Louisiana, so far as the record shows. The property, a long line of railway running across the northern part of this State, was thus operated for nearly three years. A great part of the earnings were appropriated to better the property. A passenger, shipper, furnisher of material, day laborer, or employé, having just claim for compensation or damages, unless this was awarded by the receiver, might sue, if able to bear the expenses of litigation, in a place distant from where his evidence of right might be obtained; where, according to the usual practice of the court, his claim, when it suited the convenience of all parties, would be submitted to a master in chancery, and his right thus determined, when under the act of Congress, it was his right to sue in

any other court having jurisdiction of his cause and to have an inexpensive trial in the mode appropriate under the law for the trial of his cause. This, too, after the property had passed from the custody of the court, was required to be done by all who then held unadjusted claims within an arbitrarily fixed period, when the receiver was no longer under the power of the court." *Texas Pacific R. Co. v. Johnson*, 76 Tex. 421, 432, 433; *s. c.* 18 Am. St. Rep. 60.

<sup>1</sup> See *Attorney-General v. North American Life Ins. Co.*, 89 N. Y. 94; modifying *s. c.* 26 Hun (N. Y.), 294, — where, under a statute of that State, relating to receivers of insolvent life insurance companies, a number of points were ruled touching a receiver's compensation.

<sup>2</sup> See *High on Receivers*, § 781, *et seq.*

<sup>3</sup> This is the recollection of the author of the views of Mr. Circuit Judge Dillon in deciding questions of this kind in the Eighth Federal circuit.

§ 7199. **Counsel Fees.**—Where a receiver employs counsel, the court will determine the amount to be allowed them as compensation for their services to the receiver; and if the receiver employs an attorney and pays him a certain amount for his services, and inserts that amount in his account, upon the filing of which he notifies the attorney to be present at the settlement of the account, to be heard as to the amount to be allowed to him for his services, and if the attorney attends and is heard, but the court refuses to allow any more than the amount paid by the receiver,—the attorney will be *bound by this adjudication*, and cannot afterwards maintain an action to recover anything from the receiver.<sup>1</sup> It has been held that courts will not allow a receiver any payments made to counsel for their services, when the employment of such counsel has not been authorized by the court.<sup>2</sup> The amount of compensation to be allowed to counsel for the receiver is *discretionary* with the court from which the receiver derives his authority to act.<sup>3</sup> The allowance of counsel fees on behalf of a receiver is an allowance made in form to the receiver, and not to the counsel.<sup>4</sup> A receiver, being an officer of the court, is entitled to apply to the court for *instruction* and advice in respect of the retaining of counsel;<sup>5</sup> and he may make reasonable payments of fees to them, subject to the risk of having the court refuse to allow them to him as credits on his final accounting. It seems that an *appeal* lies from an order allowing such fees;<sup>6</sup> and while the practice of allowing large and extravagant counsel fees and commissions, payable out of trust funds under the control of the Circuit Courts of the United States in equity, has been commented upon and disapproved, it seems that such orders will not, in general, be reversed except where the *discretion* of the court below has been plainly *abused*; since it has far better means of knowing what is just and reasonable than an appellate court can have.<sup>7</sup>

<sup>1</sup> Walsh v. Raymond, 58 Conn. 251;  
s. c. 18 Am. St. Rep. 264.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>2</sup> Corey v. Long, 43 How. Pr. (N.Y.)  
504.

<sup>6</sup> Trustees v. Greenough, 105 U. S.  
527, 537.

<sup>7</sup> Ibid.; Stuart v. Boulware, 133

<sup>3</sup> Stuart v. Boulware, 133 U. S. 78. U. S. 78, 82.











